

# The Concept of Social Justice in Mine-Host Community Involvement and Benefit Accrual: Reflections from Mineral Extraction in Zimbabwe

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## Abstract

Minerals play a vital role in societal and economic growth. As finite and non-renewable resources, minerals inevitably diminish upon extraction. Consequently, there is an expectation that the extraction process should involve and benefit the local communities hosting these resources. Despite expectations of benefitting local communities, mineral extraction often results in more economic, social, and environmental burdens than advantages for them. This contribution is centred on a theoretical inquiry, employing the concept of social justice to explore and mitigate the disparities in the distribution of costs and benefits experienced by mine-host communities. It aims to balance the inequities, emphasising the principles of distributive, procedural and remedial justice to reconcile the losses and gains in a fair and equitable manner

## Keywords

Minerals; social justice; distributive justice; procedural justice; remedial justice; mine-host communities; involvement; benefit accrual; Zimbabwe.

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## 1 Introduction

Zimbabwe, a landlocked country in Southern Africa,<sup>1</sup> is richly endowed with a diverse array of minerals, including lithium, gold, platinum, nickel and chrome.<sup>2</sup> In 2022, platinum contributed significantly to the country's mineral wealth, accounting for 40% of its total annual mineral revenues.<sup>3</sup> In fact, according to the World Platinum Investment Council, Zimbabwe stands as the world's third largest producer of platinum group metals,<sup>4</sup> following South Africa and Russia.<sup>5</sup> Additionally, the country is recognised as the sixth largest lithium producer globally and the largest in Africa.<sup>6</sup>

In 2022, Zimbabwe's mining sector experienced a 10% growth<sup>7</sup> followed by an additional 4.8% in 2023,<sup>8</sup> solidifying its position as a key pillar of the economy. This sector is responsible for approximately 80% of the country's export earnings, amounting to US\$5.6 billion, and contributing 20% of the government's revenue.<sup>9</sup> Projections for 2024 indicate a further mining sector

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<sup>1</sup> The country shares land borders with Zambia to the north, Mozambique to the east, Botswana to the west and South Africa to the south.

<sup>2</sup> Anon 2023 *Mining Zimbabwe* 48-49.

<sup>3</sup> Chamber of Mines of Zimbabwe 2022 <https://chamines.co.zw/assets/uploads/2023/application/3bb36313-f1fc-470d-81fe-dd628d9a2694.pdf>.

<sup>4</sup> The platinum group metals are platinum, palladium, rhodium, iridium, ruthenium and osmium.

<sup>5</sup> World Platinum Investment Council 2023 <http://www.platinuminvestment.com/investment-research/articles>. The World Platinum Investment Council indicates that South Africa accounts for 72% of the global annual platinum production, followed by Russia at 12%, Zimbabwe at 7% and North America at 6%. Other minor producers including China, Colombia and Finland account for 3% of the global annual platinum production.

<sup>6</sup> US Geological Survey 2022 <https://pubs.usgs.gov/periodicals/mcs2022/mcs2022.pdf>.

<sup>7</sup> Chamber of Mines of Zimbabwe 2022 <https://chamines.co.zw/assets/uploads/2023/application/3bb36313-f1fc-470d-81fe-dd628d9a2694.pdf>.

<sup>8</sup> Ministry of Finance, Economic Development and Investment Promotion 2023 <https://parlzim.gov.zw/download/2024-budget-statement/>.

<sup>9</sup> Chamber of Mines of Zimbabwe 2022 <https://chamines.co.zw/assets/uploads/2023/application/3bb36313-f1fc-470d-81fe-dd628d9a2694.pdf>.

growth of 7.6%,<sup>10</sup> driven by increased production in existing mines and the introduction of new mines, aiming towards a US\$14.1 billion mining industry by 2030.<sup>11</sup>

The mining sector in Zimbabwe has seen a surge in foreign capital investment, leading to the development of new large-scale platinum mines by Karo Platinum and Great Dyke Investments. These complement existing production by Zimbabwe Platinum Mines (Zimplats), Mimoso Mining Company and Unki Mines.<sup>12</sup> The global shift towards electric vehicles and the green energy transition catalysed the development of five new large-scale lithium mines in 2022,<sup>13</sup> to add to existing production at Bikita Minerals. Furthermore, 2022 marked the commencement of a large iron and steel industrial complex by Dinson Iron and Steel Company, representing a US\$1 billion investment.<sup>14</sup> Zimbabwe's mining sector is therefore experiencing significant growth,<sup>15</sup> technological advancements,<sup>16</sup> and an influx of foreign investment.<sup>17</sup> These developments are anticipated to act as catalysts, alongside agriculture, for the country's socio-economic growth.<sup>18</sup>

Despite its growth, Zimbabwe's mining sector is deeply entwined with a complex historical background marked by colonialism. This legacy is reflected in legal frameworks such as the *Mines and Minerals Act* 38 of 1961, originally framed to benefit the colonial regime rather than the country's majority black population. This historical backdrop has significantly contributed to ongoing socio-economic challenges, particularly the inability to translate the nation's abundant mineral resources into

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<sup>10</sup> Ministry of Finance, Economic Development and Investment Promotion 2023 <https://parlzim.gov.zw/download/2024-budget-statement/>.

<sup>11</sup> See Republic of Zimbabwe 2020 [https://www.veritaszim.net/sites/veritas\\_d/files/NDS.pdf](https://www.veritaszim.net/sites/veritas_d/files/NDS.pdf).

<sup>12</sup> Chamber of Mines of Zimbabwe 2022 <https://chamines.co.zw/assets/uploads/2023/application/3bb36313-f1fc-470d-81fe-dd628d9a2694.pdf>.

<sup>13</sup> Prospect Lithium Zimbabwe, Zulu Lithium, Sabi Star, Kamativi Lithium and Sandawana Lithium.

<sup>14</sup> Chamber of Mines of Zimbabwe 2022 <https://chamines.co.zw/assets/uploads/2023/application/3bb36313-f1fc-470d-81fe-dd628d9a2694.pdf>.

<sup>15</sup> Mineral export earnings grew from US\$1.9 billion in 2016 to US\$5.6 in 2022 and are expected to surpass US\$6 billion in 2024. The contribution of minerals to the national export earnings has thus increased from 56% in 2011 to 80% in 2022 making Zimbabwe an extractives-driven economy. See the Chamber of Mines of Zimbabwe 2022 <https://chamines.co.zw/assets/uploads/2023/application/3bb36313-f1fc-470d-81fe-dd628d9a2694.pdf>.

<sup>16</sup> Chamber of Mines of Zimbabwe 2022 <https://chamines.co.zw/assets/uploads/2023/application/3bb36313-f1fc-470d-81fe-dd628d9a2694.pdf>; Anon 2023 *Mining Zimbabwe* 48-49.

<sup>17</sup> Chamber of Mines of Zimbabwe 2022 <https://chamines.co.zw/assets/uploads/2023/application/3bb36313-f1fc-470d-81fe-dd628d9a2694.pdf>.

<sup>18</sup> Chamber of Mines of Zimbabwe 2022 <https://chamines.co.zw/assets/uploads/2023/application/3bb36313-f1fc-470d-81fe-dd628d9a2694.pdf>.

tangible benefits for the generality of Zimbabweans, who largely continue to live in poverty.<sup>19</sup> Therefore, despite growth in production and capacity utilisation,<sup>20</sup> the mining sector faces persistent legal challenges. These include issues related to the mining titles system, environmental conservation, and the rights of mine-host communities to be involved in and benefit from mineral extraction on their lands.<sup>21</sup>

In Zimbabwe mineral extraction often results in mine-host communities<sup>22</sup> finding themselves in a worse economic and social position post-mining than they were prior to the commencement of mining on their lands.<sup>23</sup> These communities, either as landowners or residents with interests in the land where mining occurs, frequently suffer from the development of mining projects. Far from reaping benefits, they typically endure land loss without adequate compensation and bear disproportionate socio-economic and environmental burdens associated with mining.<sup>24</sup> The negative consequences include the loss of cultural sites, farming and grazing land; environmental pollution and associated health issues; forced relocations and the loss of income.<sup>25</sup> This predicament is encapsulated in terms like the

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<sup>19</sup> For instance, Zimbabwe's former Minister of Finance and Economic Development, Patrick Chinamasa, stated while presenting the country's 2016 National Budget Statement that the nations' diamonds are "a resource that seems to have not benefitted the generality of our people, notwithstanding that the diamond industry has potential to uplift our population. In Botswana, where on average about US\$3.2 billion worth of diamonds are produced per year, respective revenues enable every child in the country to receive free education up to the age of 13." See Minister of Finance and Economic Development 2016 [https://www.veritaszim.net/sites/veritas\\_d/files/2016%20%20Budget%20Statement.pdf](https://www.veritaszim.net/sites/veritas_d/files/2016%20%20Budget%20Statement.pdf).

<sup>20</sup> The Ministry of Finance, Economic Development and Investment Promotion 2023 <https://parlzim.gov.zw/download/2024-budget-statement/> (*2024 Budget Statement*) forecast an increase in capacity utilisation in the mining sector from 84% in 2023 to 90% in 2024 driven by an increase in gold and coal production.

<sup>21</sup> Ministry of Finance, Economic Development and Investment Promotion 2023 <https://parlzim.gov.zw/download/2024-budget-statement/>.

<sup>22</sup> See Humby 2016 *SALJ* 316-351 for an exposition of the term "community" in relation to those impacted by mining operations. Also see Heyns 2019 *Law and Development Review* 561-593.

<sup>23</sup> Murombo 2013 *LEAD* 37-38. Chimonyo, Mangure and Scott 2012 <https://www.readkong.com/page/the-social-economic-and-environmental-implications-of-1059367>.

<sup>24</sup> Murombo 2010 *SAPL* 568-589; Chimonyo, Mangure and Scott 2012 <https://www.readkong.com/page/the-social-economic-and-environmental-implications-of-1059367>.

