JUDICIAL SERVICE COMMISSION

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KEYNOTE ADDRESS ON

ACCESS TO JUSTICE FOR THE POOR, VULNERABLE AND MARGINALISED PEOPLE IN ZIMBABWE

PRESENTED ON THE OCCASION OF THE 2022 RIGHT OF ACCESS TO JUSTICE SYMPOSIUM

UNIVERSITY OF ZIMBABWE — HARARE

by

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INTRODUCTION

The concept of access to justice is a matter of global concern. Jurisdictions the world over, regardless of their disposition to common law or civil law systems, grapple with its import. Where the legal system does not provide ideal conditions for every citizen to be able to access justice when his or her rights are violated, the efficacy of the rule of law and the protection of fundamental rights is undermined.

It is a bitter truth that marginalised groups face formidable systemic and personal barriers in accessing justice. This is despite the fact that these groups are disproportionately represented in the legal system, often being more vulnerable to multiple civil and criminal litigation and having more complex legal needs than the general populace. [1]

CONCEPTUALISING THE TERM "JUSTICE"

The origins of the concept of "justice" can be traced to the Egyptian word "*Maat*", regarded as the oldest word for justice meaning "truth and righteousness" of life among men and before the gods. In essence, justice extends beyond the law notwithstanding its derivation from the Latin word "*jus*" meaning right or law.[2]

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[1] Law Council of Australia, 'Overarching Themes', The Justice Project Final Report (August 2018)

[2] Law Council of Australia, Principles for Facilitating Access to Justice for Marginalised and Vulnerable Groups as a Result of the COVID - 19 Pandemic (May 2020).

Justice has been defined as "the amount of fairness that people experience and perceive when they take steps to solve disputes and grievances".[3]

The renowned philosopher Aristotle espoused the idea of justice as a state of character, a cultivated set of dispositions, attitudes and good habits. ***Institutes of Justinian a codification of Roman Law from the sixth century AD*** defines justice as "the constant and perpetual will (disposition) to render to each his due". This definition reveals four important aspects of justice –

(1) It shows that justice has to do with how individual people are treated;

(2) The definition underlines the fact that just treatment is something due to each person. In other words, that justice is a matter of claims that can be rightfully made against the agent dispensing justice, whether a person or an institution;

(3) The definition draws attention to the connection between justice and impartial and consistent application of rules. Justice is the opposite of arbitrariness. The rule concerned must be relatively stable.

(4) The definition reminds one of the fact that justice requires an agent whose will alters the circumstances of its objects. The agent might

[3] See the Legal Aid Service Providers Network (LASPNET), *Access to Justice for the Poor, Marginalised and Vulnerable People of Uganda*, (Kampala, 2015) at p. 18. Available at: https://namati.org/wp-content/uploads/2015/12/Access-to-Justice-for-the-Poor-Marginalised-and-Vulnerable-People-of-Uganda.pdf. Accessed on 30 June 2022.

be an individual person or it might be a group of people or an institution such as the State.

From these observations, it is apparent that justice has a transformative quality. This brings to the fore different facets of the concept of justice such as distributive justice, corrective justice, commutative justice, **legal justice** and moral justice.

Naturally, the first question that arises is the nature of the relationship between the law and justice. There is often a conflation of the two concepts, due to the proximity of their utilisation by the courts. The law and justice are two distinct concepts, with justice being the legitimate aim and end of the law.[4] The law is normally used as a means to ensure justice. The law is an integrated mechanism whose primary aim is the resolution of disputes in a manner that achieves justice.

Pertinent amongst the critical features of justice is the element of fairness. Equality refers to a similar apportionment of rights and duties to parties that are on an even keel. There can be no fairness when the same standards are applied to parties that are housed in different planes. For example, in order to give effect to fairness, the law may provide for an express provision that facilitates a *quota* for women representation in Parliament. This is in recognition of the historical subjugation of women and perfectly illustrates the compensatory function of

[4] Rawls John 1971. *A Theory of Justice.* Cambridge, Massachusetts: The Belknap Press of Harvard University.

justice that is aimed at providing equitable standards. In other words, when stated in the negative, justice is the avoidance of injustice.

Another equally pertinent feature of justice is equality of treatment. This is regarded as a necessary element in the concept of justice, particularly with regards to access. For instance, the right to universal suffrage is extended to all adults regardless of their rank. Access to justice as a right is also an instance that perfectly gives rise to equality of treatment for citizens. It attempts to cut across the plane of political, economic and social inequality by providing a common standard of access for all citizens.

However, fairness in the concept of justice also extends to social and economic aspects. All in all, these altruistic qualities give justice its virtuous quality. It is upon this righteous cause that **justice** is treated as a fundamental entitlement of every human being. States have no discretion in deciding whether or not to grant justice. It ought to and does exist independently of the agenda of the Government.

SOURCE OF THE RIGHT OF ACCESS TO JUSTICE

The backdrop of the seemingly immutable right of access to justice rouses curiosity as to its origins. It is at this juncture that emphasis ought to be laid on the established constitutional position that the essence of all human rights is human dignity. Human dignity exists as both a right and foundational value under the Constitution that informs the content and essence of fundamental human rights enshrined in the Bill of Rights. Human dignity, which is inherent in every

human being in equal measure, gives rise to the fundamental right to human dignity, which is listed as one of the non-derogatory rights under section 86(3)(b) of the Constitution.

Its imposition as a measuring yardstick of the content of the rights espoused in Chapter 4 of the Constitution certifies human dignity as the basis of an entitlement to justice. Inherent dignity of being human is the source of justice demanding that every person be treated by the State or by another person fairly in accordance with a standard applicable to others in similar situations. Justice is therefore a universal value based on human dignity, equality, fairness and morality. A system of rules making up a body of law as contained in the Constitution and statutes that are in conformity with the supreme law serves justice. Section 46(b) of the Constitution stipulates that when interpreting the Bill of Rights courts ought to promote the values and principles that underlie a democratic society, based on openness, justice, human dignity, equality and freedom, and, in particular, the values and principles set out in section 3.

Therefore, once the purported construction of a right does not give effect to human dignity, it cannot be taken to be justiciable. Thus, human dignity operates in the jurisprudence of the courts primarily as a foundational value that informs the interpretation of all other rights and in certain circumstances as the substance or content of a fully justiciable right.

The prominence of human dignity in the constitutional scheme of fundamental rights and freedoms was affirmed in the case of ***The State v Chokuramba* CCZ–10–19.** In that case the Court said:

> "Section 46 of the Constitution is the interpretative provision. It makes it mandatory for a court to place reliance on human dignity as a foundational value when interpreting any of the provisions of the Constitution which protect fundamental human rights and freedoms. This is because human dignity is the source for human rights in general. It is human dignity that makes a person worthy of rights. Human dignity is therefore both the supreme value and a source for the whole complex of human rights enshrined in Chapter 4 of the Constitution. This interdependence between human dignity and human rights is commented upon in the preambles to the International Covenant on Economic, Social and Cultural Rights (1966) and the International Covenant on Civil and Political Rights (1966). The preambles state in express terms that human rights 'derive from the inherent dignity of the human person'. They all refer to '… the inherent dignity … of all members of the human family as the foundation of freedom, justice and peace in the world'. The rights and duties enshrined in Chapter 4 of the Constitution are meant to articulate and specify the belief in human dignity and what it requires of the law."

This position is also accepted in other jurisdictions. In ***S v Makwanyane* 1995 3 SA 392 (CC)** at para 328, the Constitutional Court of South Africa said:

> "The importance of dignity as a founding value of the new Constitution cannot be overemphasised. **Recognising a right to dignity is the acknowledgment of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern.** This right therefore is the foundation of many of the other rights that are specifically entrenched." (*the emphasis is mine*)

Therefore, it is evident that the right of access to justice flows from the innate quality of human dignity. Implicit in this observation is the fact that human dignity cannot be waived, as it is tied to the human upon which it is bestowed. Simply by virtue of being vested with the sentient capabilities bestowed upon humanity, a person is entitled to be treated with a modicum of respect that when reduced to its rudimentary form defers to his or her dignity.

Thus it is upon this premise that **access to justice** has been defined in some circles as the ability of people to seek and obtain a remedy through formal or informal institutions of justice, and in conformity with human rights standards.[5] This "right of entry"'s sphere of influence extends beyond mere litigation. It presupposes a locale wherein the stated rights are effectively enforced. In order to achieve this objective, access to justice has to address two major concerns - predominantly, guaranteeing the said rights through mediums such as the Constitution, and concomitantly ensuring capacity development of State institutions and citizens to guarantee the protection of those rights.

The intrinsic relationship between human dignity and the right of access to justice arises from the necessity of enabling people to be able to vindicate their interests as a recognition of their intrinsic worth. There can be no championing of human dignity if the right of entry to judicial fora is unduly restricted. Consequently, issues related to access to justice are intertwined with human dignity as the source

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[5] UNDP, "Programming for Justice Access for All. A Practitioner's Guide to a Human Rights-Based Approach to Access to Justice", UNDP, Bangkok, 2005. p. 4.

that affords recognition of this right. Human dignity is the basis of an entitlement to justice. Inherent human dignity makes access to justice a must.

SCOPE AND CONTENT OF THE RIGHT TO ACCESS TO JUSTICE

Having explored the philosophical and legal underpinnings of the concept of justice, the status of access to justice as a fundamental right must not be glossed over. It exists as a justiciable fundamental right provided for in the Constitution which ties the courts to their justice function. Section 69 of the Constitution provides:

> "(1) Every person accused of an offence has the right to a fair and public trial within a reasonable time before an independent and impartial court.
>
> (2) In the determination of civil rights and obligations, every person has a right to a fair, speedy and public hearing within a reasonable time before an independent and impartial court, tribunal or other forum established by law.
>
> **(3) Every person has the right of access to the courts, or to some other tribunal or forum established by law for the resolution of any dispute.**
>
> (4) Every person has a right, at their own expense, to choose and be represented by a legal practitioner before any court, tribunal or forum." (*the emphasis is mine)*

The right of access to justice provided for under section 69(3) of the Constitution as part of the broader framework of the right to a fair hearing recognises the courts as the custodians of the Constitution and guardians of the remedies for the protection and enforcement of fundamental rights and freedoms. Access to justice

is also afforded prominence in international human rights law instruments. The Universal Declaration of Human Rights 1948 (UDHR) recognises the right of access to justice in Article 8. Article 2 of the International Covenant on Civil and Political Rights (ICCPR) refers to the right to an effective remedy for all the rights enshrined in the Covenant. At a regional level, Article 7(1) of the African Charter on Human and Peoples' Rights provides for the right of access to justice.

