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The Role of the Zimbabwe Human Rights Commission in the Promotion of Fundamental Rights and Freedoms

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1. Introduction

Human Rights Commissions (HRC) are important entities in the democratic space of many countries. They play the role of a watchdog, educator and at times they also have powers of enforcement. Such Commissions can take up cases, investigate them, resolve complaints and refer some cases to courts for judicial pronouncement. In many countries in Africa and beyond such institutions were set up a long time ago. Zimbabwe was one of the late comers in Africa in coming up with a National Human Rights Institution (NHRI). Other African countries such as Uganda, Malawi, South Africa and Ghana had taken the lead in a development that Hatchard (1999) refers to as a wind of change. Hatchard makes the observation that prior to 1990 the constitutional landscape of much of Commonwealth Africa was characterised by military rule or executive dictatorship in the form of the one-party state coupled with the widespread abuse of human rights. This period was followed up by a phase where countries adopted new constitutions some of which introduced human rights commissions. According to Chiduzza (2015) the development of NHRIs in Africa was also partly helped by the provision of donor support in the 1990s. These funds resulted in the establishment of several NHRIs to serve as independent bodies for the protection and promotion of human rights.

The key features of a good NHRI are that it must be independent and not subject to control by anybody or authority, it must be accessible to the people, have capacity to provide remedies for infringement of rights, is accountable to the public, its members have security of tenure and is adequately supported from the national purse for it to pursue its mandate without hindrance. The legal framework which sets up the Zimbabwe Human Rights Commission fares very well to NHRIs found in other jurisdictions in trying to provide the necessary legal guarantees for the effective operations of the Commission. A few aspects require streamlining to make the operations of this important Constitutional body top notch.

1.1 The Background of the Zimbabwe Human Rights Commission (ZHRC)

The Zimbabwe Human Rights Commission ZHRC started its work in 2010, after the promulgation of Lancaster House Constitution number 19. However, the history of the ZHRC can be traced earlier than that. Section 100R of amendment number 19 introduced the ZHRC and the new name for Commission. An act of parliament to regulate the ZHRC was also crafted at that time and is still in force. Under the Lancaster Constitution, introduced in 1980, the office of the Ombudsman was created with the overall mandate of investigating complaints made by the public against public authorities. The constitution provided that the Ombudsman was empowered to investigate complaints against action taken by any employees of the Government. There was a limitation in that the Ombudsman could not investigate members of the Defence Forces, Police Force or employees of a local authorities. This was a major drawback on the effectiveness of that office in protecting the public from human rights violations and abuse. The Ombudsman Act (Chap 10:18) was replaced by the Public Protector Act (Chap 10:18) which transferred the functions of the Ombudsman to the Public Protector. However, the mandate and powers of the office remained largely similar. Under the 2013 Constitution, the Public Protector Act was repealed. Section 16 of Part 4 of the Sixth Schedule to the 2013 Constitution of Zimbabwe provides as follows:

Public Protector

16. (1) The Public Protector Act [Chapter 10:18] is repealed.

(2) Any matter that was being dealt with by the Public Protector immediately before the effective date must be transferred to the Zimbabwe Human Rights Commission for finalisation.

It is debatable whether it was advisable to abolish the office of the Public Protector and give all of its functions to the Human Rights Commission. There were fears that the Zimbabwe Human Rights Commission would struggle to deal not only with “ordinary” human rights cases, without having the huge additional task of dealing with cases of bureaucratic injustice. Feltoe (2017) allays those fears by asserting that the 2013 Constitution does expressly guarantee the right to administrative justice and this right has

thus been brought within the mainstream of fundamental rights in the Bill of Rights. In this sense, the Human Rights Commission is perhaps the correct agency to deal with violations of this right.

In the 2013 Constitution the provisions relating to the ZHRC which were introduced by Amendment 19 were carried over. The new constitution retained the Zimbabwe Human Rights Commission among five other independent commissions. The Human Rights Forum of Zimbabwe (2011) called the setting up of the Commission a “commendable milestone for Zimbabwe in its bid to address human rights violations”. Indeed the setting up of the ZHRC in the form it was established was a good development for the promotion and protection of human rights in Zimbabwe. The Commission allows the public to access both human rights and administrative rights cheaply and easily.