<sup>25</sup> Murombo 2010 *SAPL* 568-589. See Murombo 2013 *LEAD* 31 for a discussion of the adverse impacts of diamond mining operations on the poor communities of Marange and Chiadzwa in Zimbabwe's Manicaland Province; Bhatasara 2013 *Environment, Development and Sustainability* 1527-1541 who discusses the implications of black granite mining on the Mutoko communities of Mashonaland East Province of Zimbabwe. Also see Centre for Natural Resource Governance 2021 <http://www.minesandcommunities.org/article.php?a=14501> pertaining to the threats of forced eviction of the Nambya and Tonga indigenous peoples of Dinde village in Hwange, Zimbabwe from their ancestral land to make way for a coal mining project.

'paradox of plenty' and the 'resource curse',<sup>26</sup> which describe how countries rich in natural resources like Zimbabwe<sup>27</sup> often experience lower socio-economic development than resource-poor countries.<sup>28</sup> In countries suffering from this resource curse, mine-host communities endure extreme poverty amid abundant mineral wealth, which is commonly exploited by external entities, including transnational corporations and politically connected elites.<sup>29</sup>

The extraction of minerals in Zimbabwe, especially when it leaves the mine-host communities in a worse state economically, socially and environmentally, is inherently unfair and unjust.<sup>30</sup> This complex situation underscores the need for a reevaluation of the sector's legal and operational frameworks to ensure equitable benefits for all Zimbabweans. Consequently, this raises pertinent questions about justice and fairness<sup>31</sup> in the allocation and use of mineral rights on lands inhabited by these mine-host communities. In fact, there are growing concerns about the equitable distribution of benefits and burdens, the rectification of unjust distributions, and the involvement of communities in decision-making processes that impact on their lives and livelihoods.<sup>32</sup>

Rather than detailing the specific challenges faced by mine-host communities in Zimbabwe, this article sets out to delve into the concept of

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These affected Nambya and Tonga indigenous peoples first settled in areas around Hwange and Victoria Falls along the Zambezi River between 300 AD and 400 AD.

<sup>26</sup> Langton and Mazel 2003 *Journal of Energy and Natural Resources Law* 32; Sachs and Warner 2001 *European Economic Review* 827; Van der Ploeg 2011 *Journal of Economic Literature* 366.

<sup>27</sup> See Murombo 2010 *SAPL* 568. Zimbabwe is endowed with minerals such as lithium, platinum, gold, diamond and chrome, mostly found along the famous geological feature known as the Great Dyke, which stretches for 550 kilometres from northern to southern Zimbabwe. However, these resources do not seem to be benefiting the generality of Zimbabweans, who remain in poverty.

<sup>28</sup> Humphreys, Sachs and Stiglitz *Escaping the Resource Curse* 4, 6, 11; Langton and Mazel 2003 *Journal of Energy and Natural Resources Law* 32; Sachs and Warner 2001 *European Economic Review* 827; Van der Ploeg 2011 *Journal of Economic Literature* 366.

<sup>29</sup> Nkongolo 2014 *African Journal of Democracy and Governance* 82. See Murombo 2010 *SAPL* 568-589; Murombo 2013 *LEAD* 31.

<sup>30</sup> The preamble to the *Constitution of Zimbabwe Amendment (No 20) Act, 2013* (the *Constitution of Zimbabwe*) states that the people of Zimbabwe are united by their common desire for freedom, justice and equality and that the people commit themselves to building a just and prosperous nation based on equality and fairness, among other values. Fairness in the award and utilisation of mineral rights in Zimbabwe prescribes that no group of people, surely including mine-host communities, should be made to bear a disproportionate share of the burdens of mineral extraction.

<sup>31</sup> Rawls *Theory of Justice* 3 considers justice to be the first virtue of social institutions.

<sup>32</sup> Vanclay 2017 *Impact Assessment and Project Appraisal* 6 defines 'livelihood' as the various means that people and communities use to make a living, including land and water-based activities such as farming, fishing, hunting and wage-based work.

social justice in the context of mineral extraction. It aims to lay the theoretical foundation for unravelling the involvement of mine-host communities in Zimbabwe and their accrual of socio-economic benefits from mineral extraction, and to suggest how it can be built on. This article sets out to dissect those social justice theories that may underlie the involvement in and benefit accrual by mine-host communities from mineral extraction on their lands.

Beginning with an overview of various scholarly interpretations of social justice in association with mine-host community involvement and benefit accrual in mineral extraction, the next section identifies three main theories of social justice, namely distributive, procedural and remedial justice. These theories are crucial for examining mineral extraction on lands inhabited by mine-host communities in Zimbabwe.<sup>33</sup> They are instrumental in addressing issues related to equality in resource distribution, fairness in participatory processes, and correcting unjust resource distribution. The article concludes by identifying the theory of social justice that most effectively promotes optimal involvement in and benefit accrual by mine-host communities in Zimbabwe from mineral extraction on their lands.

## 2 Social justice: Mine-host community involvement and benefit accrual

The concept of social justice has been associated with the distribution of socio-economic resources and the well-being of society.<sup>34</sup> Shookner<sup>35</sup> considers social justice to be a tool for ensuring that all people benefit from the distribution of the social and economic resources of society. On his part, Chaskalson<sup>36</sup> posits that social justice is achieved when the basic needs of people are satisfied and there is harmonious co-existence with respect and concern for others.<sup>37</sup> Social justice is also considered as the just, fair and equitable distribution of opportunities, privileges, resources, benefits and burdens in a society.<sup>38</sup> In this paper social justice is understood as a concept

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<sup>33</sup> Ebbesson "Introduction" 3 explains that "justice concerns arise in just about any legal context involving health, the environment and the use of natural resources". Theories of social justice are therefore expressed in various ways and apply to various contexts.

<sup>34</sup> Miller 1991 *British Journal of Political Science* 371-391.

<sup>35</sup> Shookner 2002 [https://www.allianceon.org/sites/default/files/documents/Workbook%20for%20looking%20at%20Social\\_and\\_Economic\\_Inclusion\\_Lens%202002.pdf](https://www.allianceon.org/sites/default/files/documents/Workbook%20for%20looking%20at%20Social_and_Economic_Inclusion_Lens%202002.pdf) 2.

<sup>36</sup> Chaskalson 2000 *SAJHR* 204-205.

<sup>37</sup> Rodes 1996 *Notre Dame L Rev* 626 explains that social justice demands first that "members of every class have enough resources and enough power to live as befits human beings, and second, that the privileged classes, whoever they are, be accountable to the wider society for the way they use their advantages".

<sup>38</sup> Madonsela 2020 *Global Governance* 5. See Chipkin and Meny-Gibert 2013 <https://kipdf.com/queue/understanding-the-social-justice-sector-in-south-africa> 3,

that seeks the fair re-distribution of resources, opposes discrimination and injustice in distribution, and seeks the eradication of poverty and socio-economic inequalities.<sup>39</sup> It follows that social justice cannot exist if resource distribution does not benefit all the people in a society. This understanding of social justice stands in stark contrast to the hostility and deprivation that often characterise mineral extraction on lands inhabited by mine-host communities.<sup>40</sup>

From a legal perspective, it is necessary to examine theories of social justice, namely distributive, procedural and remedial justice and their relationship with the involvement in and benefit accrual by mine-host communities from mineral extraction on their lands. Concerns over justice and fairness in the granting and utilisation of mineral rights on lands inhabited by mine-host communities invite a critical evaluation of existing laws and policies. In a legal context, theories of social justice provide a useful standard for evaluating existing or proposed policy and legislative frameworks and guide the reform process. Theories of social justice help to either legitimise or criticise existing policies and laws.<sup>41</sup> This may be termed the legitimising role of these theories.<sup>42</sup> For instance, Locke's theories of justice were used as justification for the acquisition of colonial territories which were considered *terra nullius*, or land belonging to nobody, following his reasoning about the private ownership of land and property through the application of labour.<sup>43</sup> Furthermore, as society evolves, governments are faced with circumstances that require legislative and policy reforms to meet the aspirations of their citizens.<sup>44</sup> The influence of theories of social justice can, therefore, be discerned in governmental justifications such as

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who view social justice as entailing a situation where there is a fair distribution of benefits and burdens in society.

<sup>39</sup> UN Department of Economic and Social Affairs *Social Justice in an Open World* 7-8, 15-16.

<sup>40</sup> See Chimonyo, Mangure and Scott 2012 <https://www.readkong.com/page/the-social-economic-and-environmental-implications-of-1059367>. Also see *Malvern Mudiwa v Mbada Mining Private Limited* HC 6334/09 (2009).

<sup>41</sup> Millon 1990 *Duke LJ* 241 discusses the role of the theories of corporation and the author affirms that such theories assist when it comes to justifying certain legislative or judicial interventions through new legal doctrines.

<sup>42</sup> Millon 1990 *Duke LJ* 241.

<sup>43</sup> See Bennett *Pasts Beyond Memory* 59; ACHPR 2005 [https://iwgia.org/images/publications/African\\_Commission\\_book.pdf](https://iwgia.org/images/publications/African_Commission_book.pdf) 25.

<sup>44</sup> Zimbabwe's Indigenisation and Economic Empowerment policies are particularly meant to ensure that a disadvantaged group (mainly black people) obtains economic rights geared to fight poverty and inequality. The government of Zimbabwe faced circumstances necessitating land redistribution resulting in the fast-track land reform in the year 2000. The need for balanced economic ownership became apparent by 2010 and Zimbabwe adopted indigenisation and economic empowerment laws. Economic challenges and the failure of the indigenisation law resulted in amendments through the *Finance Act* 1 of 2018 and the *Finance Act* 2 of 2020.

correcting past injustices and ensuring equal access to national resources<sup>45</sup> which are used to pursue the reforms. For instance, Aristotle's views on the notion of justice can be discerned in the *Constitution of Zimbabwe Amendment (No 20) Act, 2013*<sup>46</sup> and the *Constitution of the Republic of South Africa, 1996*<sup>47</sup> which guarantee the right to equality and non-discrimination<sup>48</sup> and provide for equal access to land and other natural resources.<sup>49</sup> Aristotle's concept of distributive justice seeks to foster equality by taking into account the existing inequalities in society, such that equals are awarded equal shares, while un-equals are awarded unequal shares tilted in favour of the most disadvantaged.<sup>50</sup> In this way Aristotle's idea of justice supports affirmative action, the redistribution of wealth and the empowerment of historically disadvantaged persons and groups.