The right to a fair hearing is meant to provide the pre-conditions necessary for the attainment of justice. Resultantly, the right of access to justice gives rise to the rule of law when interested parties have the ability to access independent and impartial judicial fora that determine disputes in a manner which is consistent with what is right and fair in the circumstances of the case. The importance of the rule of law as a concept that describes the supreme authority of the law over governmental action and individual behaviour has been extensively canvassed in this jurisdiction. It is regarded as the antithesis of arbitrary rule.[6]

In the case of ***De Beer NO* v *North Central Local Council and South Central Local Council* 2002 (1) SA 429 (CC)**, the South African Constitutional Court linked the rights of access to court and a fair hearing to the rule of law. It said:

> "The right to a fair hearing before a court lies at the heart of the rule of law. A fair hearing before a court as a prerequisite to an order being made against anyone is fundamental to a just and credible legal order. Courts in our country are obliged to ensure that the proceedings before them are

[6] Anthony Valcke, *The Rule of Law: Its Origins and Meanings (A Short Guide for Practitioners)* (March, 1 2012), available at SSRN, http://ssrn.com/abstract=2042336

> always fair. Since procedures that would render the hearing unfair are inconsistent with the Constitution courts must interpret legislation and rules of court, where it is reasonably possible to do so, in a way that would render the proceedings fair. It is a crucial aspect of the rule of law that court orders should not be made without affording the other side a reasonable opportunity to state their case. That reasonable opportunity can usually only be given by ensuring that reasonable steps are taken to bring the hearing to the attention of the person affected. Rules of courts make provision for this."

Thus, the right of access to justice plays a fundamental role in providing a common standard for all. However, its scope extends beyond granting access to an independent forum for justice. It also presupposes an expeditious hearing of the alleged grievances. The popular refrain "*justice delayed is justice denied*" encapsulates the prompt administration of justice as an important feature of the rights enshrined in section 69 of the Constitution.

The right of access to justice can also be interpreted restrictively in order to afford protection to the processes of the court. In ***Sadiqi* v *Muteswa; Sadiqi* v *Muteswa & Ors* CCZ–14–21** PATEL JCC said:

> "Section 69 of the Constitution enshrines and protects the right to a fair hearing. It guarantees that the courts are open to every person. However, this is subject to the rules put in place to regulate court proceedings and bring order to the justice delivery system. When the dirty hands doctrine is applied to refuse to entertain a litigant who is in violation of a court order, he is not being denied the right to a fair hearing. This is actually a measure that is necessary to preserve the dignity and authority of the courts so that the citizenry at large can continue to enjoy the right to a fair hearing."

Access to justice, therefore, is not an unfettered fundamental provision, as it requires comity between the right to petition the courts and adherence to the rule of law. Embedded in the interplay between the rule of law and access to justice is the right of equality before the law. Justice is embedded in equal and fair treatment of human beings.

THE COURTS' ROLE IN MAINTAINING THE CONSTITUTIONAL BALANCE OF RIGHTS

The obligatory nature of inherent human dignity makes access to justice a must on the basis that every person, regardless of social, economic and political status or condition, is equal to the other person before the law and has a right of access to justice when his or her rights have been infringed. A duty is imposed upon the courts to protect the public from flagrant human rights abuse. The Constitution is an evolutionary document that embodies the recognition of the enjoyment and fulfilment of everyone's rights. Accepted in this notion is the indivisibility and interdependence of rights. A violation of one right does not exist in a vacuum; it affects secondary rights and, by extension, the entire constitutional order.

This delicate state of affairs calls for the vigilance of the Judiciary in ensuring the protection of the public from human rights violations. Courts are a creation of the Constitution. This awareness is highlighted in the case of ***Mudzuru & Anor* v *Minister of Justice, Legal & Parliamentary Affairs N.O. & Ors* 2016 (2) ZLR 45 (CC),** wherein it was held at 59A-B that:

> "The judicial process is invoked for the purposes of achieving constitutional objectives. The court must be careful not to risk the credibility of its process by unwittingly associating its jurisdiction with proceedings that have nothing to do with the objectives of public interest litigation. Section 85(1)(d) of the Constitution guarantees standing to a person who institutes judicial proceedings seeking to achieve the objectives for which the remedy of acting in the public interest was designed. It is in the context of seeking to ensure that public interest litigation is used for its intended purpose and to prevent s 85(1)(d) procedure being abused by busybodies, merely meddlesome people for oblique motives unrelated to vindication of public interest, that courts developed factors that any person genuinely acting in the public interest has to satisfy."

The justice function of the courts is not solely confined to the dictates of section 85(1)(d) of the Constitution but also to provide an equitable remedy to the public in all spheres. This point is affirmed in the pronouncements by the Constitutional Court in ***Chigwada* v *Chigwada & Ors* S–188–20**.[7]

***Kawenda* v *Minister of Justice, Legal and Parliamentary Affairs & Ors* CCZ–3–22** illustrates the role of the Judiciary in ensuring the constitutional balance of rights. MAKARAU JCC, in resolving the question whether the age of sexual consent should be raised to eighteen years, said:

> "As stated elsewhere above, not only does the impugned law fail to protect all children, **it particularly fails to protect children who are in child marriages notwithstanding the age of the child concerned. In view of the decision of this Court in *Mudzuru and Another* v *Minister of Justice,***

[7] The judicial decisions in *Mudzuru & Anor* v *Min of Justice supra*, *Chigwada* v *Chigwada supra*, *Kawenda* v *Min of Justice et al* had social justice in mind.

> ***Legal and Parliamentary Affairs supra*****, the entire law becomes inconsistent with the Constitution and cannot be saved**.
>
> Having found that the impugned law is inconsistent with the provisions of s 81(1)(e) of the Constitution and infringes the rights to protection from sexual exploitation of children between sixteen and eighteen years and of all children in child marriages, it is not necessary that I proceed to determine whether the law violates any other right guaranteed to children by the Constitution. Similarly, it is not necessary that I determine whether the impugned law is in the best interests of children. It clearly cannot be." (*the emphasis is mine)*

As highlighted above, the Judiciary is fully cognisant of the critical role it has to play in preserving the constitutional balance of rights. It endeavours to achieve justice and vindicate public interest in a manner that is consistent with human dignity.

WHO ARE THE POOR, VULNERABLE AND MARGINALISED PEOPLE IN ZIMBABWE?

To start with, it is necessary to define what poverty, vulnerability and marginalisation mean.

Chronic poverty is the type that traps households into severe and multi-dimensional poverty and can take on an intergenerational form to the effect that those born in poverty live in it and bestow it on their children. The United Nations maintains that "Absolute poverty is a condition characterised by severe deprivation of basic human needs, including food, safe drinking water, sanitation

facilities, health, shelter, education and information. It depends not only on income but also on access to social services".[8]

Vulnerability has been defined as "the probability or risk today of being in poverty or to fall into deeper poverty in the future due to disasters or shocks that would worsen the status quo".[9]

Marginalisation has been defined as "processes by which some groups of people are being pushed or kept out of the system, or being maintained in a peripheral, disadvantaged position within that system".[10] The United Nations Education and Scientific Cooperation Organisation (UNESCO) has defined marginalisation as occurring "when people are systematically excluded from meaningful participation in economic, social, political, cultural and other forms of human activity in their communities and thus are denied the opportunity to fulfil themselves as human beings. Marginalised groups have been defined by The Orphans and Vulnerable Children (OVC) Policy as "persons in society who are deprived of opportunities for living a respectable and reasonable life that is regarded as normal by the community to which they belong".[11]

There are numerous groups and categories of people who can be categorised as poor, vulnerable and marginalised. They include people with neglected and often

[8] See the Legal Aid Service Providers Network (LASPNET), *op cit.* at p. 19.
[9] Ibid.
[10] Ibid.
[11] See the Legal Aid Service Providers Network (LASPNET), *op cit.* at p. 11.

misunderstood diseases, including the mentally ill, persons with disabilities, the elderly, the lonely and isolated, children, especially those who have disabilities, children with parents in prison, children who head households, the homeless, widows and widowers with many children to look after, people with large families, orphans and abandoned children and the chronically sick.[12]

Before moving on to the question of how the poor, vulnerable and marginalised people exercise their right of access to courts, there is need for a particular focus on the subjects of this class. This paper has previously in passing identified women, children and disabled persons as making up the bulk of the poor and vulnerable persons in Zimbabwe. They also fall into the marginalised group of people. This is because poverty, vulnerability and marginalisation entail the existence of a disability or disadvantage that militates against the ability of the affected people to exercise their rights in the same manner as would be applicable to the other members of society.

To begin with, poverty, vulnerability and marginalisation cut across the gender spectrum where they are institutionalised. Men and women may be precluded from accessing justice due to their impoverished economic position. A legal system characterised by high litigation costs is an impediment to people living below the poverty datum line who seek to vindicate their rights. This observation is consistent with the findings by UNESCO regarding the meaning of poverty,

[12] See the Legal Aid Service Providers Network (LASPNET), *op cit.* at p. 12.

vulnerability and marginalisation as situations of acute and persistent disadvantage.[13] Poverty not only creates marginalisation in the context of financial capacity but its offshoots such as illiteracy preclude the poor from acquiring knowledge of the judicial fora for justice delivery.

Children are the most vulnerable people in society. This is due to their inherent disability as minors. They require and depend on the assistance of adults to vindicate their rights and acquire justice. In the ***Mudzuru*** case *supra* the Court at 62F-G said:

> "Children fall into the category of weak and vulnerable persons in society. They are persons who have no capacity to approach a court on their own seeking appropriate relief for the redress of legal injury they would have suffered. The reasons for their incapacity are disability arising from minority, poverty, and socially and economically disadvantaged positions. The law recognises the interests of such vulnerable persons in society as constituting public interest."

In ***Sogolani*** **v** ***The Minister of Primary and Secondary Education & Ors*** **CCZ-20-20** the Court had this to say at p 41 of the typewritten judgment:

> "Children are generally regarded as impressionable people who are vulnerable to outside influences because of their age and level of maturity."