1.2 The International Framework for National Human Rights Commissions

Gomez (1998) explains that a human rights commission is a state sponsored and state funded entity set up under an act of parliament or under the constitution, with the broad objective of protecting and promoting human rights. With this overall objective in mind, a human rights commission may perform a range of functions. These functions include dispute resolution through adjudication or mediation, human rights education, documentation and research, advising governments on human rights issues, and setting human rights standards. This definition is in tandem with sections A (1) to A (3) of the Paris Principles which provide for a broad range of activities that can be done by a NHRI. Human rights commissions have a unique role to play; they review laws and policies, educate the public, advice and on occasions litigate in order to set the law. A human rights commission is an important institution in addressing human rights violations and in protecting the public from abuse.

Most national human rights institutions emerged after the adoption of the Universal Declaration of Human Rights in 1948 and the establishment of the UN Commission on Human Rights. Initially, only a few institutions were established to handle the increasing numbers of human rights instruments. Later between 1990 and 2002, the number of NHRIs rose from eight to fifty-five in all regions of the world. (Dadzie, 17)

National and local human rights commissions have been established in several parts of the world with different success stories. According to Gomez supra the first human rights commission was set up in Saskatchewan in 1947 and since then several countries have established similar commissions. Human rights commissions gained prominence after the United Nations began to actively promote the concept. This active promotion began in 1991 when the Centre for Human Rights in Geneva organized a consultation on national human rights institutions. The United Nations made a resolution dealing with national institutions for the protection and promotion of human rights (NHRIs) in 1991. The resolution was adopted by the General Assembly in 1993 through resolution 48/134.

In Commonwealth countries the impetus for this institution largely emanated from the 1991 Harare Commonwealth Declaration in which Commonwealth heads of government pledged to protect and promote the fundamental political values of the Commonwealth concentrating especially upon 'democracy, democratic processes and institutions which reflect national circumstances' (Hatchard, 1999).

In Africa, the African Charter on Human and Peoples' Rights (ACHPR) provides for the creation of NHRIs by governments in Africa. Article 26 of the ACHPR states:

State Parties to the Present Charter shall have the duty to guarantee the independence of the Courts and **shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of rights and freedoms guaranteed by the present Charter.**

Therefore, National Human Rights Institutions (NHRIs) have a solid foundation in the African continent. They are seen as a key element in the promotion and protection of human rights in the continent. Indeed, taking into account of Africa's democratic governance record, wars, environmental challenges and the rule of law challenges there is a strong justification for vibrant NHRIs in Africa.

It must be noted that NHRs occupy a very special role in that on the one hand they have characteristics that closely resemble those of Non-Governmental Organisations and on that other hand they are a public body created and funded by the government. As a consequence they have been on the receiving end of some attacks. Dickson (2000:19) captures this sentiment this way:

Human rights commissions (HRCs) around the world occupy a curious position.On the other hand, they are perceived by some as being too close to government to adopt a totally objective stance on human rights issues; nongovernmental organizations (NGOs), for instance, are often critical of HRCs for not being radical enough in their pronouncements.

It is submitted that this attack is not fair and justified. A NHRI is not a non-governmental organization and its creation alone without more cannot be a basis for its attack. After all, NHRIs are not the only institution which is created by the state in this way. For example, courts are an arm of the state but can be independent despite being one arm of the state. As long as guarantees of independence are in place; national human rights institutions can work effectively. In addition, they cannot work in isolation but need the support of other national institutions such as the executive, parliament, NGOs and the courts. Equally important for the success of the NHRI is the culture of a given nation. A culture that supports and respects the protection of human rights can equally support the success of a Human Rights Commission.

2. The Case of Ghana's Commission of Human Rights and Administrative Justice

The Commission of Human Rights and Administrative Justice (CHRAJ) was established in 1993 under the 1992 Constitution of Ghana by Act 456. CHRAJ is the national institution for the protection and promotion of fundamental rights and freedoms and administrative justice in Ghana. CHRAJ combines the work of the Anti-Corruption Agency, the Ombudsman and the Human Rights Commission under one umbrella. The Commission on Human Rights and Administrative Justice exists to enhance the scale of good governance, democracy, integrity, peace and social development by promoting, protecting and enforcing fundamental human rights and freedoms and administrative justice for all persons in Ghana. Section 218 of the Constitution provides the functions of the Commission.