Aristotle<sup>51</sup> identified and considered three dimensions of social justice, namely distributive justice, remedial justice and procedural justice. The division of social benefits and burdens is the main concern of distributive justice, while remedial justice is concerned with correcting or rectifying

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<sup>45</sup> See justifications for distributive and remedial legislative measures to empower previously disadvantaged South Africans in ss 9(2), 25(6)(7)(8), 29(2), 195(1)(i) and 217(2)(b) of the *Constitution of the Republic of South Africa, 1996* (the *Constitution of South Africa*); preamble and ss 1, 2(d)(i) and 104 of the *Mineral and Petroleum Resources Development Act 28 of 2002*; ss 2(j), 18(5) and 31(1) of the *Marine Living Resources Act 18 of 1998*; preamble and chs 4 and 5 of the *Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000*. The Constitutional Court of South Africa affirmed the commitment to social justice in several cases including *Government of the Republic of South Africa v Grootboom* 2001 SA 46 (CC) para 1; *Soobramoney v Minister of Health, Kwazulu-Natal* 1997 12 BCLR 1691 (CC) paras 8-9; *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties Ltd 39 (Pty) 2012 2 BCRL 150 (CC)* para 2.

<sup>46</sup> Okharedia 2005 *Phronimon* 1 explains Aristotle's idea as requiring that, in the endeavor to achieve equality, the distinct inequalities among people and groups in society should be taken into consideration. The distribution of goods and rights cannot be one-size-fits-all (where unequals are awarded equal shares), since people are differently positioned materially. Some people have more (are privileged), and some have less (are underprivileged). Aristotle argues that race should not be used as a criterion for the distribution of goods and rights, and to determine equality. This view contrasts with the colonial thinking which oppressed and marginalised the black population in Zimbabwe. Aristotle's views on race and equality accord with the post-colonial and post-apartheid dispensation in Zimbabwe and South Africa as expressed in s 56 of the *Constitution of Zimbabwe* and s 9(1)-(3) of the *Constitution of South Africa*.

<sup>47</sup> See Okharedia 2005 *Phronimon* 1, 3.

<sup>48</sup> Section 56(5) of the *Constitution of Zimbabwe* and s 9 of the *Constitution of South Africa*.

<sup>49</sup> Section 25(5)-(8) of the *Constitution of South Africa*.

<sup>50</sup> Aristotle, quoted in Okharedia 2005 *Phronimon* 12, stated that "those things that are alike should be treated alike, while things that are unlike should be treated unlike in proportion to their unlikeness. Equality and justice are synonymous: to be just is to be equal, to be unjust is to be unequal".

<sup>51</sup> Aristotle *Nicomachean Ethics* V 1131a 1.

injustices.<sup>52</sup> Rawls<sup>53</sup> and Solum<sup>54</sup> added to Aristotle's observation on the concept of procedural justice, which is concerned with the fairness of procedures for the distribution of resources.<sup>55</sup> Mineral extraction on the lands inhabited by mine-host communities invokes all three dimensions of social justice. Distributive justice, which is examined first, would prescribe that mine-host communities should derive benefits from mineral extraction on their lands. Secondly, when it comes to procedural justice, since mine-host communities are the most affected by mineral extraction, they should participate in the relevant decision-making and be consulted in terms of their customs and traditions. Remedial justice would prescribe that those traditional lands that are dispossessed from mine-host communities without their consent should be returned to them, while compensation should be paid for any damage caused to them. The notion of remedial justice is examined last.

### 3 The notion of distributive justice

Aristotle<sup>56</sup> defines the concept of distributive justice as "the distribution of honour, wealth, and the other divisible assets of the community, which may be allotted among its members". Distributive justice has also been defined by Dworkin<sup>57</sup> as "the right to equal treatment, that is, to the same distribution of goods and opportunities as anyone else has or is given". When these definitions are considered closely, the concept of distributive justice arguably seeks to answer two basic questions: what are the principles that define a just distribution and how should resources be distributed amongst citizens?

Three different principles of distributive justice, namely utilitarianism, libertarianism and egalitarianism, seek to explain when the approach to be adopted for the purposes of the distribution of resources may be regarded as just or equitable. Shelton, however, warns that the choice of the appropriate principle to determine a just or equitable allocation of resources is highly contested.<sup>58</sup> Variances are also common in the dimensions of

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<sup>52</sup> Aristotle *Nicomachean Ethics* V 1131a 1.

<sup>53</sup> Rawls *Theory of Justice* 85.

<sup>54</sup> Solum 2004 *S Cal L Rev* 183.

<sup>55</sup> Solum 2004 *S Cal L Rev* 183; Kuehn 2000 *Env't L Rep* 10681; Ebbeson "Introduction" 2; Schrader-Frechette *Environmental Justice* 24.

<sup>56</sup> Aristotle *Nicomachean Ethics* V 267.

<sup>57</sup> Dworkin *Taking Rights Seriously* 273.

<sup>58</sup> Shelton "Describing the Elephant" 59 and 69 explains that there is contestation regarding "whether decisions should be based on need, capacity, prior entitlement ..., the greatest good for the greatest number, or strict equality of treatment". Marx *Critique of the Gotha Program* 87 recommends the distribution of resources according to needs, thus "from each according to his abilities, to each according to his needs". Nielsen *Equality and Liberty* 62-63 sets out his egalitarian distributive principle of justice as follows: "[A]fter provisions are made for common social

distributive justice. For instance, in the egalitarian perspective of distributive justice some authors advocate strict egalitarianism<sup>59</sup> and others luck egalitarianism;<sup>60</sup> and some support the difference principle.<sup>61</sup> Due to the scope of a full inquiry into these matters, this article will not pursue them in any detailed theoretical context but will instead focus on broad categories to provide a general exposition of the concept of social justice.

### 3.1 *The utilitarian perspective of distributive justice*

The origins of utilitarianism can be traced to Jeremy Bentham, an English legal reformer.<sup>62</sup> Bentham set out to establish a norm that would act as a barometer for determining the kinds of law England should enact. He settled for a framework that would bring about the greatest net benefits to society after subtracting the burdens or costs. His utilitarian axiom was "the greatest good for the greatest number".<sup>63</sup> Utilitarianism, according to this thinking, is therefore an idea of distributive justice that defines a just distribution as one

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(community) values, for capital overhead to preserve the society's productive capacity, allowances made for differing un-manipulated needs and preferences, and due weight is given to the just entitlements of individuals, the income and wealth (the common stock of means) is to be so divided that each person will have an equal share. The necessary burdens requisite to enhance human well-being are also to be equally shared, subject to limitations by differing abilities and differing (natural) environments."

<sup>59</sup> Strict egalitarians argue that members of a society should be allocated equal amounts of resources based on the argument that all people are morally equal and only strict equality can lead to the full realisation of the equal moral worth of human beings. Leading advocates of strict egalitarianism include Kai Nielsen and Amartya Sen.

<sup>60</sup> Anderson 1999 *Ethics* 290; Arneson "Rawls, Responsibility, and Distributive Justice" 80 sets out luck egalitarianism in the following words: "[T]he concern of distributive justice is to compensate individuals for misfortune. Some people are blessed with good luck, some are cursed with bad luck, and it is the responsibility of society — all of us regarded collectively — to alter the distribution of goods and evils that arises from the jumble of lotteries that constitutes human life as we know it ... Distributive justice stipulates that the lucky should transfer some or all of their gains due to luck to the unlucky."

<sup>61</sup> Rawls *Theory of Justice* 83, 302; Rawls *Political Liberalism* 5-6; Rawls *Justice as Fairness* 242-243. Rawls acknowledges that all citizens do not start with the same socio-economic privileges and allocating benefits equally may not be fair to those least advantaged. Accordingly, the difference principle as advocated by Rawls will ensure equity by first satisfying the needs of the least advantaged in cases where strict equality would result in unfairness to the least well-off. This principle permits diverging from strict equality if the inequalities would make the least advantaged in society materially better off than they would have been under strict equality. The utilitarian objection to the difference principle is that it does not maximise utility. The libertarian objection is that it infringes liberty, property rights and/or self-ownership as it may require redistribution to benefit the poor, which libertarians view as the immoral taking of just holdings.

<sup>62</sup> Carter *Philosophical Foundations of Property Rights* 51 cites Bentham as the founder of utilitarianism.

<sup>63</sup> Quoted in Andre and Velasquez 1989 <https://www.scu.edu/mcae/publications/ii/v2n1/calculating.html>.

which produces the greatest amount of utility (or happiness) for the greatest number of people.<sup>64</sup>

Utilitarians<sup>65</sup> all ask the same fundamental question: "what distribution of goods, what principle of justice, what ascriptions of rights are such that their acceptance is in the general interest?"<sup>66</sup> Scholars who critically engage with these questions suggest that a just society is one that is arranged to achieve the greatest amount of satisfaction among its members.<sup>67</sup> Laws and policies should therefore maximise the common good.<sup>68</sup> To achieve a just outcome, relative benefits and burdens should be weighed against one another, and a determination be made regarding that which maximises the greatest good for the greatest number of people.<sup>69</sup> In addition, distributive rules are to be designed and assessed according to how they maximise or reduce welfare. It follows that a good law is one that aims for the maximisation of happiness for a greater number of individuals.<sup>70</sup> Andre and Velasquez opine that, as long as a course of action produces maximum benefits for all, utilitarians are prepared to ignore the use of misinformation, manipulation or force to achieve the desired results.<sup>71</sup> In the end, the rightfulness or wrongfulness of policies or laws depends on whether the consequences are good or bad, that is, their ability to maximise utility or welfare.<sup>72</sup>

Utilitarianism significantly influences the manner in which benefits and resources are currently distributed in society.<sup>73</sup> This is evident from the way governments and lawmakers constantly weigh the consequential benefits and harms of policies and legislation when they make decisions that affect resource distribution.<sup>74</sup> In that sense, when considering participation in and benefit accrual by host communities from natural resource extraction, governments may consider interests other than those of the communities, such as those of the generality of citizens and foreign investors. This line of thought is shown in the case of *African Commission of Human and Peoples'*

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<sup>64</sup> Bilchitz 2008 *ESR Review* 10.

