

## The protection of individual labour rights in Zimbabwe

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**Summary:** *The protection of individual labour rights in Zimbabwe is deficient despite the fact that the Constitution protects these rights. In looking to explore how this could be addressed, this article considers the evolution of the state's obligation to protect individual labour rights to this point and relies on individual labour rights protection at a global level with particular insights drawn from the approach taken to the protection of these rights in two jurisdictions, namely, England and South Africa. The approach to the protection of individual labour rights in these two jurisdictions has influenced the Zimbabwean approach to highlight that effective protection of individual labour rights is possible only when courts actively look to protect these rights. The article argues that the reason for deficiencies in the Zimbabwean approach is the fact that courts are not doing enough to protect individual labour rights in Zimbabwe. The solution to this issue, therefore, lies in Zimbabwean courts taking a more proactive role in protecting individual labour rights.*

**Key words:** *labour rights; constitutionalism; individual labour rights; codification; access to court*

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## 1 Introduction

There is some consensus among scholars that not enough is being done to protect individual labour rights in Zimbabwe.<sup>1</sup> This is despite the fact that the Constitution, as amended in 2013, includes a provision dedicated to, *inter alia*, the protection of these rights.<sup>2</sup> As is to be expected, there are calls for the state to act to address this situation. However, the state is yet to do so in any compelling way. Consequently, this article explores why little has seemingly been done to address this issue as a step toward establishing, and recommending, how this situation can be addressed going ahead.

In making this argument, the article begins by placing the discussion in its theoretical context. It does so by exploring the evolution of the state obligation to protect individual labour rights. The article also highlights how, at this point in the evolution of this obligation, individual labour rights are protected at a global level with particular insights drawn from the approach taken to the protection of these rights in two jurisdictions, those of England and South Africa, which have adopted an approach to the protection of individual labour rights that has influenced the Zimbabwean approach to highlight that, regardless of the constitutional instruments in a state that purports to protect individual labour rights, the successful protection of these rights depends on the judiciary being proactive in ensuring that people enjoy the benefits these rights bestow.

Following this, the article turns to an analysis of the approach to the protection of individual labour rights in Zimbabwe and argues that courts are not doing enough to protect individual labour rights. In conclusion, it is argued that successfully protecting individual labour rights in Zimbabwe depends on courts taking a more assertive stance to protecting these rights.

## 2 Conceptual framework

The approach to the protection of individual labour rights has developed over time and continues to do so. Such evolution is critical to appreciating the current approach to individual labour

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1 J Tsabora & TG Kasuso 'Reflections on the constitutionalising of individual labour law and labour rights in Zimbabwe' (2017) 38 *Industrial Law Journal* 43; M Gwisai 'Enshrined labour rights under s 65 (1) of the Constitution of Zimbabwe: The right to fair and safe labour practices and standards and the right to fair and reasonable wage' (2015) (2) *University of Zimbabwe Student Law Journal* 2.

2 Sec 65 of the Constitution of Zimbabwe Amendment (No 20) Act 2013 (Constitution).

rights generally. In preparing for an ensuing analysis of the approach to the protection of individual labour rights, therefore, this part attempts to establish two issues. First, it explores the evolution of the approach to the protection of these rights. Second, drawing from relevant parts of international law, the English common law, and the approach to the protection of these rights in South African law, the article highlights aspects of the modern approach to the protection of such rights.

## 2.1 Evolution of the state's role in protecting individual labour rights

Historically, the state was given a limited role in employment matters, especially the protection of individual labour rights. This was because, in liberal states that promoted ideas such as the freedom of contract and equality of employer and employee, individual labour rights were regarded as something of a private law issue based on the fact that, as a rule, employment relationships were created by agreement between parties concerning the conditions under which employees would work.<sup>3</sup> At law, such agreements, based on the mutual free will of the parties, fell under the common law developed by the judiciary.<sup>4</sup> Therefore, the state's role in protecting individual labour rights revolved around ensuring that people would have access to legal remedies when they felt that their rights had been infringed.<sup>5</sup> In time, however, the state's role changed as employees predominantly argued that the power disparity between employees and employers meant that employers could abuse employees in several ways, such as discriminating against disadvantaged groups, underpaying workers, forcing employees to work under the threat of dismissal, dismissing workers unfairly, or failing to insure workers against the risk of death, illness or disability.<sup>6</sup> As a consequence, states extended their obligation insofar as the protection of labour rights was concerned. Specifically, states began to intervene in the employment relationship in order to, *inter alia*, guarantee fair treatment of employees, promote equality,

3 A Trebilcock 'Chapter 21 – Labour resources and human resources management', <http://www.ilocis.org/documents/chpt21e.htm> (accessed 1 June 2020).

4 G Tavits 'The nature and formation of labour law', <https://www.juridicainternational.eu/index.php?id=12453> (accessed 1 June 2020); JC Botero et al *The regulation of labour* (2004).

5 ACL Davies 'Identifying "exploitative compromises": The role of labour law in resolving disputes between workers' (2012) 65 *Current Legal Problems* 269; R Dukes 'A global labour constitution?' <http://www.labourlawresearch.net/sites/default/files/papers/Dukes%20Global%20Labour%20Constitution%20-%20final%20WITH%20CORRECTIONS.pdf> (accessed 1 June 2020); B Langille 'What is international labour law for?' (2009) 3 *Law and Ethics of Human Rights* 47.

6 Botero et al (n 4); Davies (n 5) 272; Langille (n 5) 47; Dukes (n 5).

and ensure that workers' rights were protected.<sup>7</sup> Such intervention assumed different forms, the most notable interventions being the provision of individual labour rights in national constitutions with complementary legislation being enacted to ensure that people realised the benefits that these rights bestowed on them.<sup>8</sup> The aim was to achieve a fair balance between the interests of employers and employees. Despite some progress across different states, such an approach to individual labour rights was not universally adopted or, where it was adopted, states ensured that their obligation to protect individual labour rights was limited. The result is that the extent of the state's role in protecting individual labour rights, which concern employees' rights at work through the contract for work, remains unclear. This makes it difficult, as several scholars have opined, to identify appropriate interventions when it is apparent that individual labour rights are not adequately protected.<sup>9</sup> The ensuing discussion looks to establish the extent of the state's role in protecting individual labour rights as a precursor to identifying appropriate interventions when it is apparent that individual labour rights are not adequately protected.