The CHRAJ investigates complaints of human rights violations, denial of the enjoyment of a right, inappropriate administrative actions and decisions of public institutions and public officials and corruption in public institutions or by public officials. (Section 218 (a) to 218 (c)). In Ghana no institution, body or person is excluded from the Commission's jurisdiction. This in part reduces the impact of possible political interference. This is a

provision that deserves emulation by many African countries including Zimbabwe. The fact that no institution, body or person is insulated from the scrutiny of the Commission points to the seriousness that the people of Ghana view the Commission. It also means that no person can escape scrutiny by raising the cloak of their official title or office. However, for due process reasons the Commission cannot investigate; a matter which is pending before a court or judicial tribunal. The CHRAJ cannot be involved in a matter involving the relations or dealings between the Government and any other government or an international organization or a matter relating to the exercise of the prerogative of mercy. These exceptions are understandable and accord with ordinary constitutional provisions in democratic societies.

Any person complaining of a human rights abuse, administrative injustice as well as corrupt practices of public officials in Ghana can file a complaint free of charge. Complaints can be lodged via phone, email, post, and fax or in person at any of the Commission's offices in Ghana. CHRAJ has offices in a number of provinces and districts of Ghana. Section 10 of the Commission on Human Rights and Administrative Justice Act, 1993 provides that, "there shall be established in each Region and District of Ghana Regional and District branches respectively of the Commission." Complaints can also be submitted through the online form. From the available options of communication with the Commission it is apparent that there is a great degree of informality in the manner in which complaints can be made. This helps in making the CHRAJ accessible to all citizens. In terms of the remedies that CHRAJ can provide to the public, they are wide and varied. CHRAJ is also empowered to resolve complaints through negotiation and compromise (see section 218 (d) (i) of the Constitution). CHRAJ can make recommendations for corrective action and if the recommendations are not complied with within three months, CHRAJ can enforce its recommendations through the courts. (Section 218 (d) (iii) and iv) of the Constitution.

2.1 Analysis of CHRAJ's Framework

A number of positives can be drawn from the both the legal framework setting up CHRAJ as well its mode of operation. Iyer (2011) noted that CHRAJ was established in an environment where corruption, a dearth of accountability, and infringements of justice

were common under past authoritarian and civilian regimes. The Commission gained a reputation of independence within a short space of time even though it was operating in an environment where it lacked resources for operational requirements. (Iyer, *supra*, Dadzie, 38)

The CHRAJ has scored other major successes in its operations. For example it has handled a huge number of disputes within a short space of time. Dadzie (*supra*, 17) states that between its establishment in 1993 and its tenth year, the CHRAJ received as many as 64,804,000 complaints, averaging 5000 complaints annually. About seventy percent of these complaints were resolved by mediation which has the advantage of being informal, flexible and relatively simple and non-adversarial as compared with the courts' adjudicatory system. The use of mediation and other alternative forms of dispute resolution mechanisms which are more common in private law is a welcome development which can be copied by other nations. Human Rights Watch (2001) noted that these services have been found acceptable and welcome by Ghanaians and the accommodating approach has contributed to building public confidence in the CHRAJ as a responsive institution. It was therefore a good development in 2016 when the ZHRC adopted regulations through Statutory Instrument 77 of 2016 which allows the resolution of disputes through negotiation, mediation and conciliation.

Just as in many African countries including Zimbabwe, access to the ordinary courts by ordinary people is very difficult due to the costs associated with doing so. Dadzie (38) addresses the position in Ghana as follows:

Many Ghanaians still find legal representation for assessing the formal justice system beyond their means. Against this background, the CHRAJ presents a verifiable complement to the courts through its ability to enable many marginalised persons and low or non-income earners obtain access to justice nationwide. NHRIs like the CHRAJ are designed to provide a complement to the judiciary for purposes of increasing access to justice particularly for the indigent and voiceless in society as part of good governance requirements in national development.

With the number of complaints dealt with in Ghana alluded to in the two previous paragraphs this is indeed a reality for Ghanaians. In short the CHRAJ has been accepted as an institution serving the people in Ghana. Acceptance by society is key for the effectiveness of the Commission.