<sup>65</sup> See Bentham *Introduction to the Principles of Morals*; Mill *Utilitarianism*; Sidgwick *Methods of Ethics*; Singer *Expanding Circle*.

<sup>66</sup> Hare "Justice and Equality" 185-199.

<sup>67</sup> Sidgwick *Methods of Ethics* 411.

<sup>68</sup> Rawls *Theory of Justice* 233 conceived of the common good as entailing conditions and objectives that are to everyone's advantage.

<sup>69</sup> Hooft 1987 *Archives for Philosophy of Law and Social Philosophy* 31 observes that the utilitarian philosophy is concerned with achieving the greatest happiness for the greatest number.

<sup>70</sup> Carter *Philosophical Foundations of Property Rights* 51.

<sup>71</sup> Andre and Velasquez 1989 <https://www.scu.edu/mcae/publications/iie/v2n1/calculating.html>.

<sup>72</sup> Du Plessis 2013 *Stell LR* 363.

<sup>73</sup> Taylor "Social Justice" 18.

<sup>74</sup> Andre and Velasquez 1989 <https://www.scu.edu/mcae/publications/iie/v2n1/calculating.html>.

*Rights v The Republic of Kenya*,<sup>75</sup> where the Government of Kenya justified its negation of the human rights of the Ogiek people based on the argument that their eviction and the logging concessions it granted on their lands were in the public interest and for the benefit of all citizens. Elements of utilitarianism can also be gleaned in the Zimbabwean case of *Chikutu v Minister of Lands*,<sup>76</sup> involving the deprivation of community land rights. In this case the government defended its decision to strip the Shangaan indigenous people of their ancestral lands based on the envisaged overall benefits to the nation, including the generation of foreign currency from the intended large-scale irrigation scheme. These cases show that the governments did not consider development as a complex concept which cannot be applied on a one-dimensional basis. There are certain intangibles that are valuable to host communities, for instance their cultural and spiritual well-being. When such contexts are taken into consideration, economic development projects such as mining must respect the interests, rights and expectations of the mine-host communities.

The utilitarian perspective of distributive justice has therefore rightly been subjected to criticism. Rawls<sup>77</sup> and Sen<sup>78</sup> argue that utilitarianism is over-fixated on maximising the happiness of the greater number of people in society, irrespective of the resulting unequal distribution of resources. The focus of utilitarianism on maximising utility is not oriented towards justice, as it negates the basic concern for equality and fairness in the distribution of benefits.<sup>79</sup> It follows, therefore, that utilitarianism as a guiding distributive principle presents serious challenges for mine-host community involvement in and benefit accrual from mineral extraction. Maximising utility may require, for example, that a few minorities or mine-host communities suffer or sacrifice for the benefit of others. Maximising happiness using minerals requires the extraction of minerals at all costs for the benefit of the majority through national economic growth, even if mine-host communities suffer disproportionate burdens such as relocations, social ills and loss of income. In the utilitarian view, the relative or long-term benefits of national development outweigh the harm to mine-host communities caused by mineral extraction.<sup>80</sup> Utilitarians would argue that the harm caused to mine-host communities is a short-term burden or disadvantage that is outweighed

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<sup>75</sup> *African Commission of Human and Peoples' Rights v The Republic of Kenya* App No 006/2012 (26 May 2017) (the *Ogiek* case) para 150.

<sup>76</sup> *Chikutu v Minister of Lands* HH 02/2022 (2022) para 12.

<sup>77</sup> Rawls *Theory of Justice* 27, 177.

<sup>78</sup> Sen 1999 *American Economic Review* 351-352, 362.

<sup>79</sup> Taylor "Social Justice" 18.

<sup>80</sup> Hooft 1987 *Archives for Philosophy of Law and Social Philosophy* 31 asserts that, for utilitarians, justice is achieved by weighing the relative benefits and harms and determining that which maximises the greatest good for the greatest number of people.

by the long-term benefits to be enjoyed by the majority of citizens through the national economic growth that will occur if the mineral revenue is used prudently. Therefore, when the matter is considered from the utilitarian perspective, no injustice arises from entering the lands inhabited by mine-host communities to extract minerals, even if it harms those communities, as long as this maximises the happiness of the greater number of citizens.

Ideally, mine-host communities should be put in a better than or equal position with other citizens and mining companies when it comes to the distribution of costs and benefits, since they bear the greater brunt of the inconveniences of mineral extraction on the lands they inhabit. In the same vein, the common good<sup>81</sup> emphasised by utilitarians is often defined by the state and not by those most affected by mineral extraction. For states, the common good is generally national economic growth or development. The challenge is that this seemingly common good is foisted on mine-host communities, especially indigenous peoples, without their consent and to the detriment of their livelihoods. In that context, laws and policies that promote general welfare while leaving others worse off find root in utilitarianism, and this is morally wrong according to Rawls.<sup>82</sup> In his book titled *A Theory of Justice* Rawls proffers an alternative approach to distributive justice, based in this instance on an egalitarian perspective.<sup>83</sup>

### **3.2 The egalitarian perspective of distributive justice**

The egalitarian school of thought disputes that a society with social and economic inequalities can be just.<sup>84</sup> This thinking stands in stark contrast to utilitarianism, which defends social and economic inequalities if they maximise the well-being of the greatest number even at the expense of the minority. So what kind of distribution makes a society just from an egalitarian perspective? Leading egalitarian theorists such as Dworkin,<sup>85</sup> Sen<sup>86</sup> and

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<sup>81</sup> See Rawls *Theory of Justice* 233, who considers the common good as those conditions and objectives that are to everyone's advantage.

<sup>82</sup> See Bilchitz 2008 *ESR Review* 10.

<sup>83</sup> Rawls first published his book entitled *A Theory of Justice* in 1971. A revised edition was published in 1999. Rawls' notion of distributive justice is organised in accordance with two principles. Principle 1 states that each person has an equal claim to a fully adequate scheme of basic rights and liberties, compatible with a like scheme for all (the equal basic liberties principle). Principle 2 states that social and economic inequalities are to satisfy two conditions, namely; (a) they are to be attached to positions and offices open to all under fair equality of opportunity (the fair equality of opportunity principle), and (b) they are to be to the greatest benefit to the least advantaged (the difference principle).

<sup>84</sup> Van Soest 1994 *Social Work* 714.

<sup>85</sup> Dworkin *Sovereign Virtue*.

<sup>86</sup> Sen *Development as Freedom*; Sen *Idea of Justice*.

Rawls<sup>87</sup> have sought to answer this question.<sup>88</sup> They have addressed further questions, including that which must be equalised, and that which is the nature or measure of equalisation that meets the requirements of distributive justice.<sup>89</sup> Dworkin explains his version of egalitarian distributive justice through a principle of equal concern.<sup>90</sup> He holds that governments should treat each citizen with equal concern, arguing that it "is the sovereign virtue of political community"; he adds that, without it, "government is only tyranny and when a nation's wealth is very unequally distributed" it follows that "its equal concern is suspect".<sup>91</sup>

In Dworkin's view, the appropriate measure of social justice is the equal distribution of resources.<sup>92</sup> The decisions affecting the distribution of wealth, benefits and burdens must be consistent with equal concern for the interests of members of a society.<sup>93</sup> It follows that government policy and legislation should focus on both the equal importance of people's lives and their personal choice to live the kind of life they want.<sup>94</sup> In the context of the distribution of the benefits derived from mineral resources, this would mean that government should be concerned about the well-being of its citizens,

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<sup>87</sup> Rawls *Theory of Justice*.

<sup>88</sup> Aristotle also considered the question of just distribution. Okharedia 2005 *Phronimon* 6 explains that Aristotle's principle of justice entails equality of treatment. With a view to attaining distributive justice members of a society are therefore entitled to equitable distribution *inter alia* of rights and goods. The distribution takes into account the distinct conditions or inequalities of the members. Equals are treated equally by awarding them equal shares. Unequals are treated equally by awarding them unequal shares that are in their favour.

<sup>89</sup> Liebenberg 2015 *SALJ* 413.

<sup>90</sup> Dworkin *Sovereign Virtue* 1. See Chaskalson 2003 *ICON* 600, 608 who explains that the notion of equal concern is foregrounded in ss 1, 7, 9, 10, 36(1), 39(1) of the *Constitution of South Africa* through the guarantee of equality and the values of an open and democratic society based on human dignity, equality, respect and freedom. Albertyn 2018 *SAJHR* 458 states that the notion of equal concern and respect also speaks to "fair or reasonable process, and to accountability by government and participation by citizens" when it comes to achieving socio-economic rights.

<sup>91</sup> Dworkin *Sovereign Virtue* 1. In the context of mineral extraction, failure to consult host communities can be interpreted by them to mean that they are not deserving of equal concern and respect. South African courts have drawn on theories of social justice such as Dworkin's concept of justice and equality as bases for approaching the question of addressing the injustices of the past wrought by apartheid. See the cases of *President of the Republic of South Africa v Hugo* 1997 4 SA 197 (CC) para 41; *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg* 2005 1 SA 217 (CC) paras 10, 11 and 19; *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 44.

<sup>92</sup> Dworkin 1981 *Philosophy and Public Affairs* 283-345 argues that equality of resources is the distributive expression of the "equal moral worth of persons".

<sup>93</sup> Dworkin *Freedom's Law* 25.