In looking to identify the extent of the state's role in protecting individual labour rights, it is useful to begin by considering that state formation theories, which have delved into the function of states, despite being varied, typically converge on the fact that states were formed because people acquiesced to ceding their autonomy to the state. This is an idea that traces back to the social contract theory.<sup>10</sup> It also is an idea that is found under the managerial perspective on state formation, which holds that states were formed when charismatic figures, intent on tending and increasing their possessions, instilled the fear of anarchy that would accompany roving banditry in local populations and in this way got them to accept subservience to state structures.<sup>11</sup> Alternatively, the view is held under the military perspective that states emerged when one power holder opted to have a standing army and moved away from the old militia system.<sup>12</sup> This forced other power holders to do the same. It also scared people

7 Dukes (n 5).

8 Davies (n 5) 272; B Hepple 'Rights at work', [https://www.ilo.org/wcmsp5/groups/public/---dgreports/---inst/documents/publication/wcms\\_079203.pdf](https://www.ilo.org/wcmsp5/groups/public/---dgreports/---inst/documents/publication/wcms_079203.pdf) (accessed 1 June 2020).

9 Tavits (n 4); Dukes (n 5); Botero (n 4); Davies (n 5) 272; Hepple (n 8).

10 RL Carneiro 'A theory of the origin of the state' (1970) *Science* 733.

11 A Wimmera & Y Feinstein 'The rise of the nation-state across the world, 1816 to 2001' (2010) 7 *American Sociological Review* 764; H Spruyt 'The origins, development, and possible decline of the modern state' (2002) *Annual Review of Political Science* 127; Carneiro (n 10) 733; R Blanco 'The modern state in Western Europe: Three narratives of its formation' (2013) *Revista Debates* 169.

12 G Poggi 'Theories of state formation' in K Nash & A Scott (eds) *The Blackwell companion to political sociology* 95; Blanco (n 11) 169.

and led them to proactively relinquish any claim to autonomy and, instead, align with power brokers. In this context, states emerged as a way in which to put together the fiscal and human capital needed to support military might and, by implication, heighten the likelihood of military success.<sup>13</sup> Quite separately, in what is best described as the economic perspective on state formation, the emergence of states is attributed to the point when property rights became celebrated and the contract was established as the key device for the creation and transmission of rights. This left people with no choice but to cede their former autonomy and pursue salaried work.<sup>14</sup>

In addition to this, across state formation theories it is quite clear that states are championed as having emerged to afford people the opportunity to live peaceful lives where their first-generation rights were well protected. Most notable among these is the contribution of John Locke who, along with other political philosophers, saw free individuals as the basis for a stable society and argued that governments should exist to protect the inherent rights of individuals.<sup>15</sup>

Under the managerial perspective on state formation, for instance, charismatic figures got local populations to accept and value the existence of a centrally-controlled framework of rule and develop a sense of trans-local commonality, then offering these populations the option of ceding their autonomy to a sovereign.<sup>16</sup> This sovereign would then have the obligation to ensure that there was security, order, peace and good quality of life.<sup>17</sup> In order to secure this, however, individuals would need to contribute to the sovereign's capacity to secure order, peace and good quality of life by paying taxes.<sup>18</sup> According to Strayer,<sup>19</sup> the fact that this is how the modern state emerged is apparent from the fact that states have always been focused on internal and not external affairs. To illustrate this point, Strayer highlights that high courts of justice and treasury departments existed long before foreign affairs offices and departments of defence.

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13 As above.

14 Poggi (n 12) 102-106; Blanco (n 11) 169.

15 National Democratic Institute for International Affairs 'Manual on political party identity and ideology', [https://www.ndi.org/sites/default/files/2321\\_identitymanual\\_engpdf\\_06032008.pdf](https://www.ndi.org/sites/default/files/2321_identitymanual_engpdf_06032008.pdf) (accessed 1 June 2020).

16 Poggi (n 12) 97-98.

17 F D'Agostino et al 'Contemporary approaches to the social contract', <https://plato.stanford.edu/entries/contractarianism-contemporary/> (accessed 1 June 2020).

18 M Olson *Power and prosperity* (1985).

19 JR Strayer *On the medieval origins of the modern state* (1970) 26.

The same holds true under the military perspective on state formation. In terms of this perspective, the primary purpose of states was to secure peace by crafting a military superior to any aggressor. In order to build such a military, power holders would align with powerful social classes who had a vested interest in securing peace so that their property would be protected. The people making up these powerful social classes would supply credit to the power holders. Working together, power holders and the elites would then tax the common people, thereby raising resources for their military capabilities. In this context, state structures, including those responsible for the provision of welfare, as well as commercialised economies, emerged as secondary products of the power holders' efforts to provide themselves with effective military resources.<sup>20</sup>

Similarly, it is recognised under the economic theory on state formation that exploitation could have resulted in revolt when salaries became the means through which to hold people in subservient roles. In this context, the state emerged to keep the peace and hold the public in check.<sup>21</sup>

Importantly, state formation theories posit that people acquiesced to the turn to states, and that they did so because they saw the state as well suited to protecting them from internal and external threats. Effectively, the function of states was to secure protection from roving banditry, anarchical conditions and to ensure that life was lived in a rewarding manner. The economic perspective, predominantly, and other theories, to a lesser extent, point to the fact that the turn to property rights and reliance on contracts led to paid labour becoming critical to the state's survival. This was because labour and everything around it formed the basis of the generation of revenues through income taxation of individuals and corporations, general sales taxes.<sup>22</sup> Importantly, work became central to self-preservation and self-actualisation.<sup>23</sup> Not surprisingly, then, history shows that people were prepared to revolt when the state did not do enough to protect their individual labour rights. Initially, revolt assumed the form of insurrections, rebellions, revolts, *coups* and wars of independence.<sup>24</sup> In more recent times, however, such revolution has been arrived at in more peaceful ways which secure a

20 P. Carroll 'Articulating theories of states and state formation' (2009) *Journal of Historical Sociology* 553.

21 Poggi (n 12) 102-106; Carroll (n 20) 553.

22 Taxation Britannica Online Encyclopaedia 'Income tax', <https://www.britannica.com/topic/income-tax> (accessed 1 June 2020).