Thus, the concept of access to justice requires that children be recognised as individuals with fundamental rights and freedoms they are entitled to enjoy. Their

[13] Deprivation and Marginalisation in Education. http://www.unesco.org/fileadmin/ MULTIMEDIA/HQ/ED/GMR/html/dme-1.html (Accessed:11 September 2015)

vulnerability must be acknowledged to ensure that there are adequate and effective measures for the protection of their rights in the event of violation.

The status of children as independent right holders was endorsed in the ***Sogolani*** case *supra*. At p 25 of the typewritten judgment the Court said:

> "Not only does s 60(3) of the Constitution identify and protect the primary responsibility of parents and guardians in the upbringing and development of a child, it also underlines the principle that a child is an individual with a right to be heard on matters affecting him or her commensurate with his or her age and maturity. Constitutional liberties pertain to individuals. Parents and children do not possess unitary interests.
>
> Whatever considerations may justify protecting the right of adults to control their own lives, they do not validate an unqualified right of adults to deprive the children in their custody of the right to decide as free and rational persons what kinds of lives they will choose to lead. The parent-child relationship is a relationship of two individuals, each with a separate intellectual and emotional makeup. Children are distinct persons with rights of their own under the Constitution. A child is a subject of his or her own rights."

PROBLEMS ENCOUNTERED BY POOR, VULNERABLE AND MARGINALISED PEOPLE IN ACCESSING JUSTICE

Even though there are means, systems and remedies for ensuring access to justice to every person who alleges infringement of his or her fundamental right or freedom, the practical realisation of that right is fraught with challenges for the poor, vulnerable and marginalised groups of society. By reason of the procedural complexity of any justice system and the practical challenges faced in engaging such a system, challenges will always exist. In addition, other variables on which

systems of justice depend also pose challenges to accessing the courts and justice. These variables include the availability of the required resources for court operations, the litigants' grasp of the legal system, and the viability of the economy. Left unattended, these problems jeopardise the realisation of the right of access to the courts and to justice by the poor, vulnerable and marginalised people. In order to avert these challenges, a comprehensive appreciation and understanding of the actual problems derailing efforts and measures to ensure full access to the courts by the poor, vulnerable and marginalised people is required.

An examination of the manner in which the challenges affecting the exercise of the right of access to courts are perceived is the first step in the understanding of the problems. Incorrect, biased or baseless perceptions compromise the ability to identify and address the specific challenges faced. Ideally, the problems and challenges impeding the full realisation of the right of access to the courts can be perceived at an individual level, societal level and systemic level. The problems affecting a person within a particular group of the poor, vulnerable and marginalised categories of people may not affect the entire group. As such, if the problems affecting such a person are not viewed at an individual level, there will be a great risk that those problems may never be addressed. Instead, they may be overlooked in favour of the challenges affecting the entire group.

A. INSTITUTIONAL PROBLEMS

Institutional problems are usually systemic in nature. Their causes cannot usually be pinned down to a particular individual or variable but are attributable to the integral design, composition and structure of the entire system of justice. An institutional or systemic problem may arise from the way a system is structured or from obstacles within an organisation barring full access to justices. Institutional problems demand that the Judiciary should always review its preparedness and capacity to grant the poor, vulnerable and marginalised people prompt and effective judicial protection of the right of access to justice.

B. SOCIAL PROBLEMS

Apart from the systemic problems emanating from the justice system or the institutions superintending the provision of justice, problems may also arise from the social conditions of the poor, vulnerable and marginalised people. According to R C Fuller and R R Myers the term "social problem" refers to:

> "… a condition which is defined by a considerable number of persons as a deviation from some social norm which they cherish. Every social problem thus consists of an objective condition and a subjective definition. The objective condition is a verifiable situation which can be checked as to existence and magnitude (proportions) by impartial and trained observers, e.g., the state of our national defense, trends in birth rate, unemployment etc. The subjective definition is the awareness of certain individuals that the condition is a threat to certain cherished values."[14]

[14] See Richard C Fuller and Richard R Myers, "The Natural History of a Social Problem," *American Sociological Review*, June., 1941, Vol. 6, No. 3 (Jun. 1941), pp. 329 – 329 at p. 320. Available at: https://www.jstor.org/stable/2086189. Accessed on 13 June 2022.

Social problems run the gamut from poverty, tribalism, inequality of opportunities between men and women, lack of legal knowledge to illiteracy. Poor, vulnerable and marginalised people who face any of these problems may be drawn back in their quest for justice. If, for example, illiteracy is standing in the way of a poor, vulnerable and marginalised person's access to justice, such a person will be unable to effectively pursue justice until the barrier of his or her illiteracy is removed.

C. ECONOMIC PROBLEMS

Closely related to social problems are economic problems. Economic problems constitute barriers to the full enjoyment of the right of access to justice and tend to be caused by the prevailing economic conditions. In briefly discussing economic problems, I make reference to the field of economics wherein the most basic problem is regarded as scarcity. A comprehensive exposition of the basic problem of scarcity was captured thus:

> "Scarcity refers to the basic economic problem, the gap between limited that is, scarce resources and theoretically limitless wants. This situation requires people to make decisions about how to allocate resources efficiently, in order to satisfy basic needs and as many additional wants as possible. Scarcity is the limited availability of a commodity, which may be in demand in the market … . Scarcity also includes an individual's lack of resources to buy commodities."[15]

[15] See Elisha, Otekenari David. "Resources scarcity and sustainable economic growth." *Int. J. Sci. Res. Educ* 14 (2021): 43-44. Available at: https://www.researchgate.net/profile/Otekenari-Elisha/publication/350399332_Resources_Scarcity_and_Sustainable_Economic_Growth/links/605d8abb458515e8347002d1/Resources-Scarcity-and-Sustainable-Economic-Growth.pdf. Accessed on 12 June 2022.

The economic problem of scarcity necessitates the management of individuals' demand for commodities and the supply of those commodities.[16] Various problems such as inflation, high unemployment rates and arbitrage also stand in the way of the poor, vulnerable and marginalised people from accessing justice. Economic problems exacerbate the poor, vulnerable and marginalised people's capacity to raise the necessary financial resources to approach the courts for judicial protection, especially through legal practitioners.

D. ATTITUDINAL, PROCEDURAL OR PHYSICAL BARRIERS

Significantly, problems of the full realisation of the right of access to justice also manifest in the form of attitudinal, procedural and physical barriers against the poor, vulnerable and marginalised groups of people. Attitudinal barriers are most common against people with disabilities. Attitudinal barriers "are pervasive negative perceptions and value systems that focus on a person's disability rather than their ability and other valued characteristics. Attitudinal barriers may be present in societies, communities or in specific individuals".[17] A piece of legislation adopted in the Canadian Province of Manitoba known as "The Accessibility for Manitobans Act" provides a useful source for the conceptualisation of accessibility barriers. The Act was passed to remove barriers

[16] See Elisha, Otekenari David, "Resources scarcity and sustainable economic growth", *op cit.* at p. 42.
[17] See "Attitudinal Barriers", In: Preedy, V.R., Watson, R.R. (eds) *Handbook of Disease Burdens and Quality of Life Measures*. Springer, New York, NY, 2010. Available at: https://doi.org/10.1007/978-0-387-78665-0_5140. Accessed on 5 June 2022.

affecting people with disabilities and many other citizens preventing them from achieving equal opportunities, independence and full economic and social integration. On an interpretation of its provisions, an attitudinal barrier "results when people think and act based on false assumptions".[18]

As with attitudinal barriers, physical barriers to access justice are mostly encountered by persons with disabilities. Physical barriers constitute physical infrastructure or features that make access to a building difficult or impossible for a person with a disability. The United Nations Division for Social Policy Development states that:

> "Access to justice for persons with disabilities can be impeded where measures have not been taken to ensure the accessibility of relevant physical environments, including court houses, police stations, and the offices of lawyers and relevant service providers such as victims' advocates and health care facilities where forensic evidence is gathered."[19]

The attitudinal, procedural and physical barriers to justice that are faced by the poor, vulnerable and marginalised people, particularly people living with disabilities, justified the inclusion of Article 13 in the Convention on the Rights of Persons with Disabilities, to which Zimbabwe is a party. The Article reads as follows:

[18] See The Accessibility for Manitobans Act, *Barriers and Solutions*, Available at: https://accessibilitymb.ca/types-of-barriers.html#:~:text=Attitudinal%20barriers%20result%20when%20people,a%20disability%20will%20not%20understand. Accessed on 16 June 2022.

[19] See United Nations Division for Social Policy Development, *Toolkit on Disability for Africa – Access to Justice for Persons with Disabilities*,

“**Article 13**

Access to justice

1. States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.
2. In order to help to ensure effective access to justice for persons with disabilities, States Parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff.”

In light of the above obligation, the Judicial Service Commission has made considerable headway in eliminating physical and attitudinal barriers to effective access to justice faced by people with disabilities. Disability ramps have been and are being added at all courthouses. Basic and commonly relied-on statutes such as the Constitution and the Maintenance Act [*Chapter 5:09*] have been printed in braille to accommodate persons living with blindness. Staff members, particularly court interpreters, have received training on how to assist persons with disabilities. These measures have yielded positive results in removing some of the barriers to access to justice for people living with disabilities.

E. PROHIBITIVE COSTS OF LITIGATION

Relatively high costs of litigation significantly hamper the poor, vulnerable and marginalised people’s quest for the exercise of the right of access to justice. The

costs of litigation cover the overall or total amount of money expended by a person in the litigation. In the words of Mauro Cappelletti *et al*:

> "It is obvious … that dispute resolution is very expensive in modern societies, particularly in the courts. Typically, the government pays the salaries of judges and other court personnel and supplies the building and other facilities necessary to try cases, but the litigants must bear the great proportion of the other costs of settling a dispute, including attorneys' fees and court costs."[20]

In light of the host of social and economic problems faced by the poor, vulnerable and marginalised people, it often becomes impossible for them to raise the costs for legal representation. The problem of prohibitive costs of litigation demands financial resources to fix.

HOW DO THE POOR, VULNERABLE AND MARGINALISED PEOPLE EXERCISE THEIR RIGHT OF ACCESS TO JUSTICE?