<sup>94</sup> Dworkin *Sovereign Virtue* 323-324.

who should decide for themselves how they want to live their lives and how best to use their resources to attain that kind of life.<sup>95</sup>

The principle of equal concern, as explained by Dworkin, is sensitive to the plight of mine-host communities, that often endure extreme poverty despite the rich mineral resources being exploited by outsiders. Following the work of Dworkin an egalitarian approach would therefore prescribe that government, through legislative instruments and policy measures, should be concerned with the plight of mine-host communities just as much as it is concerned about national economic growth or the well-being of the generality of its citizens. The government may therefore have to allocate more resources to mine-host communities to compensate them for their losses or may have to offer them something to counterbalance their vulnerability to the socio-economic and environmental impacts of mineral extraction.

According to Rawls' principles of justice, a distribution will be just if (i) it accords equal liberty rights to everyone,<sup>96</sup> and (ii) it allows for inequality in social and economic resources only where such inequalities are to the benefit of those who are least advantaged.<sup>97</sup> The first principle requires the equalisation of basic liberties, because the citizens of a just society have the same basic liberties.<sup>98</sup> The second principle asserts that, although the distribution of wealth or resources need not be equal, it must be to everyone's advantage.<sup>99</sup> Rawls effectively opposes the utilitarian view that justifies inequalities by off-setting the hardships of some with the greatest happiness of the greater number of people in a society.<sup>100</sup> He argues that inequalities in wealth and resources should only exist if they work to the benefit of the least advantaged.<sup>101</sup> In Rawls' view, justice occurs when the benefits and burdens in society are distributed as if there were a 'veil of ignorance' that precludes personal interests from influencing decisions.<sup>102</sup>

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<sup>95</sup> Liebenberg 2015 SALJ 421 adds that equal concern requires "sensitivity to distinct circumstances and needs of groups in their particular social and historical context".

<sup>96</sup> Rawls *Justice as Fairness* 42-43. This is an equal liberty principle. See s 56(1)(2) of the *Constitution of Zimbabwe* and s 9(1)(2) of the *Constitution of South Africa*.

<sup>97</sup> Dworkin "Hypothetical Contracts and Rights" 145-157. See s 56(1)(2) of the *Constitution of Zimbabwe* and s 9(1)(2) of the *Constitution of South Africa*.

<sup>98</sup> Rawls *Justice as Fairness* 42-43. See s 56(1)(2) of the *Constitution of Zimbabwe* and s 9(1)(2) of the *Constitution of South Africa*.

<sup>99</sup> Rawls *Justice as Fairness* 42-43.

<sup>100</sup> Van Soest 1994 *Social Work* 714.

<sup>101</sup> Dworkin "Hypothetical Contracts and Rights" 145-157.

<sup>102</sup> Rawls *Theory of Justice* 87-88. Rawls developed his philosophy of justice based on what he called "the 'original position' when society has not yet come into existence and the (future) place of peoples in this position is hidden from them by a 'veil of ignorance.' The person in the original position decides what is just from a veil of ignorance of their place in society, their class position or social status nor do they know their fortune in the distribution of natural assets and liabilities. People in this position maximise benefits for the least well-off since they are ignorant of their

This approach ensures that all people have equal access to basic liberties and benefits. Rawls therefore argues for a society where members share the benefits and burdens of achieving their common well-being and enjoy principles that guide members of society to act in a fair and equitable manner. Naturally, this reasoning may well offer favourable outcomes for mine-host communities, who are often the least advantaged in the context of mineral extraction on their lands.

Rawls has been criticised for overstressing distribution as the overarching principle of justice.<sup>103</sup> Consequently, Sen<sup>104</sup> introduces the capabilities approach and asserts that distributive justice should be concerned with the freedoms which people have, to attain the kind of life they want. This reasoning connects with the idea of developing the skills in mine-host communities to enable them to engage in alternative economic activities that are not wholly dependent on support from mining companies.

### **3.3 The libertarian perspective of distributive justice**

Dissatisfied with both the utilitarian and the egalitarian concepts of distributive justice, Nozick<sup>105</sup> propounds an entitlement principle based on the libertarian concept of distributive justice. Locke<sup>106</sup> and Nozick<sup>107</sup> explain that libertarian justice means that (i) inequalities of resources or wealth are permissible if their acquisition does not prejudice others and that (ii) property rights are acquired where a person produces something through his or her labour using resources not claimed by anyone else or by voluntary transfer of the resources by a transferor who has property rights. According to this reasoning, the question as to whether a distribution is just or not depends on how it came about.<sup>108</sup> Inequalities in resource distribution are forbidden only if they are caused, for instance, by force, fraud and misinformation.<sup>109</sup>

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position. Ignorance of one's own status leads to principles which are fair to all and especially the weak".

<sup>103</sup> Schlosberg 2004 *Environmental Politics* 517; Young *Justice and the Politics of Difference* 1; Miller *Principles of Social Justice* 1, 232.

<sup>104</sup> Sen *Development as Freedom* 74-75; Sen *Idea of Justice* 231-235, 295-297. Notably, Sen does not argue that the central focus of justice should be equalising capabilities, but rather that equality of capabilities should be emphasised. Sen argues against a "unifocal view of equality" and argues in favour of multi-dimensions in which equality of capabilities is included. Interestingly, in the case of the *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v The Republic of Kenya* ACHPR Comm No 276/2003 (2010) para 283, the African Commission on Human and Peoples' Rights emphasised that development should improve the capabilities of the Endorois peoples rather than diminish their existing capabilities.

<sup>105</sup> Nozick *Anarchy, State and Utopia*.

<sup>106</sup> Locke *Second Treatise of Government* 33.

<sup>107</sup> Nozick *Anarchy, State and Utopia* 213-229; Schwartz 1992 *Social Theory and Practice* 260, 276.

<sup>108</sup> Nnaji for and Ifeakor 2016 *Ogiri* 176.

<sup>109</sup> Schwartz 1992 *Social Theory and Practice* 261.

In the context of mineral extraction, a libertarian approach would support the inequality of the burdens and benefits between mining companies and mine-host communities if the communities let go of their lands and the minerals thereon through free, prior and informed consent (FPIC). The mine-host communities would not be considered to have suffered any harm if they knowingly and voluntarily handed over their right to natural resources and wealth to mining corporations. To justify his approach, Nozick organises his theory into two ideas, which he refers to as justice in acquisition and justice in transfer.<sup>110</sup>

### 3.3.1 *The notion of justice in acquisition*

The idea of justice in acquisition is based on an initial acquisition of holdings, namely, resources or wealth, and focusses on how people obtain them.<sup>111</sup> In terms of this idea, natural resources are justly acquired through having found them first, known as first arrival; Or having mixed the resource with one's labour, that is, having first improved the resource. Nozick uses the idea of the "first arrival or first comer" where "things" are acquired where no one else has a prior claim. Nozick explains that one "may find an unheld thing now and appropriate it".<sup>112</sup> The firstcomer can justly claim sole ownership of natural resources of a "newly discovered and uninhabited area" if the resources are available in unlimited quantities.<sup>113</sup> The idea of the firstcomer could aid mine-host communities by allowing them to claim a share of the proceeds of mineral extraction on their ancestral lands, their having arrived there first. However, it is also not clear why the firstcomer who appropriates minerals or land, for example, should have exclusive rights,<sup>114</sup> as this principle could generate greater wealth for some to the exclusion of others.<sup>115</sup> Benefit sharing is advocated to alleviate this concern, and ensure the fair and equitable distribution of the benefits of mineral extraction on lands inhabited by mine-host communities. As for his idea of the first improver, Nozick<sup>116</sup> refers to Locke to explain a just acquisition:

Whatsoever then he removes out of the state that nature have provided, and left in, he hath mixed his labour with, and joined to it something that is his own, and thereby makes it his property. It being by him removed from the common

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<sup>110</sup> Nozick *Anarchy, State and Utopia* 150-151. Nozick puts forward the idea of the rectification of injustice to remedy injustices arising from the acquisition of possessions and this idea will be discussed in detail below under the rubric of remedial justice.

<sup>111</sup> Nozick *Anarchy, State and Utopia* 150-151.

<sup>112</sup> Nozick *Anarchy, State and Utopia* 151.

<sup>113</sup> Nozick *Anarchy, State and Utopia* 175.

<sup>114</sup> Schwartz 1992 *Social Theory and Practice* 270; Nozick *Anarchy, State and Utopia* 178 argues that the first to appropriate previously unowned resources are justified in having exclusive ownership if in their appropriation, as indicated by Locke, they leave "enough, and as good ... in common for others".

<sup>115</sup> See George *Progress and Poverty* 328, 338.

<sup>116</sup> Locke *Second Treatise of Government* 17, 27.

state of nature hath placed it in, it hath by this labour something annexed to it, that excludes the common right of other men: for this labour being the unquestionable property of the labourer, no man but he can have a right to what that is once joined to, at least where there is enough, and as good, left in common for others.

The extraction of minerals is an act of mixing one's labour, that is, capital and operating expenditure, with the mineral deposit, and if only this part of Locke's statement is applied to the context of mineral extraction, mining companies would have exclusive entitlement to the benefits of mineral extraction. Mine-host communities would have no claim to the minerals by the mere fact of having historically inhabited the land bearing minerals, since they would not have mixed their labour with the minerals. However, Locke also suggested that "enough and as good for others" must remain for justice to exist.<sup>117</sup> Nozick interprets this part of Locke's assertion to mean that the appropriation of natural resources must not worsen the condition of other people.<sup>118</sup> In Nozick's opinion, the phrase "enough and as good for others" also provides other people, for instance, mine-host communities in the current context, a right to a share of the benefits of natural resources, but that right is limited to a share sufficient for subsistence and not an equal share.<sup>119</sup> In this sense, a libertarian approach based on the idea of the application of one's labour prescribes that mineral extraction should not worsen but rather improve the situation of the mine-host communities and that these communities should also have a share in the benefits of the mineral extraction on the lands they inhabit, even though it may not be an equal share.