23 Tavits (n 4).

24 M Ryan *Unlocking constitutional and administrative law* (2007) 13; AW Bradley & KD Ewing *Constitutional and administrative law* (2007) 4-5.

change in the dominant values and myths of a society, in its political institutions, social structure, leadership, and government activity and policies.<sup>25</sup> Regardless of the form assumed by revolt, the result of people taking a stand consistently has been to push the state to accept an obligation to intervene in the employment relationship in order to protect individual labour rights.<sup>26</sup> There are variances in the manner in which states have looked to do this but this has most commonly been done through the turn to constitutionalism.

### 2.1.1 Constitutionalism

Here, it is worth noting that a detailed discussion of constitutionalism falls outside the ambit of this article.<sup>27</sup> In brief, constitutionalism has compellingly been portrayed by Loughlin as a republican or liberal issue. In the former, government action is contained through the creation of institutional arrangements that provide for limited government. The alternative, namely, liberal constitutionalism, casts the constitution as a set of positive laws that are enforced by judicial bodies.<sup>28</sup> For the present purpose, suffice it to note that constitutionalism is what ensures that the state is accountable to the people.<sup>29</sup>

Accountability is most commonly secured through the rule of law.<sup>30</sup> Here, it is worth noting that there are different conceptions of the rule of law. Suffice it to note that, based on the seminal works by Dicey, Raz and Lord Bingham, the rule of law ensures that the state is accountable to the people in three ways. First, the rule of law imposes the obligation that there should be equal treatment before the law. This meant that there was a need for a legislature charged with formulating laws that recognise that all are equal before the law. Second, the rule of law was realised where there were no arbitrary

25 The notable exception of the events of the 'Arab Spring in Tunisia, Libya, and Egypt which, through the collective action of ordinary citizens, ousted the long-lasting authoritarian regimes of Ben Ali, Gadhafi, and Mubarak'. See H Hami 'Government and politics', <https://opentextbc.ca/introductiontosociology/chapter/chapter17-government-and-politics/> (accessed 1 June 2020).

26 Dukes (n 5) 9.

27 Bradley (n 24) 4-5; Ryan (n 24) 13; E Petersmann 'How to reform the UN system? Constitutionalism, international law and international organisations' (1997) 10 *Leiden Journal of International Law* 421.

28 M Loughlin 'What is constitutionalisation' in P Dobner & M Loughlin (eds) *The twilight of constitutionalism* (2010) 47; E Tucker 'Labour's many constitutions (and capital's too)' (2012) 33 *Comparative Labour Law and Policy Journal* 103.

29 E Petersmann 'How to constitutionalise international law and foreign policy for the benefit of civil society?' (1998) 20 *Michigan Journal of International Law* 1 13 17.

30 P Craig 'Formal and substantive conceptions of the rule of law: An analytical framework' (1997) *Public Law* 467; J Froneman 'The rule of law, fairness and labour law' (2015) 36 *Industrial Law Journal* 823.

exercises of power. To realise this, it was not ideal to leave policy making to the legislature as this would lead to the pooling of power in a single institution which would lead to arbitrary decision making. Inevitably, then, there was the need for a separate institution, the executive, entrusted with a policy-making function, but expected to not make arbitrary decisions. Third, realising that the rule of law would depend on people having access to the courts in order to hold the state to account in an independent forum where they could not do this elsewhere.<sup>31</sup> In this context, a judicial branch became essential to the realisation of the rule of law. Effectively, practically realising the rule of law would depend on the separation of power among the legislative, executive and judicial branches.<sup>32</sup>

Despite this turn to constitutionalism realised through the rule of law and the separation of powers, however, empirical as well as anecdotal evidence drawn from choices made by states shows that states looked, and continue to look, to limit their obligations under constitutionalism. This was most commonly done through the turn to codified constitutions. These codified constitutions were touted as they lent a certain clarity to the law.<sup>33</sup> What received less attention was the fact that codification also limited the concept of constitutionalism as a tool to protect people. The most important way in which this was done was by creating closed lists of rights that would be included in constitutions. In addition, rights were ranked, with some rights referred to as first-generation or civil and political rights, being regarded as superior to second-generation or socio-economic rights. The effect of this was that, contrary to the position under constitutionalism where the state obligation to protect people was broad, general, and enforceable in court, from that point onwards the obligation on the state centred on the protection of first-generation rights.<sup>34</sup>

31 L Henkin 'Revolutions and constitutions' (1989) 49 *Louisiana Law Review* 1023; VR Johnson 'The French Declaration of the Rights of Man and of Citizens of 1789, the Reign of Terror, and the Revolutionary Tribunal of Paris' (1990) 13 *Boston College International and Comparative Law Review* 1; SB Prakash & JC Yoo 'The origins of judicial review' (2003) 70 *The University of Chicago Law Review* 887.

32 Petersmann (n 27) 426-428.

33 Bradley (n 24) 4-5; Ryan (n 24) 13; Petersmann (n 27) 426-428.

34 Davies (n 5) 272; Hepple (n 8); VA Leary 'The paradox of workers' rights as human rights' in LA Compa & SF Diamond (eds) *Human rights, labour rights and international trade* (1996) 28; H Collins 'Theories of rights as justifications for labour law' in G Davidov & B Langille (eds) *The idea of labour law* (2011) 137; J Fudge 'Constitutionalising labour rights in Europe' in T Campbell et al (eds) *The legal protection of human rights: Sceptical essays* (2011) 1.

### 2.1.2 *Role of the courts*

Even as codification became popular, therefore, courts remained particularly important. They could rely on adherence to constitutionalism to protect the person and individual labour rights.<sup>35</sup> In order to do this in practice, courts frequently used the common law to protect individual labour rights by justifying protection on grounds such as fairness, lawfulness and public policy to secure redress for individuals.