In the preceding section, I explored the conceptual, philosophical and legal foundations of the broad idea of access to justice and the human right of access to the courts. However elaborate and comprehensive the right of access to the courts and the corresponding concept of access to justice may be, without the means and mechanisms to operationalise them, they remain ideals. Therefore, I

[20] See Cappelletti, Mauro, Bryant Garth, and Nicolo Trocker. "Access to justice: comparative general report." *Rabels Zeitschrift für ausländisches und internationales Privatrecht/The Rabel Journal of Comparative and International Private Law* 40, no. H. 3/4 (1976): 669-717 at p. 674. Available at: https://www.jstor.org/stable/27876038?casa_token=Nts2DRWrvYwAAAAA:iWDw84MIbsKhBkDLlke0R2TcsgB-xRp-HZL2zQkTQzZcsyKiXZfDjbzVnZPUQaIzyG39aeWMYS1wz7qAd9VoKhBpc2cAxP-iFiaEo1EKxBV2Ys9R4s0F. Accessed on 1 June 2022.

turn now to discuss the common means by which the poor, vulnerable and marginalised people exercise their right of access to the courts.

I will begin by observing that courts of justice emerged as the preeminent mechanisms by which all persons may obtain justice. The courts are, by their design, a creature of various societies' quests to establish guarantees through which their common ideal of justice could be maintained. By establishing the courts, societies developed a means of enforcing justice that is associated with the law.

I have briefly referred to the emergence of law as a means of ensuring the maintenance of justice. But for justice to be maintained, the law will have to be enforced. Logically speaking, it is only natural that people will be drawn to those measures of enforcing the law that are most effective and best capable of maintaining justice. Access to the courts is, thus, a generally trusted route through which people can reassert their equality and inherent dignity.

In this light, I preface this part of my address by stating that most societies established judicial protection as a means by which they could guarantee the perpetual protection of justice. If judicial protection fails to guarantee justice, then it ceases to be relevant as a means of asserting human dignity and equality. Therefore, the critical question that each society must be seized with is how its chosen mechanisms of judicial protection continuously remain suited to provide justice.

THE WAYS IN WHICH THE POOR, VULNERABLE AND MARGINALISED PEOPLE'S RIGHT OF ACCESS TO JUSTICE MAY BE REALISED

Given the importance of ensuring that people are able to access justice and assert their equality and dignity, centuries-old mechanisms of safeguarding justice have generally been adopted in most jurisdictions today. These mechanisms include guaranteeing rights through a constitution or in a bill of rights and judicial protection.

Regarding the mechanism of guaranteeing justice through the entrenchment of fundamental rights in a constitution or bill of rights, the Zimbabwe jurisdiction satisfies this. The Constitution contains a comprehensive Declaration of Rights. The rights to equality and human dignity form part of the said Declaration of Rights. The entrenchment of such rights in the Constitution is itself a means of protecting justice. The whole body of fundamental rights must, therefore, be regarded as an instance of protection and guarantee of justice.

The mere assertion of fundamental rights in a constitution is a method of ensuring that all people, including the poor, vulnerable and marginalised people, are dealt with fairly by the State or other citizens. Elaborating fundamental rights and freedoms establishes parameters within which all conduct is carried out. Anything done in violation of fundamental rights would, as a matter of fact and law, be an injustice. The ***Mudzuru*** case *supra* confirms at 55E-G that the principle that the

enactment of fundamental rights in a constitution is a form of protection for the right-holders. It was observed:

> "Section 44 of the Constitution imposes the obligation on the State and every institution and agency of the government at every level to respect, protect, promote and fulfil the fundamental rights and freedoms enshrined in Chapter 4 of the Constitution. The constitutional obligation requires the State to protect every fundamental right and freedom regardless of the social and economic status of the right-holder.
>
> Like a shepherd who cannot escape liability for a lost sheep by claiming ignorance of what happened to it, the State is expected to know what is happening to fundamental rights and freedoms enshrined in Chapter 4. It is under an obligation to account, in the public interest, for any infringement of a fundamental right even by a private person. **The scheme of fundamental human rights and freedoms enshrined in Chapter 4 is based on the constitutional obligation imposed on the State and every institution and agency of the government at every level to protect the fundamental rights and freedoms to ensure that they are enjoyed in practice**." (*the emphasis is mine*)

By providing a Declaration of Rights, the Constitution satisfied the first of the methods that are widely in place all over the world to guarantee justice in society. It makes the State and every person, including juristic persons, aware of the entitlement of all individuals to dignified treatment and the specific instances in which an individual ought to be treated fairly. The manner in which the Constitution embodies the protection of rights and becomes a guarantee of a source of justice was aptly illustrated by the Constitutional Court in the case of ***Chironga & Anor* v *Minister of Justice, Legal and Parliamentary Affairs & Anor* CCZ–14–20** at pp 1–2. The Court stated that:

> "**One of the crucial elements of the new constitutional dispensation ushered in by the 2013 Constitution is to make a decisive break from turning a blind eye to constitutional obligations. To achieve this goal, the drafters of the Zimbabwean Constitution …, 2013 ('the Constitution') adopted the rule of law and supremacy of the Constitution as some of the core founding values and principles of our constitutional democracy. For this reason, public office-bearers ignore their constitutional obligations at their own peril**. Left unchecked those clothed with state authority or public power may quite often find the temptation to abuse such powers irresistible, as LORD ACTON famously remarked: 'Power tends to corrupt, and absolute power corrupts absolutely!'" (*the emphasis is mine*)

The above remarks must be considered within the context that the most egregious injustices are perpetrated by those who wield public power. They spell out that the adoption of the rule of law and the supremacy of the Constitution as some of the core values of a constitutional democracy is a form of control that is placed on public office-bearers. Although the above-quoted passage does not recite the founding value of respect for fundamental human rights and freedoms, the basic point made in the passage must be extended to that founding value. It would then follow that the Constitution also makes a decisive break from turning a blind eye to the constitutional obligations pertaining to the respect, promotion, protection and fulfilment of fundamental human rights.

Notwithstanding the foregoing, the mere guarantee of the fundamental rights that are intended to ensure the optimum state of justice in a society is not an exclusive solution. Many jurisdictions accept that for there to be meaningful realisation of justice through the provision of fundamental rights, there must also be an

authority to oversee the protection of those rights. This is why R P Miño states that:

> "The concept of guarantee of rights has undergone fundamental transformations in the last century, which have contributed to the development of the protection and safeguarding of rights in the Constitutions."[21]

R P Miño quoting E Jiménez, argues that the fundamental transformations that the concept of guarantee of rights has gone through are due to the abandonment of:

> "… the romantic pretension, derived from the French Revolution, whereby it was sufficient to enshrine human rights in the political constitution, for them to be respected by authorities and citizen …" [22]

The concept of guarantee of rights faces a major limitation if it is solely dependent on the good faith expected from authorities and citizens in their conduct and treatment of the ordinary person. Given the nature of humans, it is conceptually impossible to accept that authorities and citizens will always pay heed to the fundamental rights guaranteed by the Constitution and thus ensure justice. There are bound to be injustices and violations of fundamental rights. The limitations of the concept of guarantee of rights to fully protect the people for whom it is created necessitate a complementary method of guaranteeing justice.

[21] See R P Miño, "The right to effective judicial protection", *Corale Rosales* [*Online*]. Available at: https://corralrosales.com/en/the-right-to-effective-judicial-protection/?utm_source=Mondaq&utm_medium=syndication&utm_campaign=LinkedIn-integration. Accessed on 12 June 2022.

[22] *Ibid*.

Accordingly, it is from an acknowledgement of the inadequacies of the constitutional guarantee of human rights that judicial protection emerged.

Judicial protection is the second common means by which justice is obtained. It invariably exists to complement the concept of the constitutional guarantee of rights. This is why judicial protection has been described by one scholar in the following terms:

> "Judicial protection entails the guarantees offered by a legal order to the people as they individually or collectively enforce their rights or seek redress through litigation in courts of law. In any country, rights on paper conferred by various legislation have little meaning if they cannot be claimed by individuals and be enforced via available legal remedies.
>
> The concept of judicial protection at national level as well as at international level encompasses various elements such as access to justice, the right to an effective remedy and principles of fair trial and due process of law.
>
> The common place where redress or legal remedies can be sought in a national legal order is the court of law. Democratic States therefore are under obligation to provide to the citizens adequate procedural tools for the realisation of this mechanism."[23]

How does the Constitution provide for the mechanism of judicial protection? The justice delivery system in Zimbabwe is primarily a constitutional establishment. This is evident from section 162 of the Constitution, which provides that judicial authority is derived from the people of Zimbabwe and that the same judicial

[23] See Ruhangisa, John Eudes. "Judicial protection under EAC law: direct actions." In *East African Community Law*, pp. 229-253. Brill Nijhoff, 2017 at p. 229. Available at: https://www.jstor.org/stable/10.1163/j.ctt1w76vj2.17?seq=2. Accessed on 19 May 2022.

authority is vested in the courts. The legal term “vesting”, as used in section 162 of the Constitution, suggests the “giving to” or “assigning to” the courts or “clothing the courts with” the judicial authority necessary for the establishment of a viable system of justice delivery. The Constitution itemises all the courts in Zimbabwe, including the Constitutional Court, the Supreme Court, the High Court, Magistrates Courts and Customary Law Courts among other courts, as the recipients of judicial authority. It is only in these fora that judicial authority may cognisably and validly be exercised in order to meet the ends of justice.

Obviously, there must be a means by which judicial authority is exercised. It is necessary to reiterate that it is through judicial officers who make up the Judiciary that judicial authority is exercised. Judicial authority derives its importance from the need to establish a power that can hear disputes and interpret laws, including the laws on fundamental human rights, in a society. Therefore, in real terms, judicial protection manifests through the men and women who exercise judicial authority in the different courts.

Judicial authority, from which judicial protection offshoots, exists alongside the Declaration of Rights. The makers of the Constitution intentionally placed both phenomena in the Constitution. Conveniently, the reason why the two phenomena exist in the same statute is to be found in the Constitution itself. Section 165(1) of the Constitution provides:

“**165 Principles guiding the judiciary**

(1) In exercising judicial authority, members of the judiciary must be guided by the following principles —

(a) justice must be done to all, irrespective of status;

(b) justice must not be delayed, and to that end members of the judiciary must perform their judicial duties efficiently and with reasonable promptness;

(c) the role of the courts is paramount in safeguarding human rights and freedoms and the rule of law." (*the emphasis is mine*)

The first observation to make from the provision is that justice is at the centre of the exercise of judicial authority. It occurs twice in the first subsection that directs how the Judiciary exercises judicial authority. The ultimate goal of all the processes carried out in the courts must be justice. The purpose of the creation of courts and conferment of jurisdiction on them is so that they uphold the cause of justice. The second self-explanatory observation to make is that the courts have a paramount role in safeguarding fundamental human rights and freedoms. Both of these observations point to the conclusion that the makers of the Constitution intended the courts to complement the guarantee of rights in the Constitution by ensuring justice and safeguarding fundamental human rights and freedoms.