The notion of justice in acquisition has been criticised by Palmer,<sup>120</sup> who argues that most current possessions are historically traceable to injustices such as the spoils of war, slavery, colonialism, apartheid, marginalisation and forced relocations. He further argues that if these historical injustices are unresolved, Nozick's entire proposition based on justice in acquisition is misplaced.<sup>121</sup> Nozick<sup>122</sup> acknowledges that not everyone acts in accordance with the ideas expressed in justice in acquisition. He observes that "some people steal from others or defraud them, or enslave them, seizing their product and preventing them from living as they choose, or forcibly exclude others from competing in exchanges".<sup>123</sup> This leads to Nozick's second idea of justice in transfer as discussed below.

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<sup>117</sup> Locke *Second Treatise of Government* 17, 27.

<sup>118</sup> Nozick *Anarchy, State and Utopia* 175, 178.

<sup>119</sup> Nozick *Anarchy, State and Utopia* 175.

<sup>120</sup> Palmer *Looking at Philosophy* 358.

<sup>121</sup> Palmer *Looking at Philosophy* 358.

<sup>122</sup> Nozick *Anarchy, State and Utopia* 152.

<sup>123</sup> Nozick *Anarchy, State and Utopia* 152.

### 3.3.2 *The notion of justice in transfer*

The idea of justice in transfer focusses on the way a person can acquire holdings from another. Possessions that are justly held, that is, without force, theft or fraud, among other ills, can be freely transferred.<sup>124</sup> To explain his idea of justice in transfer, Nozick draws attention again to Locke,<sup>125</sup> who states that "If he would give his nuts for a piece of metal, pleased with its colour; or exchange his sheep for shells, or wood for a sparkling pebble or a diamond, and keep those by him all his life he invade not the right of others."

Nozick interprets Locke's argument to mean that, if the arrangement, that is, the transfer of resources and wealth, was voluntary and not forced, the transfer is just.<sup>126</sup> A libertarian approach based on the idea of justice in transfer suggests that the state can justly sell or transfer rights in mineral resources to mining companies without consultation with the mine-host communities if it owns them.<sup>127</sup> However, this libertarian approach needs to be confronted by mine-host communities, particularly indigenous peoples, who consistently claim prior ownership of their lands and the natural resources thereon even if the current national law vests those resources in the state.<sup>128</sup> In fact governments arguably use force, intimidation and misinformation to evict mine-host communities to make way for mining.<sup>129</sup> Consequently justice in transfer is difficult to attain in the context of mineral extraction.

The process in which justice is attained is also important when it comes to the notion of social justice. Unjust processes violate social justice, while just processes aid the attainment of social justice. This thinking is encapsulated in the notion of procedural justice discussed below as an element of social justice.

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<sup>124</sup> Locke *Second Treatise on Government* 46.

<sup>125</sup> Locke *Second Treatise on Government* 46.

<sup>126</sup> Locke *Second Treatise on Government* 46.

<sup>127</sup> Schwartz 1992 *Social Theory and Practice* 262 holds that it is a grave concern that libertarianism "licenses some people suffering appalling misery and degradation for the benefit of others or at least while others thrive" as long as the transfer was voluntary by the person with a claim to the resources.

<sup>128</sup> *Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria*, ACHPR Com No 155/96 (2001); *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v The Republic of Kenya* ACHPR Comm No 276/2003 (2010) and *African Commission of Human and Peoples' Rights v The Republic of Kenya* App No 006/2012 (26 May 2017).

<sup>129</sup> Human Rights Watch 2016 <https://www.hrw.org/report/2016/09/27/they-destroyed-everything/mining-and-human-rights-malawi>.

## 4 Procedural justice

According to Aristotle procedural justice entails a "status wherein individuals have an equal share in ruling and being ruled".<sup>130</sup> In other words, procedural justice is concerned with one's treatment as an equal and with respect, relating to decision-making affecting the distribution of goods and opportunities.<sup>131</sup> In Kuehn's view, procedural justice "involves justice as a function of how a decision is made, and it requires a focus on the fairness of the decision-making process, rather than on its outcome".<sup>132</sup> So interpreted, procedural justice is concerned with treating others with fairness in the procedures leading to a certain decision and the distribution of resources in society.<sup>133</sup> This notion of justice emphasises democratic decision-making, which encompasses involvement, representation, equality and engagement.

Scholars<sup>134</sup> have grappled with the question of what makes a procedure just or fair and the notion of procedural justice that should be adopted in a just society. In his analysis of the subject Rawls<sup>135</sup> identifies three notions of procedural justice: perfect, imperfect, and pure procedural justice.<sup>136</sup> As for perfect and imperfect procedural justice, a brief outline is sufficient, unlike pure procedural justice, which accords with the idea of involvement and effective participation and thus directly relates to the involvement of mine-host communities in decision-making about mineral extraction on the lands they inhabit.

According to Rawls,<sup>137</sup> perfect procedural justice comprises two elements, namely (i) an independent criterion for that which constitutes a fair or just

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<sup>130</sup> Heyman 1992 *Iowa L Rev* 851.

<sup>131</sup> Dworkin *Taking Rights Seriously* 273.

<sup>132</sup> Kuehn 2000 *Env't L Rep* 10688.

<sup>133</sup> Tyler and Mentovich *Mechanisms of Legal Effect 2* especially points to "the justice of procedures, whether they are fair or unfair, ethical or unethical, and otherwise accord with people's standards of fair processes for social interaction and decision-making".

<sup>134</sup> Solum 2004 *S Cal L Rev* 228; Rawls *Theory of Justice* 73-75; Kuehn 2000 *Env't L Rep* 10692 sought to determine whether a "fair process can negate a claim that a disproportionate outcome is unjust". Hart *Concept of Law* 167 argues that a disparate distribution of benefits may be considered just if impartial attention was given to competing claims to the benefits. Greenberg 1993 *4 Risk: Health Safety and Environment* 236 contends that, if appropriate criteria are applied to every area, then the results of the sitting decision are fair even if they disproportionately burden some groups and benefit others.

<sup>135</sup> Rawls *Theory of Justice* 73-75.

<sup>136</sup> Rawls *Theory of Justice* 73-75.

<sup>137</sup> Rawls *Theory of Justice* 73-75. Rawls explains that, where perfect procedural justice reigns, "there is an independent criterion of what is a fair division, a criterion defined separately from and prior to the procedure which is to be followed. And ... it is possible to devise a procedure that is sure to give that desired outcome". In this case

outcome of the procedure, and (ii) a procedure that guarantees achieving that fair outcome. A procedure is perfect when people know that which is just and if they can craft a procedure that guarantees the attainment of that result.<sup>138</sup> For instance, if people know in advance that mine-host communities deserve half of the proceeds of mineral extraction on their land, perfect procedural justice is attainable if a procedure is crafted to ensure that mine-host communities obtain half of the proceeds.

Although in the case of imperfect procedural justice an independent criterion for fairness of outcomes exists, Rawls asserts that no procedure guarantees a fair result.<sup>139</sup> An imperfect procedure therefore exists when people know that which is just in advance, but cannot put in place a procedure that guarantees that result.<sup>140</sup> A situation where the government intends that the benefits of mineral extraction accrue to mine-host communities and only to the individuals in those communities, but where it cannot devise a procedure that will ensure that result, serves as an example of imperfect procedural justice. The benefits may end up accruing to people who are not part of the community or fail to benefit some members of the community. For instance, South Africa's Mining Charter Impact Assessment Report of 2009 reveals that mine-host communities continue to live in poverty despite the existence of various empowerment efforts.<sup>141</sup> This is attributable *inter alia* to mining companies taking a narrow approach to empowerment that involves benefitting handpicked individuals who are then disguised as representing the broader interest of the mine-host community.<sup>142</sup> In Zimbabwe parliamentary reports reveal that no progress has been made towards the empowerment of local communities while the extraction of mineral resources continues.<sup>143</sup>

Pure procedural justice entails situations where there is no criterion for that which constitutes a just outcome other than the procedure itself.<sup>144</sup> In such a case, there is no independent prior criterion for assessing whether or not the result is right. Instead there is a correct or fair procedure which, if

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"equal shares for each person" is the independent criterion of a fair division. A rule that says the "slicer picks last" is the procedure that produces that outcome.

<sup>138</sup> Robinson and Reeser *Ethical Decision-Making* 9.

<sup>139</sup> Sadurski 2006 *OJLS* 397-399.

<sup>140</sup> Robinson and Reeser *Ethical Decision-Making* 9.

<sup>141</sup> Department of Mineral Resources 2009 [https://www.gov.za/sites/default/files/gcis\\_document/201409/miningcharterimpact.pdf](https://www.gov.za/sites/default/files/gcis_document/201409/miningcharterimpact.pdf) 11.

<sup>142</sup> Department of Mineral Resources 2009 [https://www.gov.za/sites/default/files/gcis\\_document/201409/miningcharterimpact.pdf](https://www.gov.za/sites/default/files/gcis_document/201409/miningcharterimpact.pdf) 11.

<sup>143</sup> See Portfolio Committee on Mines and Energy 2013 <https://veritaszim.net/node/1633>. Also see Portfolio Committee on Mines and Energy 2018 <https://parlzim.gov.zw/download/second-report-on-mines-energy-on-the-diamond-sector-in-zimbabwe-2009-201>; Portfolio Committee on Mines and Mining Development 2022 <https://www.veritaszim.net/node/5665>.

<sup>144</sup> Rawls *Theory of Justice* 86.

properly followed, makes it likely that the outcome will be correct or fair.<sup>145</sup> Accordingly, a just system, whether it be of a legal or socio-economic nature, follows just processes. As long as just processes are followed, whatever the outcomes are, they will also be just. An approach based on pure procedural justice would prescribe, for example, that the extraction of minerals on lands inhabited by mine-host communities should be preceded by the giving of the free, prior, and informed consent (FPIC) of those communities and not by force, aggression, deceit or misinformation, even if the FPIC results in the dislocation of the communities. A procedure that ensures consultation and involvement and that affords affected people an opportunity to participate in the process of making decisions that affect them is therefore considered to be a just procedure. Such a procedure is considered to be just even if the results are unfavourable.<sup>146</sup> In this sense, it is the participation in the process and not the outcomes defines procedural justice.<sup>147</sup> Participation in the process gives dignity to those who are affected by the proceedings, as every citizen has a right to be treated with concern and respect.<sup>148</sup> According to this line of thinking, a procedure that includes some members of the community while unfairly excluding others from the decision-making process cannot be a just procedure.