Based on this decision by the judiciary, a body of law emerged that was more protective of individual rights. Over time, this body of law has been codified. With codification, however, the old problems have reappeared. Where courts could rely on concepts such as 'unfair labour practice' to advance constitutionalism, when these concepts have been codified, it has become apparent that the laws cannot anticipate the boundaries of fairness or unfairness of labour practices. This is because the complex nature of labour practices does not allow for such rigid regulation of what is fair or unfair in any particular circumstance. If anything, it has become even more apparent that labour law practices draw their strength from the inherent flexibility of the concept of 'fair'. This flexibility provides a means of giving effect to the demands of modern industrial society for the development of an equitable, systematised body of labour law. The flexibility of 'fairness' will amplify existing labour law in satisfying the needs for which the law itself is too rigid.<sup>36</sup>

The result is that courts, once again, have emerged as the most reliable institution to protect the person and individual labour rights.

## 2.2 *Some comparative perspectives on individual labour rights*

Among its several functions, international labour law, the body of international legal norms that regulates issues concerning work, protects individual labour rights. In addition, the International Labour Organisation (ILO) is the dedicated specialised agency of the United Nations (UN) with the mandate to promote social justice and internationally-recognised human and labour rights. This framework has succeeded in encouraging states to import individual labour rights into their laws. Experience suggests that in looking to ensure that people enjoy the benefits that these rights bestow, states have adopted different approaches. For instance, some states

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35 B Langille 'Labour law's theory of justice' in Davidov & Langille (n 34) 105.

36 T Poolman *Principles of unfair labour practice* (1985) 10.

approach these rights as a freedom of contract issue with employers and employees treated as equals. As a protective measure, legislation often is enacted to protect vulnerable groups. This approach has proven popular to those calling for deregulation and limitation of interventions in the labour market.<sup>37</sup> To ensure some modicum of consistency in how the laws are applied by different states, the ILO has put in place a supervisory mechanism to ensure that states honour their international labour law obligations in real ways.

For all this success and oversight, however, it remains true that across most states, ensuring that people enjoy the benefits that these rights bestow still falls to states.<sup>38</sup> In states, this is a function that has devolved to courts, accounting for an explosion of litigation on individual labour rights in many states.<sup>39</sup> That courts remain pivotal in this way is most apparent when the experiences of England and South Africa, two jurisdictions with advanced labour law regulatory frameworks, are considered.

To this end, England has a long and storied tradition of courts protecting individual labour rights through the common law. However, in more recent years the fascination with the codification of these rights in statutes had led to what Gardner referred to as a 'contractualisation' of labour relationships characterised by the employment relationship increasingly being reduced to a contractual relationship. This evolution was most prominently captured in the Employment Rights Act of 1996 (ERA) which provided that to be an employee or a worker required only that a party should hold a contract. As expected, this model was easily abused by employers trying to exclude their workers from employment protections by manipulating contractual terms to obscure the nature of their working relationship.<sup>40</sup> An opportunity arose for the courts to tackle this issue in 2019 when the Supreme Court heard *Gilham v MoJ*.<sup>41</sup> In this case the claimant argued that she was entitled to whistleblowing protections under the ERA despite the fact that, as a judge, she did not have an 'employer' in the manner defined by the ERA. In order to overcome this, the claimant judge argued that the freedom to blow the whistle was a recognised aspect of the right to freedom of expression under article 10 of the European Convention on Human

37 Hepple (n 8).

38 L Swepston 'International labour law' in R Blanpain (ed) *Comparative labor law and industrial relations in industrialized market economies* (2010) 141.

39 Hepple (n 8).

40 J Gardner 'The contractualisation of labour law' in H Collins, G Lester & V Mantouvalou *Philosophical foundations of labour law* (2018) 33.

41 [2019] UKSC 44.

Rights (European Convention).<sup>42</sup> She further argued that the state's failure to extend whistleblowing protections to judicial office holders violated article 10 in conjunction with article 14 of the Convention. The Supreme Court accepted this argument and, in order to ensure that individual labour rights were protected, relied on section 3 of the Human Rights Act of 1998 to reach a Convention-compliant interpretation by extending whistleblowing rights to judges, thereby affording the claimant judge the protections she sought.<sup>43</sup>

Separately, in South Africa, the Constitution protects individual labour rights.<sup>44</sup> In addition, the Labour Relations Act extends on these protections.<sup>45</sup> Despite this turn to the extensive codification of individual labour rights, South African courts have adopted a generous and purposive interpretation of the constitutional right to fair labour practices. Indeed, South African courts have not hesitated to invoke the right to fair labour practices to invalidate laws, customs, conduct and practices of labour policy that are arbitrary and unfair. For instance, in *Sidumo & Another v Rustenburg Platinum Mines Ltd & Others*<sup>46</sup> the South African Constitutional Court invoked the right to fair labour practices and rejected the common law reasonable employer test in determining the fairness of a dismissal. In *South Africa National Defence Union v Minister of Defence & Another*<sup>47</sup> legislation prohibiting members of the defence force from joining trade unions was declared unconstitutional based on section 23 of the South African Constitution. The constitutional right to fair labour practices has also been relied upon to extend labour protections to vulnerable employees such as illegal migrant workers,<sup>48</sup> workers engaged in illegal work<sup>49</sup> and employees *in utero*.<sup>50</sup> Without doubt, workers tend to benefit if the judiciary exercises its constitutional jurisdiction in a supervisory manner, intervening only when necessary to fulfil its role as guarantor of constitutional labour rights.<sup>51</sup>

Effectively, between the general analysis and the analyses of the approaches to the protection of individual labour rights in England

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42 ETS 5.

43 C Devlin 'From contract to role: Using human rights to widen the personal scope of employment', <https://ohrh.law.ox.ac.uk/from-contract-to-role-using-human-rights-to-widen-the-personal-scope-of-employment-protections/protections> (accessed 1 April 2021).

44 Sec 23 of the Constitution of South Africa entrenches the broad right to fair labour practices and selected collective labour rights.