CHRAJ's Commissioner and two Deputy Commissioners, all of whom are appointed by the president, have the same status as Appeals Court and High Court judges in Ghana, with the same security of lifelong tenure. (Sections 3 and 4 of the Act). The purpose of the tenure provision is to enable the commissioners to make decisions impartially, without fear of losing their jobs. In a way the provision insulate the Commissioners from political interference. In addition, independence of the Commission is guaranteed by section 6 of the Act. These provisions are positive in their impact to the operations of the Commission.

One major weakness of the structure of CHRAJ lies in its multi-functions. The law bundles three different functions into the hands of CHRAJ as a way of limiting the costs of running the unit. Iyer (*supra*, 3) explains this as follows:

...the commission's design limited its reach. CHRAJ combined the mandates of an ombudsman, a human rights commission and an anti-corruption institution under one umbrella. The Committee of Experts had envisioned the extraordinarily broad mandate as a way to keep costs low.

Placing so many functions that are unrelated to each other has the risk of jeopardizing the effectiveness of the body. It may also lead the unit to be over whelmed by its responsibilities. CHRAJ has a mandate that straddles human rights, administrative inefficiencies and corruption. This is too wide a mandate. Iyer agrees and provides the following illustration:

First, the institution's broad mandate resulted in a heavy workload for all employees. For example, in 2002, the 12 lawyers at the commission's main office in Accra handled an average of 200 cases each. The triple mandate of ombudsman, human rights agency and anti-corruption commission created a heavy caseload and a congested docket. In 1993-1994, CHRAJ received 3,197 cases. In 2003, it received 13,726 cases. (Iyer, 9)

While administrative issues may be closely related to human rights matters the two have little in common with combating corruption other than the mere fact that corruption can result in a denial of human rights protection for citizens. Even if the three areas are related other countries have provided for different bodies to deal with them. That is a better approach. Notwithstanding that challenge the unit appears to have acquitted itself very well in its discharge of its functions.

Another weakness of CHRAJ lies in its limited number of Commissioners. Three Commissioners provided for by section 216 of the Constitution as read with section 2 of the Act are too limited a number. While CHRAJ has done well, despite this challenge, the best is to expand the number of Commissioners to a minimum of around five or six. Compare for example the positive report by Human Rights Watch. (APRM, 2005; Human Rights Watch, 2001). A wider number of Commissioners would help in the operations of the Commission. For example if two Commissioners cannot attend a meeting for whatever reason it would mean that the remaining Commissioner cannot have a meeting. Having slightly more members will help in achieving a quorum despite missing other members.

The CHRAJ (2010) complained of poor funding, coupled with inordinate delays in releasing budgeted funds. The Commission noted that this had often delayed investigations and implementation of planned programmes. In addition, lack of adequate resources has led to a high rate of staff attrition, among the professional class, poor infrastructural and logistical support. The Commission in the report cautioned that this state of affairs would have an effect on the quality of work as well as the general output of the Commission. This challenge appears to be a general challenge in African institutions. As a result in the same report the Commission gave acknowledged financial and technical the support received from the Royal Dutch Embassy and DANIDA in the year. Reliance on donor support raises a number of concerns for institutions of this nature. There is a justifiable fear that once donors play a significant role in support of such institutions they could end up dictating the agenda of the NHRI. At the end of the day this would affect the independence of the Commission.

3. The Zimbabwe Human Rights Commission

The Zimbabwe Human Rights Commission (ZHRC) is created by section 242 of the constitution. The Commission is made up of a Chairperson and 8 other members appointed by the president from a list of 12 nominees. The chairperson is appointed with the consultation of the Judicial Services Commission and the Committee on Standing Rules and Orders of parliament. Members of the Commission are chosen for their integrity and experience in the promotion of human rights. To provide for the procedures of the commission as well as making further provision for the Commission parliament enacted the Zimbabwe Human Rights Commission Act (Chapter 10:30) in 2012. This Act supports the Constitution in regulating the functions and mandate of the ZHRC.

The nomination process has challenges in that the president and politicians have enormous power in the appointment process. Sarkin (2012) argues forcefully that the role of parliament and the president should be reduced. He raises the fear that the present dispensation creates a situation of horse trading of candidates for their political persuasion as opposed to their suitability. In addition, he says that the fact that the president chooses 8 candidates from a list of candidates rather than simply appointing those candidates sent to him “further exacerbates the influence of politics in the process”. In his view there should be no room for the president to pick and choose candidates referred to him. While a valid point, the other side of the argument is that parliament represents all people of Zimbabwe hence its involvement is justifiable in a democratic society.