The excerpt from the work by E Ruhangisa suggests that the main feature of judicial protection is the vindication of rights through litigation in courts of law. Any person or group of people intending to protect and compel the respect of a fundamental right is, as a matter of necessity, required to approach the courts in order to make good use of the mechanism of judicial protection.

Correspondingly, the preeminent way by which the poor, vulnerable and marginalised people's right of access to justice through the courts is enforced and protected is through the courts themselves. Various legal actions of a constitutional and non-constitutional nature exist and can be resorted to in protecting the right in question from any act tending to divest it. Therefore, the aforesaid establishment of the courts by the Constitution is an intentional constitutional objective, which is distinctly pertinent in guaranteeing the realisation of the right of access to justice.

The entire legal fraternity, from Judges and magistrates to legal practitioners, is the vital lifeblood of the mechanisms established to ensure unending access to justice. The legal order vests a great deal of both privilege and responsibility in judicial officers and legal practitioners by charging them with the mechanisms of ensuring access to justice. There are several reasons for entrusting judicial officers and legal practitioners with the primary responsibility of operationalising the mechanisms for exercising the right of access to justice. These reasons are predominantly connected with the mechanism of judicial protection. They lie in the presumption that judicial officers and legal practitioners are fit and proper people with ethical grounding, knowledge and skills to operate the mechanism of judicial protection.

In view of the responsibility given to the legal fraternity, there must be a continuous awareness of the difficulties faced by the poor, vulnerable and

marginalised groups of people in accessing justice. In other words, the entire legal fraternity must be able to identify and map out ways to address the challenges that militate against the poor, vulnerable and marginalised people's equal, effective and prompt access to justice. Without such awareness, the poor, vulnerable and marginalised people may never be placed on the same footing as everyone else for accessing justice. They will remain excluded from true access to justice due to the blind eye that would have been turned to the distinct disadvantages they face.

Finally, the manner in which the poor, vulnerable and marginalised people exercise their right of access to justice through the two mechanisms discussed above has to be considered holistically. To elaborate on this point, it is necessary to recap the liberal formulation of the concept of access to justice, which is the "participation in the individual and collective benefits accruing from society's provision of the best, and most equitably delivered, justice service it can render".[24] Since the concept of access to justice is not limited to access to the courts and lawyers, there must be a recognition that other stakeholders within the justice delivery system must be viewed as capable of augmenting full access to justice. These stakeholders include institutions such as the Human Rights Commissions. The capability of these institutions to receive complaints of injustices and to even seek judicial protection on behalf of the poor, vulnerable

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[24] See Maru, V. "Access to Justice and Legal Empowerment: A Review of World Bank Practice". *Hague J Rule Law* 2, 259–281 (2010). Available at: https://doi.org/10.1017/S1876404510200076. Accessed on 20 June 2022.

and marginalised people broadens the avenues by which these people may obtain access to justice.

When all has been said, neither the constitutional guarantee of fundamental rights nor the mechanism of judicial protection automatically translate to the accessibility of the courts by the people, particularly the poor, vulnerable and marginalised people. To start with, there is an implied recognition and acceptance by the Constitution itself that barriers may be faced in accessing the courts despite the fact of their existence. There would be no need to enshrine the right of access to the courts in section 69(3) of the Constitution in the absence of any conceivable threat to the exercise of that right.

Several measures have thus been put in place to give effect to the mechanisms augmenting the right of access to justice for the poor, vulnerable and marginalised people. At best, these measures limit the number of obstacles that may be faced in implementing the constitutional guarantee of fundamental rights and the mechanism of judicial protection. They are as follows -

1. THE PRINCIPLE OF EQUALITY

The principle of equality goes beyond its philosophical purpose of safeguarding access to justice. In practice, the principle of equality is relied upon as a guarantee of fair access to the courts. Equality ensures that the poor, vulnerable and marginalised people obtain judicial protection or enjoy constitutionally protected rights equally with the rest of the people. Equitable measures have to be put in

place in order to remove the barriers that the poor, vulnerable and marginalised people face in utilising the available mechanisms for accessing justice and providing them with support such as legal aid in order to simplify their quest for justice.

However, it must be acknowledged that the principle of equality is limited in certain respects as a means of safeguarding access to justice. In practical terms, it is difficult to maintain full equality in the way people access justice. In this regard, some scholars have regarded perfect equality as utopian. In the word of C Mauro *et al*:

> "Although effective access to justice has increasingly been accepted as a basic social right in modern societies, the concept of 'effectiveness' is itself somewhat vague. Optimal effectiveness could be expressed as complete 'equality of arms' – the assurance that the ultimate result depends only on the relative merits of the opposing positions, unrelated to the relative abilities or strengths of one party. **This perfect equality, of course, is Utopian; the differences between parties can never be completely eradicated**. The question is how far to push toward the Utopian goal. In other words, how many of the 'barriers' to effective equality of arms should be attacked? The identification of the barriers thus is the first task in giving meaning to 'effectiveness'."[25] (*the emphasis is mine)*

Even though perfect equality remains illusory, there remains a good ground for continuously working toward the attainment of more favourable and fair

[25] See Cappelletti, Mauro, Bryant Garth, and Nicolo Trocker. "Access to justice: comparative general report." *Rabels Zeitschrift für ausländisches und internationales Privatrecht/The Rabel Journal of Comparative and International Private Law* 40, no. H. 3/4 (1976): 669-717 at p. 674. Available at: https://www.jstor.org/stable/27876038?casa_token=Nts2DRWrvYwAAAAA:iWDw84MIbsKhBkDLlke0R2TcsgB-xRp-HZL2zQkTQzZcsyKiXZfDjbzVnZPUQaIzyG39aeWMYS1wz7qAd9VoKhBpc2cAxP-iFiaEo1EKxBV2Ys9R4s0F. Accessed on 1 June 2022.

conditions of access to justice by the poor, vulnerable and marginalised people. This is so because minimising the barriers that the poor, vulnerable and marginalised people presently face correspondingly increases their chances of having true access to justice. Thus, the persistent aim of achieving equality in access to justice must always be regarded as a useful compass in ensuring that the poor, vulnerable and marginalised people are given the best opportunity of access to courts for effective remedies for the vindication of their rights.

2. SECTION 85 OF THE CONSTITUTION – THE ENFORCEMENT PROVISION

Section 85 of the Constitution is a fundamental provision that stands as a bulwark against the invasion or violation of the right of access to justice. It is an effective means to the mechanism of judicial protection. In the ***Mudzuru*** case *supra* at 55H, the section was rightly characterised in the following terms:

> "Section 85(1) of the Constitution is the cornerstone of the procedural and substantive remedies for effective judicial protection of fundamental rights and freedoms and the enforcement of the constitutional obligation imposed on the State and every institution and agency of the government at every level to protect the fundamental rights in the event of proven infringement." (*the emphasis is mine*)

Section 85 of the Constitution reads as follows:

"PART 4

ENFORCEMENT OF FUNDAMENTAL HUMAN RIGHTS AND FREEDOMS

85 Enforcement of fundamental human rights and freedoms

(1) Any of the following persons, namely —

(*a*) any person acting in their own interests;

(*b*) any person acting on behalf of another person who cannot act for themselves;

(*c*) any person acting as a member, or in the interests, of a group or class of persons;

(*d*) any person acting in the public interest;

(*e*) any association acting in the interests of its members;

is entitled to approach a court, alleging that a fundamental right or freedom enshrined in this Chapter has been, is being or is likely to be infringed, and the court may grant appropriate relief, including a declaration of rights and an award of compensation.

(2) The fact that a person has contravened a law does not debar them from approaching a court for relief under subsection (1).

(3) The rules of every court must provide for the procedure to be followed in cases where relief is sought under subsection (1), and those rules must ensure that —

(*a*) the right to approach the court under subsection (1) is fully facilitated;

(*b*) formalities relating to the proceedings, including their commencement, are kept to a minimum;

(*c*) the court, while observing the rules of natural justice, is not unreasonably restricted by procedural technicalities; and

(*d*) a person with particular expertise may, with the leave of the court, appear as a friend of the court.

(4) The absence of rules referred to in subsection (3) does not limit the right to commence proceedings under subsection (1) and to have the case heard and determined by a court."

There are several mechanisms in section 85 of the Constitution rendering it an ideal means of utilising the mechanism of judicial protection. The foremost is that section 85 broadened the grounds for claiming *locus standi* or standing where one

intends to seek judicial protection against injustice. The observations relating to the broadened standing were made in the ***Mudzuru*** case *supra* at p 56E in these words:

> "The liberalisation of the narrow traditional conception of standing and the provision of the fundamental right of access to justice compel a court exercising jurisdiction under s 85(1) of the Constitution to adopt a broad and generous approach to standing. The approach must eschew over-reliance on procedural technicalities, to afford full protection to the fundamental human rights and freedoms enshrined in Chapter 4. A court exercising jurisdiction under s 85(1) of the Constitution is obliged to ensure that the exercise of the right of access to judicial remedies for enforcement of fundamental human rights and effective protection of the interests concerned is not hindered provided the substantive requirements of the rule under which standing is claimed are satisfied."

See also ***Mupungu* v *Minister of Justice, Legal & Parliamentary Affairs & Ors*** CCZ–7–21 at 22.

In light of the broadened *locus standi*, the poor, vulnerable and marginalised people are empowered to assert their right to access the courts either individually or on behalf of one another as a group or class of persons. The widened *locus standi* also entitles another person to approach the courts under section 85(1)(d) of the Constitution on behalf of the poor, vulnerable and marginalised people who are unable to do so. The logical consequence of broadening standing is that the poor, vulnerable and marginalised people enjoy greater access to the courts. They may even obtain justice in a case they never personally filed and were not a party to.