45 Act 66 of 1965.

46 [2007] 12 BLLR 1097 (CC).

47 (1999) 20 ILJ 2265 (CC).

48 *Discovery Health v CCMA & Others* (2008) 29 ILJ 1480 (LC).

49 *Kylie v CCMA & Others* (2010) 31 ILJ 1600 (LAC).

50 *Wyeth SA (Pty) Ltd v Manqele* (2005) 6 BLLR 523 (LAC).

51 A Cooper 'Labour relations' in S Woolman & M Bishop (eds) *Constitutional law of South Africa* (2014) 53-9.

and South Africa, it is quite apparent that even in those states that tout deregulation, freedom of contract and equality between employees and employers, there is recognition of individual labour rights. There is also an acknowledgment of the fact that the state is under an obligation to ensure that these rights are protected. Where state efforts are deficient in dispensing with this obligation through legislation, it falls to courts to be proactive in ensuring that these rights are effectively protected.

### 3 Protection of individual labour rights in Zimbabwe

The preceding discussion explored the evolution of protection of individual labour rights up to the modern day and, with the aid of the international law and a look at relevant comparative experiences, established that the protection of individual labour rights has always fallen to, and continues to fall to, the courts. It is through these lenses that the Zimbabwean approach must be assessed.

Consistent with the norm, the employment relationship was always regarded as a private law matter in Zimbabwe, formerly Rhodesia. As such, individual labour rights were protected under the Roman-Dutch common law. However, the protection effort using the common law was deficient in that it drew focus to the lawfulness of employer conduct and did little to protect people from broader forms of unfair labour practices. Not surprisingly, people objected to this position and Rhodesia moved to enact legislation to remedy this. Notable instruments adopted by the state at the time included the Master and Servants Act of 1901, the Industrial Conciliation Act 10 of 1934, Industrial Conciliation Act 21 of 1945 and the Industrial Conciliation Act 29 of 1959. Importantly, though, the legislation was part of a broader effort to foster colonialism and suppress African trade unions. This was apparent from the labour law framework which was fragmented by divisions based on race and gender. It did little to address the majority of people's concerns. Ultimately, along with other issues rooted in the state's discriminatory policies,<sup>52</sup> this prompted a violent revolution which led to the attainment of Zimbabwe's independence in April 1980.<sup>53</sup>

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52 Eg, the Industrial Conciliation Act 1959 permitted discrimination in wages based on race, sex and age. Further, women could not enter into contracts of employment without the consent of their husbands. Lastly, the right against unfair dismissal was not guaranteed and workers could be summarily dismissed.

53 See M Gwisai *Labour and employment law in Zimbabwe* (2006) 21.

At independence, the new government looked to introduce social reforms to placate the masses who were aggrieved by the debilitating effects of colonialism.<sup>54</sup> Quite expectedly, they looked to achieve this through the turn to constitutionalism. To this end, the early social, economic and political transformation of Zimbabwe was predicated on the turn to the codified Zimbabwean Constitution of 1980. This Constitution was the supreme law of independent Zimbabwe and any other law inconsistent with it was null and void.<sup>55</sup>

Following from the preceding discussion, however, as positive a development as the turn to constitutionalism was, its value to the protection of people's interests generally was diminished by the turn to a codified constitution, which looked to limit the state's commitment to constitutionalism. The Constitution contained a justiciable Declaration of Rights, which did not directly protect these individual labour rights. However, the Constitution did carry rights that impacted indirectly on individual labour rights, such as the rights to freedom from forced labour;<sup>56</sup> protection from discrimination;<sup>57</sup> freedom of assembly and association;<sup>58</sup> equality;<sup>59</sup> and protection from inhuman and degrading treatment.<sup>60</sup> In addition, the Constitution did recognise Roman-Dutch common law as a source of law in Zimbabwe, thus allowing courts to protect individual labour rights based on constitutionalism.<sup>61</sup>

Beyond this, and in what seemed to be acceptance of the fact that the protection of individual labour rights, and all labour rights, was a critical state function, in June 1980 Zimbabwe joined the ILO. Membership meant that the state undertook the obligation to protect all labour rights, including individual labour rights. Indeed, based on these obligations the state enacted several statutes that impacted individual labour rights. Notable among these was the Minimum Wages Act of 1980, which gave the Minister of Labour powers to fix minimum wages.<sup>62</sup> Section 8 of that Act prohibited discrimination in wages based on race, sex and age. This was followed by the Employment Act 13 of 1980. This Act repealed several

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54 AP Cheater 'Industrial organisation and the law in the first decade of Zimbabwe's independence' (1991) *Zambezia* 11.

55 Sec 3 1980 Constitution.

56 Sec 14 1980 Constitution.

57 Sec 23 1980 Constitution.

58 Sec 21 1980 Constitution.

59 Sec 18 1980 Constitution.

60 Sec 15 1980 Constitution.

61 Sec 89 1980 Constitution.

62 This was done through the Minimum Wages (Specification of Wages) Notice 37 of 1980.

colonial pieces of legislation<sup>63</sup> and extended the scope of the state's control over the employment relationship. For instance, section 3 of the Employment Act empowered the Minister of Labour to make regulations covering all aspects of employment, including, but not limited to, the following: the rights of employees, both collective and individual rights; deductions from remuneration; leave of absence; provision of benefits and allowances; establishment of pension; holiday and provident insurance; special conditions of women and juvenile employees; employment of the disabled; settlement of labour disputes; and general conditions of employment. The Act also granted female employees full legal capacity to enter into an employment relationship and the right to paid maternity leave.<sup>64</sup> Further, section 8 of the Act prohibited summary dismissal.<sup>65</sup>

For all this progress, however, the fact that these rights were not constitutionally protected and were protected in several statutes resulted in the fragmentation of labour laws, which made it difficult for anyone to effectively protect their individual labour rights. Importantly, courts did not do enough to protect individual labour rights as directed by the international position. Instead, as calls for a better framework rose, the state borrowed over time from the common law cultivated by judges and looked to protect these rights through a turn to a more cohesive body of statutory law headlined by the Labour Relations Act of 1985.<sup>66</sup> Importantly for individual labour rights, section 2 of the Act defined an unfair labour practice as 'an unfair labour practice specified in Part III, or declared to be so in terms of any other provision of the Act'. According to sections 8 and 9 of the Labour Act, which succeeded the Labour Relations Act, unfair labour practices are limited to specific acts or omissions by employers, trade unions or workers' committees. Further, only employees can claim an unfair labour practice and the labour practice in some way must relate to the specific forms of conduct that the Labour Act has designated as an unfair labour practice. In addition to this, section 8 of the Labour Act provides that an employer commits an unfair

63 It repealed the infamous Master and Servants Act, African Juveniles Act, African Labour Regulation Act and the Foreign Migratory Labour Act.