Scholars<sup>149</sup> express additional views on what makes a procedure just or fair. For instance, Solum<sup>150</sup> points out that a procedure is fair if it affords people their right to participate in the form of notice and an opportunity to be heard. Fraser<sup>151</sup> propounds the notion of "parity of participation", according to which a just society is one in which citizens have equal participation in

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<sup>145</sup> Rawls *Theory of Justice* 86.

<sup>146</sup> In *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, South African Social Security Agency* 2014 1 SA 604 (CC) para 24 the court held that the determination of the procedural fairness of an administrative decision is independent of the outcome of the decision.

<sup>147</sup> Tyler 2001 *Issues of Democracy* 16-19. Tyler 2001 *Issues of Democracy* 20 discusses participation in terms of three elements, namely (i) voice/neutrality, which entails fairness of decision making or opportunities for input before decisions are made, (ii) validation, which relates to whether their views are listened to and considered in decision making and whether decisions are made following understandable and transparent rules, while (iii) respect relates to fairness of treatment during the decision-making process. Gibson 2008 *Journal of Politics* 701 concludes that, where people view the process that was used as fair, they are likely to accept unfavourable outcomes or unequal shares of the resources they receive compared to what others receive.

<sup>148</sup> Mashaw *Due Process* 162-163 explains the importance of participation independent of outcomes and states that "it is common-place for us to describe process affronts as somehow related to disrespect for our individuality, to our not being taken seriously as persons".

<sup>149</sup> Solum 2004 *S Cal L Rev* 191; Fraser 2000 *New Left Review* 107-120; Liebenberg 2015 *SALJ* 427-428; Fraser "Social Justice" 30.

<sup>150</sup> Solum 2004 *S Cal L Rev* 191.

<sup>151</sup> Fraser 2000 *New Left Review* 107, 109; Fraser "Social Justice" 7, 30, 36.

political and socio-economic decision-making. This is because all people have a right to participate as equals in society,<sup>152</sup> which is based on the equal moral worth of all human beings.<sup>153</sup> In Fraser's<sup>154</sup> view, citizens should engage with the government when it comes to deciding their livelihoods. It follows that the government must ensure the production of conditions for genuine participation by citizens. Fraser<sup>155</sup> states that participatory parity requires a government to remove "social arrangements that institutionalise deprivation, exploitation and gross disparities" when it comes to resources. Related to the focus of this paper, a just procedure would ensure that mine-host communities are accorded equal participation and consultation in decision-making about mineral extraction on their lands. The consultation should be conducted according to the customs and traditions of the affected communities.

## 5 Remedial justice

In the context of mineral extraction, remedial justice would entail the right of mine-host communities to redress for (i) lands and minerals lost to mining companies without consultation and their consent, and (ii) damage, including to health, suffered due to the adverse impacts of mineral extraction. In these circumstances the theory of remedial justice, which seeks to ensure redress for wrongs suffered through the provision of appropriate remedies, becomes invaluable.<sup>156</sup> The remedies may be in the form of compensation, restitution, an apology or an undertaking of non-repetition.<sup>157</sup> These remedies branch into strands of remedial justice such as rectificatory justice, corrective justice, compensatory justice, reparatory justice, restorative justice and restitutive justice.<sup>158</sup> The existence and overlapping nature of these constituent strands of remedial justice show that no one single form of remedial justice may sufficiently redress a wrong. For

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<sup>152</sup> Liebenberg 2015 *SALJ* 427-428.

<sup>153</sup> Fraser "Social Justice" 45.

<sup>154</sup> Fraser "Social Justice" 45.

<sup>155</sup> Fraser "Social Justice" 36.

<sup>156</sup> Maguire and Lewis 2012 *Macquarie Journal of International and Comparative Environmental Law* 24.

<sup>157</sup> Buyse 2008 *Heidelberg Journal of International Law* 129-153.

<sup>158</sup> It is also noticeable that some remedies are referred to interchangeably in extant literature, as in the case of rectificatory justice and corrective justice. The terms compensatory, restitutory and reparatory justice are also used interchangeably.

example, the provision of compensation may have to be accompanied by an apology<sup>159</sup> or an undertaking of non-repetition.<sup>160</sup>

Rectificatory justice stems from the work of Aristotle, who considers the role of judges to be that of making parties equal by imposing a penalty on the wrongdoers, especially by taking away from the wrongdoers that which they gained or secured through the wrongful action.<sup>161</sup> Aristotle's view of justice as "rectificatory" treats parties as equals, based on the principle of equality before the law,<sup>162</sup> and it determines whether one has done wrong to another who suffered the wrong or damage and then seeks to restore the wronged party to the position s/he was in before the injustice occurred.<sup>163</sup> In this sense, the role and aim of rectificatory justice is to rectify the wrong suffered by the victim by correcting the injustice.<sup>164</sup>

Based on Aristotle's work, Nozick argues that some past injustices are so great that it is necessary to rectify them.<sup>165</sup> Nozick's idea of the rectification of injustice is related to questions such as (i) how to deal with possessions that are unjustly acquired or transferred, (ii) how to deal with historical transgressions or injustices by the state, and (iii) the quantum of compensation due to victims.<sup>166</sup> Nozick's notion of the rectification of

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<sup>159</sup> In *African Commission on Human and Peoples' Rights v Republic of Kenya* App No 006/2012 (Judgment (Reparations) of 23 June 2022) para 129 the African Court on Human and Peoples' Rights considered the issue of an apology as a remedy. However, the court did not order an apology by the Kenyan government as it determined that the other measures ordered by the court such as the restitution of lands and the recognition of the Ogiek as an indigenous people were sufficient and effective.

<sup>160</sup> See the case of the *African Commission on Human and Peoples' Rights v Republic of Kenya* App No 006/2012 (Judgment (Reparations) of 23 June 2022) para 150 in which the African Court on Human and Peoples' Rights ordered the Kenyan government to adopt legislative, administrative and other measures to ensure the non-repetition of the violations of the rights of the Ogiek. The measures (paras 117, 151-155) included (i) compensation, (ii) restitution of the lands, (iii) recognition of the Ogiek as an indigenous people, (iv) the establishment of frameworks for dialogue and consultation with the Ogiek on all matters that affect them, (v) dialogue and consultation on whether those entities awarded commercial operations on Ogiek land could continue their operations under lease from the Ogiek or on the basis of a royalty and benefit sharing with the Ogiek, and (vi) establishment of a Development Fund for the Ogiek.

<sup>161</sup> Maguire and Lewis 2012 *Macquarie Journal of International and Comparative Environmental Law* 25.

<sup>162</sup> Swat 2013 *SAPL* 75.

<sup>163</sup> Maguire and Lewis 2012 *Macquarie Journal of International and Comparative Environmental Law* 25.

<sup>164</sup> Maguire and Lewis 2012 *Macquarie Journal of International and Comparative Environmental Law* 25. Adler 2007 *U Pa L Rev* 1859 refers to this form of justice as corrective and states that it "imposes a duty on the agent who has acted wrongfully, and thereby caused loss to some individual, to repair the loss".

<sup>165</sup> Nozick *Anarchy, State and Utopia* 32.

<sup>166</sup> Nozick *Anarchy, State and Utopia* 27, 152-153.

injustice prescribes that property acquired through violation of the rights of others can remain with the current holder only if the prejudiced people have been compensated for their loss.<sup>167</sup> In this way the rectification of injustices seeks to restore the situation as closely as possible to the situation that obtained before the injustice occurred. Alternatively, rectification and compensatory justice require the counterbalancing of benefits for those wrongly injured, "which will serve to bring them up to the level of wealth and welfare they would now have if they had not been disadvantaged".<sup>168</sup> A remedial justice approach based on the rectification of injustices would therefore prescribe the rectification of past transgressions against mine-host communities by improving their welfare and well-being, including compensation for the unjust displacement of the communities.<sup>169</sup>

The third form of justice, remedial justice, entails more than just compensation. If compensation alone would suffice, this would mean that once compensation has been paid an otherwise unjust action would be deemed acceptable.<sup>170</sup> In the context of damages caused to mine-host communities, remedial justice requires that, in addition to the payment of compensation, the restitution or restoration of the lands expropriated as well as a clean-up of any spillages or contamination must be undertaken. Restitutive or restorative justice would prescribe that natural resources unjustly acquired should be restored to the mine-host communities and, if

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<sup>167</sup> Nozick *Anarchy, State and Utopia* 27, 152-153.

<sup>168</sup> Nickel 1975 *Colum L Rev* quoted in Swat 2013 *SAPL* 78.

<sup>169</sup> The Supreme Court of South Africa explained in the case of *Haakdoornbult Boerdery CC v Mphela* 2007 5 SA 596 (SCA) para 48 that the "purpose of giving fair compensation is to put the dispossessed, insofar as money can do it, in the same position as if the land had not been taken".