The ZHRC has a general mandate of promoting awareness and respect for human rights and the realisation of such rights in Zimbabwe. Section 243 lays out a number of powers for the Commission. These powers include promotion of awareness, promote protection, monitor, assess and ensure observance, receive and consider complaints from the public, investigate any authority or person, secure appropriate redress and protecting the public against abuse of power. The Commission has powers to direct the police to carry out suspected criminal violations of human rights and to visit places of detention, prisons and refugee camps.

The powers of the Commission are indeed wide and diverse. Sarkin (2012) has a problem with this diversity of responsibilities of the Commission. He believes that too many responsibilities may clog the Commission from properly carrying out its core work of protecting human rights. He says that giving the Commission so many functions can dilute its abilities with respect to its core human rights functions. He suggests as an alternative establishing an Ombudsman, and an office that inspects prisons and other places of detention. The criticism while justified can be answered very well. The fear that the Commission runs the risk of being distracted from its core functions by other activities is genuine but as long as those other activities deal with human rights then it is the responsibility of the Commission to act on them. But to an extent the criticism is valid. Just as in the Ghanaian Commission, there are too many responsibilities that are not core human rights matters.

The Commission is mandated in terms of 323 of the constitution to submit an annual report to parliament. The weakness of that requirement is that the report has to be submitted through the line minister. The problem of the requirement is that the minister may delay or stop a report being sent to parliament for any reason. This opens the whole process to political interference. This may therefore become a stumbling block to the work of the Commission.

3.1 Analysis of the Structure of the ZHRC

This section will appraise the strengths and weaknesses of the structure of the ZHRC on the basis of the following attributes; independence, accessibility, accountability and mandate. It is a positive development that Zimbabwe decided to come up with a Human Rights Commission created by the Constitution of the land. Being a constitutional body the Commission has a certain degree of legal stability and protection. Unlike an ordinary statute constitutional provisions are more difficult to amend or repeal. The formalities and processes required for amending the constitution are more stringent as provided by article 328 of the Constitution. Hatchard (1999) agrees that, “unlike many offices of the ombudsman, all the NBHRCs are established by the national constitution. This gives them a greater measure of protection against attempts to undermine their activities or even to legislate them out of existence.” Chiduza (*supra*) cautions that the fact that the

Constitution established a fully operational Human Rights Commission with enabling legislation, does not automatically guarantee the effective protection and promotion of human rights. The fear held being that the institution could just be a window dressing created without a real intent to promote and protect human rights. Chiduza (2015) believes that, “the success of the ZHRC in effectively protecting and promoting human rights goes deeper than its mere establishment.” Indeed a number of factors, such as, legal, political, financial and social have a bearing on the performance of a body such as the ZHRC.

3.1.1 Independence of the ZHRC

Independent Commissions such as the ZHRC must be independent and not subject to the direction or control of any individual. One fundamental requirement set out in the Paris Principles is that National Human Rights Institutions must be independent of the state. Section B (1) of the Paris Principles stipulate that:

- (1) The composition of the national institution and the appointment of its members, whether by means of an election or otherwise, shall be established in accordance with a procedure which affords all necessary guarantees to ensure the pluralist representation of the social forces (of civilian society) involved in the promotion and protection of human rights, particularly by powers which will enable effective cooperation to be established with, or through the presence of, representatives of:
 - (a) Non-governmental organisations responsible for human rights and efforts to combat racial discrimination, trade unions, concerned social and professional organisations, for example, associations of lawyers, doctors, journalists and eminent scientists;
 - (b) Trends in philosophical or religious thought;
 - (c) Universities and qualified experts;
 - (d) Parliament;
 - (e) Government departments (if these are included, their representatives should participate in the deliberations only in an advisory capacity).

It is crystal clear that there is emphasis is on total independence of the institution from political interference as well as the need to cater for all sectors of society in the composition of the Commission.

In this regard Article 235 of the Zimbabwean constitution provides that:

(1) The independent Commissions—

(a) are independent and are not subject to the direction or control of anyone;

(b) must act in accordance with this Constitution; and

(c) must exercise their functions without fear, favour or prejudice; although they are accountable to Parliament for the efficient performance of their functions.

(2) The State and all institutions and agencies of government at every level, through legislative and other measures, must assist the independent Commissions and must protect their independence, impartiality, integrity and effectiveness.