64 Gwisai (n 53) 24.

65 The Emergency Powers (Termination of Employment) Regulations, 1982 also prohibited the summary termination of a contract of employment on notice unless the parties mutually agreed to the termination or the employer obtained ministerial approval. In *Tavengwa v Marine Centre (Pvt) Ltd* 1984 (2) ZLR (H) the High Court held that the Regulations did not cover cases of misconduct. An employer retained the right to summarily dismiss an employee who had committed an act of misconduct.

66 It remains the mainstay of Zimbabwe's labour law and in 2002 was renamed to the Labour Act (Chapter 28:01). Over the years it has been amended by the Labour Relations (Amendment) Act 12 of 1992, Labour Relations (Amendment) Act 17 of 2002, Labour (Amendment) Act 7 of 2005 and the Labour (Amendment) Act 5 of 2015.

labour practice if, by act or omission, she or he prevents employees from exercising any rights conferred on them in terms of Part II of the Act;<sup>67</sup> contravenes any provision of Part II or section 18 of the Act;<sup>68</sup> refuses to negotiate in good faith with a workers' committee or trade union; refuses to co-operate in good faith with an employment council; fails to comply with a collective bargaining agreement, or a decision of an employment council; bargains collectively with an unregistered trade union where a registered trade union exists; demands from any employee or prospective employee any sexual favour and engages in any form of sexual harassment.<sup>69</sup>

The turn to codifying the concept of unfair labour practices certainly made individual labour rights easier to identify and, pooling them under one statute helped to make it easier for any concerned party to protect them. The problem with the approach, however, was that the list of unfair labour practices in the Act was closed and exhaustive. It omitted important unfair labour practices such as transfers of employees, promotions and unilateral changes to terms and conditions of employment by employers.<sup>70</sup> This essentially meant that workers' individual labour rights were not comprehensively protected by statute.

Under the circumstances, and drawing from history, the international law, and comparative experience, the way in which to get around this limitation was through judicial action to protect individual labour rights using the constitutionalism standard which embraced a wider definition of unfair labour practices. This would require a judicial buy-in.<sup>71</sup> As one would expect, different courts adopted different approaches.

67 The rights guaranteed in Part II of the Act include the following: employees' right to membership of trade unions and workers' committees (sec 4); prohibition of forced labour (sec 4A); protection of employees against discrimination (sec 5); protection of employees' right against discrimination (sec 6); and protection of employees' right to democracy in the workplace (sec 7).

68 Sec 18 of the Labour Act protects the right of female employees to paid maternity leave.

69 Secs 8(a)-(h) of the Labour Act. Note that the other unfair labour practices prescribed in sec 9 of the Labour Act fall outside the scope of this discussion as they are committed by trade unions and workers' committees. They are mainly concerned with collective labour rights. Sec 10 of the Labour Act gives the Minister of Labour powers to prescribe by statutory instrument further acts or omissions which constitute unfair labour practices.

70 *Agribank v Machingaifa* SC 61/07; *Air Zimbabwe (Pvt) Ltd v Zendera & Others* 2002 (1) ZLR 132 (S).

71 See M Wallis 'The rule of law and labour relations' (2014) 35 *Industrial Law Journal* 849; J Jowell 'Of vires and vacuums: The constitutional context of judicial review' (1999) *Public Law* 448; H Arthurs 'The constitutionalisation of employment relations: Multiple models, pernicious problems' (2010) 19 *Social and Legal Studies* 403.

Some courts opted against relying on constitutionalism, with courts such as the Court deciding *Muwenga v PTC*<sup>72</sup> affirming that specific unfair labour practices mentioned in section 8 and 9 of the Labour Act were a closed list. In that case, the appellant was challenging the decision of the respondent not to promote him in a position in which he had worked in an acting capacity for a long period and had given good service. The appellant argued that the situation surrounding the failure to promote him amounted to an unfair labour practice as defined in the Act. The Supreme Court reasoned that not every labour practice that is unfair is an unfair labour practice under the Act. To be an unfair labour practice, an action or omission must specifically be described as such by the Act. If a practice is not specified as an unfair labour practice by the Act, then it cannot be raised as an unfair labour practice under the Act. Therefore, the Court found that the failure to promote the appellant did not amount to an unfair labour practice as it was not specified as such in the Act.<sup>73</sup>

Conversely, some courts relied on concepts consistent with constitutionalism such as lawfulness, reasonableness and good faith, to go beyond the closed list of unfair labour practices protection proffered in the statute law and protect individual labour rights.<sup>74</sup> A rather interesting example of this was *Guruva v Traffic Council of Zimbabwe*<sup>75</sup> where the respondent notified the appellant that he was to be transferred to another town. The appellant wrote back, making submissions against the transfer, and giving personal reasons for objecting to the transfer. The respondent considered the submissions and advised the appellant that the decision to transfer him stood. Aggrieved by the decision, the appellant approached the Court, arguing that the decision to transfer him was unfair in that the respondent had neither observed the *audi alteram partem* rule, nor had it fulfilled his legitimate expectation of being heard before the transfer. The Supreme Court accepted that transferring an employee without giving him an opportunity to be heard was an unfair practice. Although the employer had a right to transfer an employee from place to place, the employer's discretion is not to be readily interfered with except for good cause. Good cause, while not easy to define, would include the failure to give an employee an

72 1997 (2) ZLR 483 (S).