Significantly, section 85 of the Constitution accommodates a less stringent basis for invoking the jurisdiction of a court. The jurisdictional facts that a person acting on behalf of the poor, vulnerable and marginalised people simply has to allege in order to invoke the jurisdiction of the court is that a fundamental right or freedom of persons belonging to any of these groups has been infringed or is likely to be infringed. This is why in ***Meda* v *Sibanda*** 2016 (2) ZLR 232 (CC) at 236B-C it was held that:

> "It is clear from a reading of s 85(1) of the Constitution that a person approaching the Court in terms of the section only has to allege an infringement of a fundamental human right for the Court to be seized with the matter. The purpose of the section is to allow litigants as much freedom of access to courts on questions of violation of fundamental human rights and freedoms with minimal technicalities. The facts on which the allegation is based must, of course, appear in the founding affidavit."

Given the lowered basis for invoking the jurisdiction of a court in terms of section 85(1) of the Constitution, the poor, vulnerable and marginalised people are given a remedy for obtaining judicial protection, provided the person acting on their behalf shows that the infringement of the fundamental right or freedom has adversely and directly affected public interest.

The most prominent cases that have addressed the question of child marriage and the constitutionality of the previously stated age of consent have emanated from public interest suits. As highlighted in the paper, section 85(1) of the Constitution has lifted previously enforced restrictions regarding *locus standi*. Members of the

general public with a vested interest in the plight of the poor, vulnerable and marginalised people in society should take up the mantle and access justice on their behalf.

However, it must be borne in mind that the protagonists in public interest litigation must not patronise the beneficiaries. Their interests as affected parties in the matter ought to be treated in a manner that is in accordance with their human dignity.

The foregoing features of subsection (1) of section 85 of the Constitution giving effect to judicial protection are further strengthened by the provisions of subsection (3). In terms of that subsection, the right to approach the court under subsection (1) must be fully facilitated by the rules of court; formalities relating to the proceedings, including their commencement, must be kept to a minimum; and a court, while observing the rules of natural justice, must not unreasonably be restricted by procedural technicalities. By requiring formalities to be kept to the bare minimum and giving a court the power to circumvent procedural technicalities, the subsection gives the widest judicial protection to the right of access to justice.

The last feature that needs to be considered also relates to section 85(3)(d) of the Constitution. The section provides that the rules of a court may permit a person with particular expertise, with the leave of the court, to appear as a friend of the court. It is tempting to understand "a friend of the court", as used in

section 85(3)(d), to be restricted to the traditional conception of a friend of the court who appears to represent an unrepresented party or to provide assistance in providing answers to novel questions of the law.[26] Geoff Budlender comments on the new conception of *amicus curiae* provided for under Rule 10 of the Constitutional Court Rules of South Africa, which is in similar terms to section 85(3)(d) of the Constitution. He says:

> "The new constitutional order introduced a fourth form of *amicus curiae*: a non-party requests the right to intervene so that it might advance a particular legal position which it has itself chosen. This form of *amicus* was not permitted under the common law. This new form of *amicus curiae* reflects two important changes brought about by our new constitutional democratic order. First, it reflects the underlying theme of participatory democracy in the Final Constitution. In matters of broad public interest, such as the interpretation of the Final Constitution, courts are more disposed towards listening to the voices of persons other than the parties to a particular dispute. Secondly, it reflects the fact that constitutional litigation often affects a range of people and interests that go well beyond those of the parties already before the court."[27]

The Constitutional Court Rules, 2016 are inclined towards the acceptance of the new form of a friend of the court or *amicus curiae*. Rule 10 (2) and (3) provides that:

> "(2) A person with the expertise described in subrule (1) may apply to the Court or a Judge for an order to appear as *amicus curiae*.

[26] See Geoff Budlender, "*Amicus Curiae*" in Woolman *et al*, eds, *Constitutional Law of South Africa* 2nd Ed, (Cape Town: Juta & Co, 2012) at 8–1.
[27] *Ibid*.

(3) An application in terms of subrule (2) shall be made no later than five days after the filing of the respondent's heads of argument or after the time for filing such heads of argument has expired, and shall —

(*a*) describe the particular expertise which the applicant possesses;

(*b*) describe the interests of the applicant in the proceedings;

(*c*) briefly identify the position to be adopted in the proceedings by the applicant; and

(*d*) set out the submissions to be advanced by the applicant, their relevance to the proceedings and the applicant's reasons for believing that the submissions will be useful to the Court and different from those of the other parties."

By requiring a person applying to be admitted as a friend of the court to show his or her interest in the matter and to identify the particular position that he or she seeks to take, rule 10(3) of the Constitutional Court Rules brings the new form of a friend of a court under its scope of application. See the cases of ***In Re: Prosecutor-General of Zimbabwe of his Constitutional Independence*** **CCZ–13–17** and ***Chokuramba*** *supra* for examples of scenarios wherein friends of the court intervened to advance particular positions, backed by submisssions they believed would be useful to the Constitutional Court in the determination of the issues that were before it. The possibility of the admission of a friend of the court to advance particular interests and legal positions is useful in the protection of the rights of poor, vulnerable and marginalised people. The Legal Aid Directorate, law clinics, civil society organisations and legal practitioners may apply to be admitted as friends of the court in matters involving the alleged violation of the fundamental rights or freedoms of the poor, vulnerable and marginalised people.

Despite the procedural outlook of section 85 of the Constitution, persons claiming *locus standi* under subsection (1) must address their minds to the applicable rules of court regulating access to a court in terms of that section. For example, when someone who has obtained leave for direct access approaches the Constitutional Court in terms of section 85(1) of the Constitution, rule 22(2) of the Constitutional Court Rules, 2016 requires the person to file an affidavit setting out the facts upon which relief is claimed. In particular, the Rules require an application to state the nature of the violation being alleged, the basis upon which the applicant seeks relief and the nature of the relief which is sought. The procedural rules in place aid the poor, vulnerable and marginalised people have the basis of their claims to justice fully clarified and, when properly interpreted and applied, they need not be considered obstacles to access to justice.

It must also be stated that the provisions of section 85 of the Constitution may be directly relied on to ensure the proper application and operation of the mechanism of judicial protection by the courts. This is because a person who had approached a court, other than the Constitutional Court, for relief may impugn such a court's decision if he or she alleges that the court violated a fundamental right by the manner it reached its decision. This is why in the case of ***Williams* v *Msipha N.O. & Ors* 2010 (1) ZLR 552 (S) at 566B–C**, it was stated that:

> "The right to an effective judicial protection of a fundamental human right or freedom requires that the judicial officer should act in accordance with

> the requirements prescribed by the Constitution for the protection of the particular right or freedom."

With particular reference to the Supreme Court, the Constitutional Court held in the case of ***Lytton Investments (Private) Limited* v *Standard Chartered Bank Zimbabwe Limited & Anor* 2018 (2) ZLR 743 (CC)** at 750A that:

> "The individual constitutional complaint against infringement of fundamental rights and freedoms is a procedure for constitutional review that is separate from but additional and complementary to the other constitutional remedies."

In the ***Mwoyounotsva* v *Zimbabwe National Water Authority* CCZ–17–20** case at p 12, para 33, the Court described constitutional review of a decision of a court in the following words:

> "The theory of constitutional review of a decision of the Supreme Court in a case involving a non-constitutional matter is based on the principle of loss of rights in such proceedings because of the court's failure to act in terms of the law, thereby producing an unlawful decision. There must, therefore, be proof of the failure to comply with the law. The failure must be shown to have violated a fundamental right protected by the Constitution."

The theory of constitutional review under section 85 of the Constitution of a decision of a court – which usually is the Supreme Court – guarantees the viability of the mechanism of judicial protection itself. Constitutional review of the decisions of courts presents itself as a way of preventing arbitrary decisions that

infringe fundamental rights and freedoms enshrined in **Chapter 4** of the Constitution.

Even though the principle undergirding section 85 of the Constitution is that justice must be accessed by all, the law imposes some conditions for access to justice. The most obvious condition that comes to mind is *locus standi in judicio* or standing. In simple terms, it refers to one's right, ability or capacity to bring legal proceedings in a court of law and it is justified by showing that one has a direct and substantial interest in the subject matter and outcome of the litigation.[28] According to the author A Moyo:

> "There are strong linkages between broad standing rules and access to constitutional justice. This is so because 'a more liberal standing regime … makes it easier for individuals to raise constitutional issues as a means of vindicating constitutional entitlements'."[29]

Children are the most affected subgroup of the poor, vulnerable and marginalised people by the legal condition that they ought to have standing before approaching the courts. Without standing, children are unable to approach the courts in their own capacity for the vindication of their fundamental rights. However the broad provisions on standing set out in section 85(1) of the Constitution ameliorate the difficulties that the poor, vulnerable and marginalised people without *locus standi* would face in attempting to access the courts for justice.

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[28] See *Makarudze & Anor* v *Bungu & Ors* 2015 ZLR 15 (H) at p 23B.

[29] See Moyo, Admark. "Standing, access to justice and the rule of law in Zimbabwe." *African Human Rights Law Journal* 18, no. 1 (2018): 266-292 at p. 289. Available at: http://dx.doi.org/10.17159/1996-2096/2018/v18n1a13. Accessed on 16 May 2022.

The second significant legal condition is that the poor, vulnerable and marginalised people seeking to access the courts must comply with the rules of court. The case of ***Museredza & 303 Others* v *Minister of Agriculture, Lands, Water and Rural Resettlement & Ors* CCZ–1–22** aptly demonstrates the precondition of satisfying the rules of court. In that case, a group of people approached the Constitutional Court seeking leave for direct access in order to apply for the rescission of an order that they claimed to have been erroneously sought or granted. However, they did not approach the Court in accordance with the applicable rules of the Constitutional Court that govern the rescission of judgments. The Court held at pp 12–13 that:

> "[24] … the right of access to courts does not give a litigant the licence to unilaterally decide on the procedure for accessing the court. The procedure applicable is as a consequence rooted in fairness and this is concretised by the power of the Court to enact rules that delineate procedural requirements. This Court has in a plethora of authorities emphasised the obligation of litigants to adhere to the law and adopt the process set out in rules. In *Kombayi v Berkhout* 1988(1) ZLR 53 (S) at 56D-57A, the court in that matter emphasised the obligation by litigants and their legal practitioners to observe the rules of the respective courts wherein relief is sought. …
>
> [25] It is trite therefore that the rules form the backdrop of procedure, and that this serves to buttress the rules of natural justice that there be an equal playing field where every party is afforded a right to be heard in their cause."

Similarly, in the cases of ***Sidiqi* v *Muteswa*; *Sidiqi* v *Muteswa & Ors*** *supra*, a litigant sought to rely on section 69 of the Constitution to justify his refusal to

comply with the extant judgments that bound him. The Court held that section 69 could not be used as defence for his disregard of extant orders of the Supreme Court.