(3) No person may interfere with the functioning of the independent Commissions.

It follows that from a legal point of view the Commission has independence. The Constitution gives the Commission separate legal personality and as such makes it capable of making its own decisions. In addition, chapter 18 Part 1 of the Constitution further attempts to insulate Independent Commissions from interference. These are good provisions which attempts to create independence and to insulate the commissions and the office holders from interference. Independency come in many different forms. It can be legal, operational, financial (resource) and other attributes.

The institution must also be totally independent of other government bodies and departments. Reporting requirements that subsumes the Commission to political players or government officials distorts the independence of the body. Likewise, its budget should not be mixed with that of any line ministry of government department. The Human Rights Forum *supra* (2011: 2) argued that:

The present Commission as set out in Amendment 19 is not independent and therefore not in line with Paris Principles.....Control of the Commission with respect to independence, budgeting, funding and reporting mainly rests with the Minister of Justice.....

It is therefore a serious problem if the commission is or is perceived as an impartial institution. Just like the courts a good perception and respect can only be enhanced if there is a community consensus of ZHRC'S independence and impartiality. Therefore, any feeling from whatever quarter that the Commission is not independent creates serious challenges of legitimacy and good will in the eyes of the public.

In the final analysis it is suggested that the Commission should have direct access to parliament for reporting purposes. Likewise, ZHRC must have a direct vote in the national budget which is not reported or submitted through a line ministry.

3.1.1.2 Security of Tenure of Commissioners

On the positive side, the Zimbabwe Human Rights Commission Act, in terms of s20 as read with section 320(1) of the Constitution guarantees the security of tenure of members of the ZHRC. Members are appointed for a five year term which may be renewed for one additional term. At the same time, Commissioners can only be removed from office for cause through a process similar to that of the removal of judges. This enables members of the ZHRC to exercise their duties without any fear of being removed from office. Commissioners thus have clearly defined terms of office in order to ensure that they discharge their duties without fear or favour. This arrangement enables Commissioners to act independently of any outside influence as their offices are not threatened. This is at par with the position in Ghana's CHRAJ.

This is as near as possible with the requirements of the Paris Principles in Section 2 (1) (3) where it says:

(3) In order to ensure a stable mandate for the members of the national institution, without which there can be no real independence, **their appointment shall be effected by an official act which shall establish the specific duration of the mandate.** This mandate may be renewable.....

This principle requires that the term of office must be clear from inception so that members can exercise their functions independently without fear.

The only weakness that has been raised with the Zimbabwean provisions is the immense power wielded by the president in the appointment and removal process. The president is the one who has power to suspend a Commissioner and to appoint the Tribunal which determines the suitability of a member to continue to hold office. Chiduza supra provides examples in South Africa and Namibia where other bodies such as Parliament are involved in the appointment and removal process of Commissioners. Indeed, a situation where one individual and a political player for that matter wield a lot of power in the appointment and removal of members of an Independent Commission is not justifiable by

any standard. Hatchard (p33) shares the same misgiving. He notes that it is problematic that there is no opportunity for input from organs of Civil Society in the appointment process. This is contrary to the Paris Principles, paragraph 1 which recommend that the appointment procedure must involve the 'pluralistic representation of the social forces (of civilian society) involved in the protection and promotion of human rights'. The absence of any participation by Civil Society in the appointment process of Commission is thus a major flaw if regard is had to the requirements of the Paris Principles.

ZHRC Commissioners normally scrutinize government or public authorities conduct in their daily work. As an interested party it is too much to give the President such powers. A better approach would be to share that power between the office of the president and the House of Assembly which after all represents all people. The Malawian example where Civil Society is involved in the process of appointment of Commissioners may be a good case study.

3.1.1.3 Financial Independence

It is a requirement of the Paris Principles that NHRIs must be independent in terms of resources available to it in the sense that it must have an adequate budget to support its needs. In this respect section B (1) (2) of the Paris Principles provide that:

(2) The national institution shall have an infrastructure which **is suited to the smooth conduct of its activities, in particular adequate funding**. The purpose of this funding should be to enable it to have its own staff and premises, in order to be independent of the Government and not be subject to **financial control which might affect its independence**. (Emphasis added).