73 L Madhuku *Labour Law in Zimbabwe* (2015) 78; *Nyamande & Another v Zuva Petroleum (Pvt) Ltd* SC 43/15.

74 See *Mudarikwa & Another v Director of Housing and Community Service & Another* 2007 (1) ZLR 41 (S); *City of Gweru v Munyari* SC 15/05. Also see A van Niekerk et al *Law @ work* (2014) 189.

75 2009 (1) ZLR 58 (S).

opportunity to be heard, unfounded allegations, victimisation and any action taken to disadvantage the employee.<sup>76</sup>

As was to be expected, these inconsistencies in courts' approaches to the protection of individual labour rights left people disgruntled. Such disgruntlement was only enhanced when Zimbabwe began to experience a serious economic and political crisis characterised by hyper-inflation, liquidity challenges, political violence and rampant violation of workers' rights. This led to something of a protracted revolution which featured violent and disputed 2008 general elections and the subsequent formation of the 2009 Government of National Unity, culminating in a renewed commitment to constitutionalism celebrated through the turn to the codified 2013 Constitution.<sup>77</sup>

Importantly for the present purpose, the codified Constitution guaranteed several protections for individual labour rights.<sup>78</sup> To this end, section 65(1) of the Constitution entrenched the broad right to fair and safe labour practices. In addition, other individual labour rights, such as the right to be paid a fair and reasonable wage,<sup>79</sup> the right to just, equitable and satisfactory conditions of work,<sup>80</sup> the right to equal remuneration for similar work<sup>81</sup> and the right of female employees to fully paid maternity leave for three months,<sup>82</sup> were also included in the Constitution.<sup>83</sup> Coming from a history where people's individual labour rights had not been comprehensively protected by statute and courts had not been consistent in their approach to protect individual labour rights based on constitutionalism, leaving people disgruntled, the inclusion of these rights in the Constitution was generally hailed as a positive step in the march towards the advancement of social justice in the workplace, improving the quality of life of workers, and balancing the power between labour and capital so that workers would enjoy greater job security, and benefit from basic norms of fairness and proportionality.<sup>84</sup> It was

76 *Taylor v Minister of High Education & Another* 1996 (2) ZLR 772 (S); *Sagandira v Makoni Rural District Council* SC 70/14; *Rainbow Tourism Group v Nkomo* SC 47/15.

77 Art 6 of the Global Political Agreement signed on 15 September 2008. T Madebwe 'Constitutionalism and the new Zimbabwean Constitution' (2014) *Midlands State University Law Review* 6.

78 Tsabora & Kasuso (n 1) 43.

79 Sec 65(1) Constitution.

80 Sec 65(4) Constitution.

81 Sec 65(6) Constitution.

82 Sec 65(7) Constitution.

83 See Madhuku (n 73) 78.

84 D Beatty 'Constitutional labour rights: Pros and cons' (1993) 14 *Industrial Law Journal* 1; I Holloway 'The constitutionalisation of employment rights: A comparative overview' (1993) 14 *Berkeley Journal of Employment and Labour Law*; R] Grodin 'Constitutional values in the private sector workplace' (1991) 13 *Industrial Relations Law Journal* 1; Collins (n 34) 139; E Reid & D Visser *Private law and human rights: Bringing rights home in Scotland and South Africa* (2014) 391.

problematic, however, that the individual labour rights were based on, and retained, the problematic unfair labour practice approach adopted in statutes that predated the Constitution. Of note, the state has done little to enact legislation giving effect to individual rights. There was some attempt to align existing laws with the Constitution through the Labour (Amendment) Act 5 of 2015.

Drawing on lessons on the implications of codified constitutions, as well as the experiences in comparable states, as well as the Zimbabwean experience to that point, it ought to have been clear that mere codification was not sufficient. Whether the change was coming would depend on the courts. As such, what was more encouraging was that courts were empowered to protect the Constitution, which meant that they could protect individual labour rights based on constitutionalism without being concerned about acting in a manner not consistent with statute law. In hindsight, it appears that, given the judiciary's history in Zimbabwe, scepticism was more appropriate.

In several cases courts have noted that direct reliance on the Constitution to enforce labour rights should be avoided as this would lead to two streams of jurisprudence. By doing so, courts have effectively limited their power to protect individual labour rights by holding that it is not possible to bypass labour legislation by seeking to directly enforce constitutional labour rights.<sup>85</sup>

In addition, courts have maintained the interpretation of the concept of unfair labour practices, which they applied prior to the enactment of the 2013 Constitution which effectively failed to protect individual labour rights.<sup>86</sup> This is best illustrated in *Greatermans Stores (1979) (Pvt) t/a Thomas Miekles Stores & Another v The Minister of Public Service, Labour and Social Welfare*,<sup>87</sup> where the Constitutional Court held that, while the Labour Act limits the extent of the protection of people's individual labour rights as protected under the Constitution, which is the supreme law in the country, such limitation is justifiable. In that case the applicant, an employer, challenged the retrospective application of section 18 of the Labour Amendment Act 5 of 2015. The section required employers to pay every employee whose services were terminated on three months' notice after 17 July 2015 compensation for loss of employment

85 *Magurure & Others v Cargo Carriers International Haulers t/a Sabot* CCZ5/16; *Mushapaidze v St Annes Hospital & Others* CCZ 18/17; *Katsande v IDBZ* CCZ 9/17.

86 See, generally, Wallis (n 71) 849.

87 CCZ 2/18.

equivalent to one month's salary for every two years of service.<sup>88</sup> The applicant argued that the Amendment Act violated its right to fair labour practices in section 65(1) of the Constitution. In delivering judgment, the Constitutional Court held that for a person to allege an unfair labour practice as a violation of the right enshrined in section 65(1) of the Constitution, the conduct complained of must constitute one of the acts or omissions listed by the Labour Act as unfair labour practices.