When the two cases are considered together, it becomes evident that another precondition imposed on the poor, vulnerable and marginalised people seeking to access the courts is that they have to do so within the parameters of the rules of the courts. Even though these preconditions have predetermined the manner in which the right of access to justice will be exercised, the conditions are rooted in considerations of public interest and justice. A right of access to justice must be counterbalanced with equal conditions that recognise the human inclination to abuse court processes.

3. FLEXIBLE PROCEDURES AND VICTIM-CENTRIC COURTS

It is not unusual to hear of victims of injustice shunning the courts because they fear the reprisals that may be directed at them by their assailants, relatives or even members of the community. Despite the accessibility and availability of the courts to the poor, vulnerable and marginalised people on the basis of the principle of equality with all other people, practical access to them may be impeded by victim-insensitive approaches and complex procedures. This is why measures are in place and continue to be reviewed to ensure that the courts are victim-sensitive and have flexible procedures.

A victim-centred approach is defined as "the systematic focus on the needs and concerns of a victim to ensure the compassionate and sensitive delivery of services in a non-judgmental manner".[30] Victim-centred approaches are most common in criminal courts. In this regard, measures were established to increase the participation of survivors of crime in the criminal justice system. Usually, most of the victims of crime are women and children, who also form part of the the poor, vulnerable and marginalised people.

In recognition of their vulnerability and the unsuitability of the regular criminal procedures to afford them access to justice, the Victim Friendly System – "VFS" – was set up in 1997 through the amendment of the Criminal Procedure and Evidence Act aimed at supporting survivors of sexual violence and abuse to pursue their right to access specialised health, justice, welfare and other services.[31] In this way, witnesses that are deemed to be vulnerable in any criminal proceeding are given a range of support services to assist their participation in the proceedings, including using an intermediary to work with the vulnerable witness. The VFS is available at all criminal courts. The Judicial Service Commission is continuously taking efforts to ensure the viability of the system, including the training of judicial officers and support staff as well as the

[30] See Office for Victims of Crime Training and Technical Assistance Centre, "Victim-centred approach," Accessed 3 June 2022. Available at: https://www.ovcttac.gov/taskforceguide/eguide/1-understanding-human-trafficking/13-victim-centered-approach/.

[31] See the *Protocol on the Multi-Sectoral Management of Sexual Abuse and Violence in Zimbabwe*, (Harare: Judicial Service Commission, 2012). Available at: https://www.togetherforgirls.org/wp-content/uploads/2017/10/Multi_Sectoral_Protocol_2012-Zimbabwe.pdf. Accessed on 19 June 2022.

development of working blueprints such as the Protocol on the Multi-Sectoral Management of Sexual Abuse and Violence in Zimbabwe.

Regarding "flexible and understandable procedures", it is difficult to pinpoint with precision what a flexible justice system is. Notwithstanding this, it happens that justice systems and the procedures employed by the courts are usually conceptualised in terms of what they should not be. The typical words used are that systems should not be "rigid", "complex", "slow" and "expensive". Conversely, the characteristics that a civil justice system that ensures access to justice should conform to were aptly summed up by LORD WOOLF, who is a former Master of the Rolls and Chief Justice of England and Wales. These characteristics are as follows:

"(1) It should be just in the results it delivers.

(2) It should be fair and seen to be so by:

- ensuring that litigants have an equal opportunity, regardless of their resources, to assert or defend their legal rights;
- providing every litigant with an adequate opportunity to state his own case and answer his opponent's; and
- treating like cases alike.

(3) Procedures and costs should be proportionate to the nature of the issues involved.

(4) It should deal with cases with reasonable speed.

(5) It should be understandable to those who use it.

(6) It should be responsive to the needs of those who use it.

(7) It should provide as much certainty as the nature of particular cases allow.

(8) It should be effective, adequately resourced and organised."[32]

Admittedly, the poor, vulnerable and marginalised people will usually face considerable difficulties in understanding court procedures and utilising them. Notwithstanding this, the Judicial Service Commission has taken the time to find and implement ways to simplify court processes and provide support to persons who face challenges in using the courts. In the past five years, the rules of all courts were simplified with procedures that were now archaic and difficult to understand removed. Additionally, the Judicial Service Commission constituted a Rules Committee that is composed of all relevant stakeholders in the justice delivery system, which continuously considers issues relating to the adaptation of the rules of courts to provide simple, effective and adequate access to justice.

4. THE INTEGRATED ELECTRONIC CASE MANAGEMENT SYSTEM – I.E.C.M.S.

Unforeseen and unpredictable events are capable of interfering with physical access to justice. Characterised by strict control measures including curfews and restrictions on movement and almost all court activities, the horrors of the COVID-19 pandemic exemplified the ways in which physical access to justice can suddenly be interfered with beyond the capacity to promptly mitigate such interference.

[32] See R Matsikidze, "The Rules of Civil Procedure in the Magistrates Courts of Zimbabwe: When Rules of Civil Procedure Become an Enemy of Justice to Self-Actors", *University of Zimbabwe Law Journal*, 2019 at p. 79. Available at: https://old.zimlii.org/zw/journals/UZJL%202%281%29-04-matsikidze-civil.pdf. Accessed on 28 May 2022.

Recently, the Judicial Service Commission launched the Integrated Electronic Case Management System – the "I.E.C.M.S". The I.E.C.M.S. is a web and computer-based system that manages and tracks all aspects of cases filed in the courts. It is capable of integrating all the courts in Zimbabwe and has already integrated some of the superior courts, such as the Constitutional Court and the Supreme Court. At present, it is operational in the Constitutional Court, the Supreme Court and the Commercial Division of the High Court. Plans are at an advanced stage to roll out the I.E.C.M.S. programme to cover the remaining courts, thus completing the process of the digitisation of all the courts.

The I.E.C.M.S. provides multifarious benefits to both judicial officers and court users. The leading advantage is that there is prompt and efficient access to a court. A litigant can file a case from anywhere in the world and participate in court proceedings virtually. Additionally, the case management system helps to improve the efficient finalisation of matters and the reduction of the case backlog. I must highlight that the Judicial Service Commission has set up e-filing centres at all court stations in the country. This is intended to provide members of the public without electronic gadgets access to the I.E.C.M.S. and assistance during their use of the case management platform. The creation of an electronic and prompt avenue to obtain judicial protection thus improves access to justice for the poor, vulnerable and marginalised people.

5. SYSTEMIC OR INSTITUTIONAL SOLUTIONS

Barriers to effective access to the courts often manifest due to the actual structure or setup of the court system. Effective solutions to such problems can only be secured by the reconfiguration of the system or institution itself. The Judiciary is open to adopting solutions for any systemic problems impeding full access to justice by the poor, vulnerable and marginalised people. These problems may emerge from the structure of a judiciary or the court system. They may undermine the mechanisms put in place to ensure access to justice. Systemic solutions then come in to address the root cause of each systemic problem.

The Judiciary is alive to the fact that its modes of operation need to be continuously assessed in order that it is able to offer the judicial protection guaranteed by the Constitution. Various measures have been put in place to equip members of the Judiciary with the critical skills that are necessary for affording the poor, vulnerable and marginalised people judicial protection. The foremost measure in this regard is the establishment of a training institute for judicial officers.

The Judicial Training Institute of Zimbabwe – "J.T.I.Z." – was established to facilitate the training of judicial officers. The Institute, which operates under the auspices of the Judicial Service Commission, facilitates and promotes the training and capacity development of all staff members within the Judicial Service, including Judges and magistrates. The J.T.I.Z. also gives effect to the provisions of section 165(7) of the Constitution, which place an important obligation on

members of the Judiciary to take reasonable steps to maintain and enhance their professional knowledge, skills and personal qualities, and in particular to keep themselves abreast of developments in domestic and international law. It is through skills development that an efficient Judiciary that can advance access to justice will be established. The training work carried out by the J.T.I.Z. is complemented by strict ethical guidelines in the conduct of judicial work such as the timelines imposed for the delivery of judgments in reserved matters.

Another measure that was put in place by the Legislature is the establishment of specialised courts, such as the maintenance court and the children's court. The two aforementioned courts are particularly designed for the poor, vulnerable and marginalised people. Specialised courts are another instance of systemic or institutional solutions to operationalising judicial protection. An article by Professor A Frieberg in the *Journal of Judicial Administration* has set out the advantages of specialised courts as follows:

> "A specialised court can be regarded as a court with limited or exclusive jurisdiction in a field of law presided over by a judge with expertise in that field. The advantages of specialisation include improved judicial decision-making through the use of judicial expertise, more efficient court processes because of judges' and counsels' familiarity with the subject matter and interlocutory processes and reduced backlogs in the generalist courts."[33] (*the emphasis is mine*)

[33] See Freiberg, Arie. "Problem-oriented courts: Innovative solutions to intractable problems?" *Journal of judicial administration* 11, no. 1 (2001): 8-27 at p. 12. Available at: https://www.researchgate.net/profile/Arie-Freiberg/publication/292693494_Problem-oriented_courts_Innovative_solutions_to_intractable_problems/links/56e72e0408ae4c354b1a78d6/Problem-oriented-courts-Innovative-solutions-to-intractable-problems.pdf. Accessed on 31 May 2022.

The development of institutional solutions to systemic problems enables the Judiciary to be constantly aware of the difficulties faced by the poor, vulnerable and marginalised people in accessing justice. There is a transformative and constitutional control of the work of Judges that seeks to ensure the people are able to access justice. In other words, there is a demand for substantive constitutionalism.

6. LEGAL AID DIRECTORATE

This scheme is the most vital component in driving access to justice, particularly in respect of poor, vulnerable and marginalised persons. The purpose of the Directorate is to bridge the debility that prevents marginalised persons from accessing justice. This commitment follows through the guiding principle in section 31 of the Constitution which states that "the State must take all practical measures, within the limits of the resources available to it, to provide legal representation in civil and criminal cases for people who need it and are unable to afford legal practitioners of their choice". Poor, vulnerable and marginalised persons fall under the ambit of this provision, as they are inherently vulnerable in legal proceedings, more often than not being unable to cater for their own litigation.[34]

[34] Section 50(1)(b) of this Constitution stipulates that any person arrested 'must be permitted, without delay … (ii) at their own expense, to consult in private with a legal practitioner […] of their choice'. Section 70 provides that any person accused of an offence has a right '(d) to choose a legal practitioner and, at their own expense, to be represented by that legal practitioner', or '(e) to be represented by a legal practitioner assigned by the State and at State expense, if substantial injustice would otherwise result'.