<sup>170</sup> Kuehn 2000 *Env't L Rep* 10694.

that is no longer possible, the communities must be compensated<sup>171</sup> or share in the benefits of the exploitation of the resources.<sup>172</sup>

Meaningful engagement has been deployed as a remedy at both the national court level using domestic law<sup>173</sup> and the regional court level based on international law.<sup>174</sup> For instance, the Constitutional Court of South Africa deployed meaningful engagement as a remedy for inadequate engagement with affected people. The case of *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg*<sup>175</sup> is the first to consider meaningful engagement as a remedy. In this case the applicants opposed eviction from dangerously dilapidated buildings on the basis that the eviction and relocation to the outskirts of the city would destroy their livelihood, which was dependent on informal trading in the inner city of Johannesburg. The Constitutional Court first ordered the parties, in an interim judgement, to engage with each other meaningfully before the eviction of the applicants. The court defined meaningful engagement as a two-way process in which the parties would discuss the proposed eviction in a meaningful way to find a palatable solution.<sup>176</sup> The purpose of meaningful engagement, in the court's view, was to determine whether the

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<sup>171</sup> The case of *African Commission on Human and Peoples' Rights v Republic of Kenya* App No 006/2012 (Judgment (Reparations) of 23 June 2022) (Ogiek case) paras 42-44, 59, 66 explains that compensation should be commensurate to the prejudice suffered and the court is to exercise its discretion in equity to determine what amounts to fair compensation in cases where the violations occurred over a long time as these are difficult to quantify. In the Ogiek case the African Court of Human and Peoples' Rights agrees with the Permanent Court of International Justice case of *The Factory at Chorzow (Germany v Poland)* (Merits, Judgment of 13 September 1928) [1928] PCIJ Rep Series A, No 17, 47, which explains that the State responsible for the violation needs to make an effort to "wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed". Regarding whom is to be compensated, the African Court explains in paras 42-43 of the Ogiek case that damages can be claimed by the victims of the violation, their immediate heirs and other close relatives and "subject to certain conditions, groups and communities may be entitled to reparations meant to address collective harm."

<sup>172</sup> See Art 2 of the *International Covenant on Civil and Political Rights* (1966); Art 7 of the *African Charter on Human and Peoples' Rights* (1981); *African Commission on Human and Peoples' Rights v Republic of Kenya* App No 006/2012 (Judgment (Reparations) of 23 June 2022) para 117.

<sup>173</sup> *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg* 2005 1 SA 217 (CC).

<sup>174</sup> *African Commission on Human and Peoples' Rights v Republic of Kenya* App No 006/2012 (Judgment (Reparations) of 23 June 2022) para 117.

<sup>175</sup> *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg* 2005 1 SA 217 (CC).

<sup>176</sup> *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg* 2005 1 SA 217 (CC) para 14. The court in *Doctors for Life International v Speaker of the National Assembly* 2006 6 SA 416 (CC) affirmed that involvement is a powerful tool that brings participatory processes to those previously excluded.

plight of the affected people could be alleviated by upgrading the buildings to improve the living conditions on the properties. In the final judgement the court linked meaningful engagement to the right to access to adequate housing with the requirement for the involvement of communities in the affairs of local government.<sup>177</sup>

The case of *Baleni v Minister of Mineral Resources*<sup>178</sup> also involves the question of meaningful engagement. In this case, mining rights were granted without adequate consultation with and the consent of the affected community. The High Court of South Africa reversed the grant of the mineral rights and explained that when land is held on a communal basis, the community must be consulted and permitted to consider the proposed project on their land.<sup>179</sup> This is based on the right of the community to decide what happens on such lands in accordance with their customs and traditions.<sup>180</sup> In the case of *Sustaining the Wild Coast v Minister of Mineral Resources*,<sup>181</sup> the High Court of South Africa set aside the decision by the Department of Mineral Resources and Energy to grant an oil and gas exploration right which allowed the holders to undertake seismic surveys. The court found no meaningful consultation with the affected communities since the holders had consulted the traditional leaders only, contrary to the customs and traditions of the affected communities, which require consensus among members of the communities. The court explains that "meaningful consultations consist not in the ticking of a checklist, but in engaging in a genuine, *bona fide* substantive two-way process aimed at achieving, as far as possible, consensus..."<sup>182</sup>

Meaningful engagement was also deployed as a remedy in the case of the *African Commission on Human and Peoples' Rights v Republic of Kenya* (the *Ogiek* case)<sup>183</sup> when the African Commission on Human and Peoples' Rights ordered the Kenyan government to commence dialogue and consultation with the Ogiek people. The purpose of the dialogue was to reach an agreement on whether those granted concessions on Ogiek lands could continue with their operations through leases or royalty and benefit sharing with the Ogiek. These examples demonstrate that meaningful engagement can also be deployed in the context of mining to resolve

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<sup>177</sup> Section 151(1)(e) of the *Constitution of South Africa*.

<sup>178</sup> *Baleni v Minister of Mineral Resources* 2019 2 SA 453 (GP).

<sup>179</sup> *Baleni v Minister of Mineral Resources* 2019 2 SA 453 (GP) para 83.

<sup>180</sup> *Baleni v Minister of Mineral Resources* 2019 2 SA 453 (GP) para 83.

<sup>181</sup> *Sustaining the Wild Coast v Minister of Mineral Resources* 2022 1 All SA 796 (ECG) para 95.

<sup>182</sup> *Sustaining the Wild Coast v Minister of Mineral Resources* 2022 1 All SA 796 (ECG) para 95.

<sup>183</sup> *African Commission on Human and Peoples' Rights v Republic of Kenya* App No 006/2012 (Judgment (Reparations) of 23 June 2022) para 117.

disputes centred on mine-host community involvement in and benefit accrual from mineral extraction on their lands.

## **6 Key findings and concluding remarks**

The article has identified three theories of social justice: distributive, procedural and remedial, under which the subject of the involvement and accrual of socio-economic benefits by mine-host communities from mineral extraction on their lands could be discussed and explained. In addition, the article has examined the content of these three theories and established what they entail in the context of mine-host community involvement and benefit accrual from mineral extraction in Zimbabwe. These theories present foundations upon which existing and new policy and legislative frameworks could be evaluated with a view to the reform of the existing policy and legislation.

In the third section, the article examined the question regarding the concept of distributive justice that would ensure the ideal distribution of resources among host communities, mining companies and other citizens. It was established that the distributive justice strand embraces utilitarian, egalitarian and libertarian perspectives. The utilitarian perspective of distributive justice advances the greatest happiness for the greatest number of citizens even if it means that a few must be sacrificed. It was demonstrated that this perspective would legitimise the exploitation of mineral resources by mining companies and the government of Zimbabwe for the benefit of the whole nation even if such exploitation negated the well-being of the mine-host communities. For that reason, utilitarianism was found to be unsatisfactory in relation to the welfare and well-being of mine-host communities in Zimbabwe, as it would not support their involvement and benefit accrual from mineral extraction on their lands. In terms of the libertarian perspective of distributive justice, the article showed that inequalities of resources or wealth are permitted if these are not brought about by prejudicing others and where resources have been acquired by producing something through one's labour or using resources not belonging to anyone else. In this way, libertarianism would legitimise the exploitation of minerals by mining companies on lands inhabited by mine-host communities in Zimbabwe without the communities being involved or accruing benefits if the minerals are adjudged to belong to someone else who is not part of the communities, such as the state. This article therefore confirmed that libertarianism does not support involvement and benefit accrual by mine-host communities from mineral extraction on the lands they inhabit.

The egalitarian perspective of distributive justice prescribes that the government must show equal concern for all its citizens without sacrificing

some for the benefit of others. All citizens are to have an equal distribution of benefits, and inequality is permissible only where it is entertained for the benefit of the least advantaged. Consequently, the egalitarian perspective legitimises the re-distribution of wealth and would ensure that mine-host communities in Zimbabwe are involved and accrue maximal benefits from mineral extraction on their lands, since they would then be viewed as the ones most affected by the mining operations. Significantly, in the context of mineral extraction in Zimbabwe, a just distribution of the costs and rewards of mineral extraction as based on the egalitarian perspective is one in which the mine-host communities would not bear a disproportionate share of the burdens. Instead, they would be accorded socio-economic benefits commensurate with the burdens that they have to bear due to mineral extraction on their lands. The costs and benefits of mineral extraction on their lands would be equalised in this way.

The article also discussed the contribution of the second form of justice, namely procedural justice, to the understanding of the question of mineral extraction on lands inhabited by mine-host communities. It was established that an approach based on pure procedural justice would prescribe effective involvement and participation by Zimbabweans in decision-making on matters affecting them. This would advance the consultation, involvement and participation of mine-host communities in matters centred on mineral extraction on the lands they inhabit.

Lastly, the article assessed the third form of justice, remedial justice, and explained what it brings to mine-host communities in Zimbabwe when faced with mineral extraction on the lands they inhabit. The article established that, where the rights of mine-host communities are violated and their lands taken and exploited without their involvement and accrual of benefits, remedial justice is necessary. Not only does it prescribe the restitution of the lands and resources but it also holds that compensation should be paid for damages caused to mine-host communities.

The goal of this article was to examine and explain theoretical perspectives that may be viewed as underpinning the involvement in and accrual of socio-economic benefits by Zimbabwean mine-host communities from mineral extraction. While finding the principle that determines a just or equitable allocation of resources is difficult, the egalitarian idea of justice connects with the quest for mine-host community involvement in and benefit accrual from mineral extraction on their lands. Such principles should be coupled with just and fair procedures for the consultation and involvement of the affected communities and appropriate remedies to correct unfair distribution.

This article is expected to spur further research centred on mine-host community involvement in and benefit accrual from mineral extraction in Zimbabwe.

This exposition of the concept of social justice and its associated theories extends beyond rectifying the challenges faced by mine-host communities in Zimbabwe. It holds the potential to be applied to other sectors such as industry, agriculture and public infrastructure projects in the water, energy and transport sectors, offering a pathway to enhance social justice in areas historically neglected and disregarded by the colonial powers. Such an application could address long-standing inequities and foster the application of a more equitable framework across various economic sectors.

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## List of Abbreviations

ACHPR	African Commission on Human and Peoples' Rights
Colum L Rev	Columbia Law Review
Duke LJ	Duke Law Journal
Env't L Rep	Environmental Law Reporter
ESR Review	Economic and Social Rights Review
ICON	International Journal of Constitutional Law
Iowa L Rev	Iowa Law Review
LEAD	Law, Environment and Development Journal
Notre Dame L Rev	Notre Dame Law Review
OJLS	Oxford Journal of Legal Studies
S Cal L Rev	Southern California Law Review
SAJHR	South African Journal on Human Rights
SALJ	South African Law Journal
SAPL	Southern African Public Law
Stell LR	Stellenbosch Law Review
U Pa L Rev	University of Pennsylvania Law Review
UN	United Nations