Courts have also insisted on continuing to apply the reasonable employer test. In terms of this common law principle, an employer has the discretion on what penalty may be imposed upon an employee who has been found guilty of misconduct. A court cannot interfere with the exercise of this discretion by the employer unless the employer acted unreasonably in having a serious view of the act of misconduct.<sup>89</sup> This approach has whittled down workers' rights to job security and the right against unfair dismissal to objectionable levels that do not coincide with protections of individual labour rights expected under a constitutional dispensation. This is apparent from *Innskor Africa (Pvt) Ltd v Chimoto*<sup>90</sup> where the respondent was employed by the appellant as a pizza maker. During the course of his employment, he produced a pizza valued at \$4 without having received the necessary docket authorising the production of the pizza. He was dismissed from employment on the basis that his misconduct was serious and that it went to the root of the employment relationship. On appeal to the Labour Court, the penalty of dismissal was set aside on the basis that the employer had not taken into account mitigating factors prescribed in section 12B(4) of the Labour Act and section 7(1) of the Labour (National Employment Code of Conduct) Regulations, 2006. Dissatisfied with the ruling the employer appealed to the Supreme Court, which set aside the Labour Court ruling. It held that the discretion to impose a penalty rests with the employer in the first instance and can only be interfered with if there is a clear misdirection. It found that there was no basis by the Labour Court to interfere with the penalty of dismissal. The offence went to the root of the employment relationship and

88 The Labour (Amendment) Act 5 of 2015 was a reaction by the state to the massive terminations on notice that followed the handing down of *Nyamande & Another v Zuva Petroleum (Pvt) Ltd* SC 43/15. For a detailed discussion of the case, see TG Kasuso & G Manyatera 'Termination of the contract of employment on notice: A critique of *Nyamande & Another v Zuva Petroleum (Pvt) Ltd* SC 43/15' (2015) 2 *Midlands State University Law Review* 88; MG Gwanyanya 'Legal formalism and the new Constitution: An analysis of the recent Zimbabwe Supreme Court decision in *Nyamande & Another v Zuva Petroleum*' (2016) 16 *African Human Rights Journal* 283.

89 *Zimplats v Godide* SC 2/16; *ZB Bank v Masunda* SC 48/16.

90 SC6/12.

the employer had exercised its discretion reasonably.<sup>91</sup> This approach violates the constitutional right to fair labour practices because it gives preferential status to the employer's view on fairness of a dismissal, thus tilting the balance against employees.

Further, courts have underperformed in their role to protect individual labour rights because, since the onset of the 2013 constitutional era, they have consistently and inexplicably accepted that workers' statutory individual labour rights can be waived. A contract of employment must comply with specific provisions of labour legislation. Any provision in a contract to the contrary would be against the law and a nullity. That statutory provisions override the common law goes without saying. For example, in *Magodora & Others v Care International Zimbabwe*<sup>92</sup> employees signed contracts of employment in terms of which they agreed that the renewal of their fixed-term contracts could not give rise to a legitimate expectation of further renewal based on the right against unfair dismissal in section 12B of the Labour Act. When they claimed an unfair dismissal based on section 12B(3)(b) of the Labour Act, the Supreme Court held that the employees had waived their statutory rights through the common law contract. They could not in the circumstances entertain any legitimate expectation to be re-engaged.<sup>93</sup> Separately, in *Nyamande & Another v Zuva Petroleum (Pvt) Ltd*<sup>94</sup> the Supreme Court exalted the employer's common law right to terminate the contract of employment on notice at the expense of workers' job security, thus tilting the scales of justice in favour of employers.<sup>95</sup> This formalistic approach rooted in the common law has also been maintained in remedies for unlawful dismissal. In Zimbabwe, reinstatement is not a primary remedy and cannot be ordered as the only remedy. It must be accompanied by an alternative order of damages in lieu of reinstatement and the option of whether to reinstate or pay damages lies with the employer and not the employee.<sup>96</sup> Madhuku argues, convincingly, that giving the employer a choice, in every case, to opt for damages as an alternative to reinstatement does not strike the required balance between the employer and employee and is

91 See also *Madzima v Marange Resources (Pvt) Ltd* SC 12/18; *AjasiWala v Freda Rebecca Mine* SC 56/16.

92 SC 24/14.

93 See also *UZ-UCSF Collaborative Research Programme in Women's Health v Shamuyarira* 2010 (1) ZLR 127 (S).

94 SC 43/15.

95 For a detailed discussion of the case, see Kasuso & Manyatera (n 88) 88-106; Gwanyanya (n 88) 283-299.

96 *Farm Community Trust v Chemhere* SC22/13; *BHP Minerals (Pvt) Ltd v Takawira* 1999 (2) ZLR 77 (S).

contrary to section 65(1) of the Constitution.<sup>97</sup> It is a pursuit of the employer's interests at the expense of the employees.

In sum, quite inconsistent with what has grown to be embraced in international law, and in similarly-placed jurisdictions, Zimbabwean courts have failed to rely on the inclusion of a constitutional right to fair labour practices in the Constitution to protect individual labour rights in a meaningful way. The situation that subsisted before the most recent turn to constitutionalism persists. The reason arguably is attributable to the judiciary being dominated by petite bourgeois elites whose ideology is rooted in ideals of labour market liberalisation consistent with unitarism.<sup>98</sup> It therefore is not surprising that the conservative and formalistic approach to individual labour rights has been maintained by the judiciary.

#### 4 Conclusion

Not enough is being done to protect individual labour rights in Zimbabwe. An analysis of the evolution of these rights leading to the international law position at present, as well as knowledge gleaned from the experiences of similarly-placed jurisdictions, suggests that this failure to protect individual labour rights is rooted in inadequate judicial activity to protect these rights.

In conclusion, therefore, the key to greater protection of individual labour rights lies in the courts, on the basis of cases submitted to them, taking action to protect these rights based on the tenets of constitutionalism, something which the Constitution empowers them to do. What is difficult to achieve in the Zimbabwean context is compelling the courts to embrace this responsibility. Because compulsion would require action from the legislature, or pressure from the public, it probably is not reasonable to expect that this will happen in contemporary Zimbabwe. Therefore, it is left to the judiciary itself to initiate change.

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97 Madhuku (n 73) 249.

98 Gwisai (n 53) 31.