To this end, the Legal Aid Act [*Chapter 7:16*], even though it predates the Constitution, serves to establish the criteria for benefiting from the legal aid scheme. Section 8 of the aforesaid Act stipulates that:

> "Subject to this Act, a person shall be eligible for legal aid under this Act if, in the Director's opinion —
>
> (*a*) he has insufficient means to obtain the services of a legal practitioner on his own account; and
>
> (*b*) he has reasonable grounds for initiating, carrying on, defending or being a party to the proceedings for which he applies for legal aid; and
>
> (*c*) he is in need of or would benefit from the services provided in terms of this Act in respect of the proceedings for which he seeks legal aid."

However, the work of the Legal Aid Directorate has been hampered by the gradual economic slide experienced since the turn of the century. As such, greater co-ordination is required between the Law Society and the Directorate to ensure that p*ro deo* litigation increases in respect of the poor, vulnerable and marginalised sections of society. This in turn will supplement the valiant efforts by civil society organisations such as UNDP and ZWLA in alleviating the problems that torment poor, vulnerable and marginalised people in society.

Another initiative, though a matter of policy, is the adequate financing of the Legal Aid Directorate. This arises out of the need to acknowledge that poor, vulnerable and marginalised people are vulnerable and require the support of the State in accessing justice. Poor, vulnerable and marginalised people ought to be

accorded this financial support, as the State bears the primary duty of attending to the needs of its subjects.

7. PARALEGAL PROGRAMMES

This presentation would be incomplete and it would be remiss to fail to relate the role that legal students can play in enhancing access to justice in respect of poor, vulnerable and marginalised people. Though not yet registered as legal practitioners by the High Court, law students are repositories of knowledge of both adjectival and substantive law. As such, there is an avenue for them to contribute as paralegals to the access for justice initiative. The *Paralegal Advisor Services Institute in Malawi* (PASI) describes paralegals "like paramedics or bare foot doctors, [that] provide 'first' legal aid to ordinary people".[35] Therefore, they occupy a vital role in the dissemination of legal knowledge to the poor, vulnerable and marginalised people.

FORMS OF RELIEF AFFORDED TO THE POOR, VULNERABLE AND MARGINALISED PEOPLE THROUGH JUDICIAL PROTECTION

The existence of inherent rights to equality and dignity necessitates the availability of remedies that are commensurate with people's objectives of accessing the courts. There are several forms of relief that courts are able to give to the poor, vulnerable and marginalised people and in order to give effect to their

[35] The Paralegal Advisory Service Institute, *Where there is no lawyer: Bringing justice to the poorest of the poor*, (2015).

claim of a right of access to courts. Suffice to note that the right of access to the courts is a means to an end. Even when someone alleges that his or her right of access to the courts has been violated, the logical purpose of the vindication of that right is the protection of another right.

The *ubi jus ibi remedium* maxim stands out as a restatement of the necessity of having remedies for any right accorded by the law. The maxim literally means that "where there is a right, there is a remedy".[36] The existence of an efficient and sufficient remedy completes the whole system of access to justice. It encapsulates the basic understanding that a person must be able to obtain a remedy for every injustice meted out to him or her that is recognised by the law.

In the normal run of things, the mechanism of judicial protection must result in poor, vulnerable and marginalised people obtaining specific relief that addresses any violation or infringement of their right of access to justice. Even though all the forms of specific relief that the courts may grant fall under judicial protection, it is important to discuss some of them separately in order to put their utility into perspective. Accordingly, I am deliberately zeroing in on the remedies enumerated under section 85 of the Constitution, because the section falls within the principal provisions of the constitutional order that are established to ensure the protection of fundamental human rights.

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[36] See Black H M *et al* (eds), *Black's Law Dictionary,* Fourth Edition, (St Paul's, Minnesota: West Publishing Co., 1968) at p 1690.

Section 85(1) of the Constitution provides as follows:

> <u>“(1) Any of the following persons, namely —</u>
>
> …
>
> is entitled to approach a court, alleging that a fundamental right or freedom enshrined in this Chapter has been, is being or is likely to be infringed, and the court <u>**may grant appropriate relief, including a declaration of rights and an award of compensation**</u>.” (*the emphasis is mine*)

The provisions of section 85(1) of the Constitution do not predetermine the kind of relief that a court may grant in order to give effect to the judicial protection of a fundamental right or freedom. The most important characteristic spelt out by section 85(1) is that whatever relief is granted, it must be <u>appropriate</u>. The word “appropriate” suggests that a remedy must not only be proper but suitable in the circumstances. For a remedy to be regarded as sufficient, it must adequately address the complaint. See the decision of the African Commission on Human and People’s Rights in ***Gabriel Shumba* v *Zimbabwe* 228/04**. Two specific forms of the possible relief that a court may grant are enumerated in section 85(1) of the Constitution, namely, a declaration of rights and compensation. Interdicts would also be sufficient to forestall a likely or ongoing injustice arising from an infringement of a fundamental right or freedom.

THE EFFECT OF THE PROVISIONS OF SECTION 175(6) OF THE CONSTITUTION

A discussion of the specific forms of relief that a court may grant would be incomplete without reference to section 175(6) of the Constitution.

Section 175(6) plays a special role in the realisation of the judicial protection of the right of access to justice. The section is decisive of the manner in which the end-product or remedy obtained upon resort to judicial protection is fashioned. It reads:

> "(6) When deciding a constitutional matter within its jurisdiction a court may —
>
> (a) declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of the inconsistency;
>
> (b) make any order that is just and equitable, including an order limiting the retrospective effect of the declaration of invalidity and an order suspending conditionally or unconditionally the declaration of invalidity for any period to allow the competent authority to correct the defect."

It is self-evident from the wording of section 175(6) of the Constitution that justice and equity are at the centre of the orders that courts may make in constitutional matters, including in constitutional matters that involve fundamental human rights. A court, in exercising its powers under section 175(6), relies on a discretion that is bounded by considerations of justice and equity. The issuance of an order in accordance with section 175(6) means that the retrospectivity of a declaration of invalidity may be limited or the declaration may be temporarily suspended conditionally or unconditionally.

Notwithstanding the imperative of maintaining the unbridled enjoyment of fundamental human rights and justice, section 175(6) of the Constitution serves a purpose in balancing the relief flowing from the mechanism of judicial

protection with the need to maintain order in constitutional governance. The subsection recognises that without control relief issued by a court may cause disorder. A court must be aware that when it declares a law or conduct to be unconstitutional, its decision will have an impact on other institutions of the State. Giving suspended orders maintains the comity existing between arms of the State. In addition, the limited retrospectivity or suspended prospectivity of a declaration may stop further injustice from occurring.

In the South African case of ***Rahube* v *Rahube & Others* [2018] ZACC 42** at para 64, the Constitutional Court of South Africa stated that:

> "This Court must be cautious not to create new and different injustices in our attempt to remedy the one perpetrated by section 2(1) of the Upgrading Act. This Court is, therefore, empowered under section 172(1) of the Constitution to make an order limiting retrospectivity. In *Ramuhovhi*, this Court held that one of the factors that must be considered when limiting retrospectivity is the disruptive effect that unlimited retrospectivity would have. It further stated:
>
> > 'Limiting retrospectivity helps "avoid the dislocation and inconvenience of undoing transactions, decisions or actions taken under [the invalidated] statute". Currie and De Waal state that the disruptive effects of an order of retrospective invalidity must be balanced against the need to give effective relief to the applicant and similarly placed people.'"

Accordingly, the poor, vulnerable and marginalised people need not frown upon orders with limited retrospectivity or suspended prospectivity, as they are intended to balance the comity existing between different arms of the State and

to prevent further injustices from occurring as a result of uncontrolled declaration of invalidity. This is why it was observed in the ***Mudzuru*** case *supra* that section 175(6) of the Constitution deals with "the immense disruption that a retrospective declaration of invalidity may cause on the persons who conducted themselves on the basis that the legislation [or conduct] was valid".

The foregoing remarks should never be regarded as a suggestion that declarations of invalidity concerning the judicial protection of the fundamental right of access to justice will always be modified. There are some instances in which it will be impracticable, unjust, inequitable or inappropriate to suspend the operation of a declaration of invalidity. In the ***Chokuramba*** case *supra* the Court did not issue a suspended declaration of invalidity because it was just and equitable to guarantee the immediate protection of the rights of the juveniles who were subject to the order.

CONCLUSION

The poor and vulnerable people are the primary victims of marginalisation, discrimination, exclusion and exploitation, leading to extreme forms of poverty and vulnerability. Without effective, inclusive and affordable access to justice mechanisms, the poor, vulnerable and marginalised people are denied the opportunity to enjoy, claim or reassert their rights or challenge breaches thereof. The barriers to justice that are attitudinal, procedural or physical have the effect of denying the poor, vulnerable and marginalised people the appropriate standard

of justice that is critical for resolving some root causes of marginalisation, discrimination, poverty and vulnerability.

The right of access to justice of poor, vulnerable and marginalised people exists to guarantee that there is always fair dealing between people. I observed in my address that justice is borne out of the basic human right of dignity. The decision of the Constitutional Court in ***Chokuramba*** *supra* helpfully distilled the rationale and importance of human dignity as a foundational value. It is from the firm basis of human dignity that the notions of justice, fairness and equality can only arise. Access to justice must be considered as access to the protection of human dignity.

I discussed the means through which poor, vulnerable and marginalised people can exercise their right of access to justice. Two mechanisms stood out, namely, the concept of the constitutional guarantee of rights and judicial protection. These mechanisms are complementary and mutually depend on each other. For access to justice by poor, vulnerable and marginalised people to prevail, there must be measures in place to ensure the efficacy of the system of judicial protection. Various measures were identified as aiding access to justice, including section 85 of the Constitution and the I.E.C.M.S. I reiterate that these measures are interrupted by social and economic problems. Consequently, there must be a constant awareness by all stakeholders of the problems undermining access to justice. I therefore end by saying that all stakeholders in the justice delivery system must play their part in ensuring the feasibility of the solutions aimed at

addressing the problems faced by poor, vulnerable and marginalised people in accessing justice.

I Thank You!