In this regard article 322 provides that 'Parliament must ensure that sufficient funds are appropriated to the Commissions to enable them to exercise their functions effectively.' While a good provision on the face of it, in reality the ZHRC faced resource challenges during its formative years leading to the frustration of some of its Commissioners. The ZHRC unfortunately does not receive a direct budget from the fiscus. Instead, the Commission receives its vote via the Ministry of Justice, a situation that compromises the independence and integrity of the Commission. As a result of this arrangement, the Commission during its formative years (that is between 2012 and 2014) had resource challenges. Out of a budget requirement of US\$7, 5 million Treasury only released

US\$600 000 in August 2014. These challenges were widely reported in the print media in 2014 and were also noted by the United Nations Development Programme (UNDP) in Zimbabwe. (2014) Commenting on this aspect Chiduzo appropriately noted that:

For the ZHRC to discharge its duties effectively, the government needs to ensure that the Commission has adequate resources, its members are adequately remunerated, that the institution itself is financially independent, and that any public funds should not be under the direct control of the government. However, due to the severe economic challenges in Zimbabwe, the ability of the ZHRC to function effectively has been adversely affected over the years. Such challenges have had a negative impact on the Commission, with the former Chairperson, Reg Austin, resigning and citing operational challenges, including lack of staff, office space, and the absence of political will. At the time of his resignation the former commissioner also stated that the Commission had "no budget, no accommodation, no mobility, and no staff."

The financial challenges alluded to above are serious and points to a bad situation prevailing at the Commission. These challenges hamper the proper function and discharge of the mandate of the institution. It must be stated that the period 2012 to 2014 coincided with a difficult economic period for the nation at large. Some of the resource challenges of the Commission at that time have to be understood with that background in mind. However, from 2016 onwards the situation improved for the better. The challenges of office space, secretariat, staff and other operational resources were resolved.

Secondly, the institution must have resources to support its work and functions. Resources include offices, equipment, vehicles and other material resources. Thirdly, the Commission must have adequate and competent human resources in the form of the secretariat and the Commissioners. The UNDP Report above summarized some of the challenges that the Commission was facing at that time in the following words:

The full operationalization of the Commission is still pending in spite of the enabling legislation having been finalized in October 2012 because of absence of a secretariat, the non- finalization of the Terms and Conditions of Service of the Commissioners. This impedes the Commission's work because of the lack of clarity on the commissioners' status.

The ZHRC owns a building given to it by the Government to use as operating space. However, the offices require extensive renovations before the Commission can occupy them. In the meantime the ZHRC has procured temporary office space with support from the Danish Institute for Human Rights from where it is operating. (UNDP in Zimbabwe 2014).

A number of approaches can be used to assist the ZHRC in garnering resources for its use outside of the fiscus. If the Commission has financial autonomy it can be able to raise funds from grants and from donors. The legal framework should allow the institution to fund raise and seek assistance where necessary. Granted, care would be needed to ensure that in doing so ZHRC remains impartial and accountable to Zimbabwe.

3.2 Accessibility

A Human Rights Commission must be accessible to the public particularly the downtrodden and vulnerable groups of society such as women, mentally challenged, children, minority groups and the disabled. These disadvantaged groups normally bear the brunt of human rights abuses hence require the services of national human rights institutions more than any other groups. See for example the case of *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* 276/2003. This fact suggests that the Commission must be easily be approachable in terms of processes, composition and geographical reach. Section 22 of the Act recognizes this fact. A situation where the offices of the Commission are located only in the cities with no local offices in the provinces is not good enough just like a situation where the printed materials are in one language. To date the Commission has offices in Harare and Bulawayo. To that extent, ZHRC is very far behind the position found in Ghana where they have local offices in many districts.

Accessibility can also be affected by modes of communication adopted by the Commission. Information in the vernacular and local languages concerning the Commission improves on the accessibility of the institution. Accessibility is closely connected to availability of resources. Financial and other resources are critical in ensuring accessibility and availability of services to the public. It is notable that the ZHRC has established an interactive website which is easy to use. To its credit it has

carried some visible awareness campaigns including road shows in towns and some growth points.

The ZHRC needs to improve its level of accessibility by opening more offices in the provinces and in some cases in the districts, by having a more diverse staff population and raising awareness on the existence of the institution. Awareness raising is critical for the Commission to be effective in discharging its human rights promotion and protection mandate. The lawmaker imposed the requirement for a devolved office set up in order to improve on accessibility. Section 22 of the Act provides that the Commission “shall endeavour to establish a principal office and offices at provincial, district and other administrative levels as it considers fit for the better performance of its functions.” This provision is on all fours with section 10 of the CHRAJ Act. ZHRC should try as much as possible to establish offices in the districts. Such devolved offices can be very simple and manned by one paralegal who receives complaints and pass them on to specialists in Harare and Bulawayo. These offices can be attached at existing public buildings like court houses and police stations.

3.3 Accountability

The ZHRC is a public body which must be accountable to the people of Zimbabwe. Hatchard *supra* advocates for a system of checks and balances where someone is responsible for “guarding the guard”. He notes that the independence of the commission does not include insulating it from a regular review (although not supervision) of its activities. This observation is eminently sensible. If public accountability is not infused in the operations of ZHRC, then there could be a risk that the public do not receive the best service.

The legal framework in Zimbabwe is very clear that the Commission has an obligation to account to parliament through the provision of certain reports to Parliament and other bodies. In terms of section 8 of the Act the Commission has an obligation at the end of each financial year to submit to the Minister an annual report of its operations. The Commission may submit any additional reports to the Minister relating to the operations of the Commission. The Minister has a duty to table before Parliament any report submitted to him or her by the Commission.

Sections 244 and 323 of the Constitution further address other related reporting obligations. It is clear that the Commission has a responsibility to submit reports to regional and international human rights bodies. These requirements are in line with the

Paris Principles sections A (3) (a). The Paris Principles require that NHRIs should be responsible for the submission to government, Parliament and any other competent body, reports on any matters concerning the promotion and protection of human rights. In accordance with the Paris Principles such reports shall relate to: recommendations on the creation or amendment of any legislative or administrative provisions, including Bills and proposals; any situation of violation of human rights; human rights in general and on more specific matters; and proposals to put an end to human rights violations. It follows that the responsibility to account to the public via parliament has its roots in the international framework of the operations of NHRIs.

The only blame that can be given to these reporting requirements is that the reports to parliament are submitted via the responsible minister. This a long and winding reporting mechanism. This a weakness in the structure of the reporting system that deserves a relook. The danger with this approach is that the minister can deliberately sit on the report submitted to him if he or she does not want the contents of the report to become public knowledge. While the provisions seems to suggest that the Minister has no discretion once he receives a report, in reality the process can be abused. A better approach would have been one where the Commission Chairperson was given direct access to present the report to Parliament. This way the opportunity to sabotage the report on the part of the minister would be non-existent. In any case, the Chairperson of the Commission stands in a much better position to speak to and defend if necessary the report of the Commission than a minister of government. Better still, the legal provisions ought to have provided for direct access of the Commission to a parliamentary portfolio committee to apprise parliament of its functions. In practice though, despite the absence of an enabling provision in our law, this arrangement is still possible through the robust portfolio committee system being used in the Zimbabwean parliament. Codifying the provision in the law would make our law and practice better.

3.4 Powers of the Commission

To be effective the Commission must have a mandate that enables it to advance, protect and promote human rights. Too limited or too wide a responsibility may have a negative bearing on the role of the institution. The powers of the Commission are provided in

section 243 of the Constitution. In addition, the nature of the remedies and or interventions that the ZHRC can provide is an indicator of its effectiveness. From the powers given to the Commission one can assess whether the ZHRC is a watchdog that has teeth that can bite. Hatchard *supra* believes that the most striking difference between an Ombudsman's office and that of a Human Rights Commission concerns their remedial powers. Traditionally, an ombudsman office is restricted to making recommendations to resolve complaints whereas National Human Rights Institutions enjoy considerably wider powers, including the power to enforce their own decisions. Therefore, the ability to provide remedies and to enforce those remedies is a hallmark of a functional human rights commission. On the face of it, the ZHRC seems to lack the latter powers and its powers are comparable to that of a traditional ombudsman's office.

In the case of Zimbabwe, the Commission has very wide powers including those to promote human rights, investigating cases and to provide some remedies such as recommending prosecution of offenders and "directing the Commissioner-General of Police to investigate cases of suspected criminal violations". The power to direct the Commissioner-General of the police is indeed an important power. Section 243 of the Constitution of Zimbabwe which provides the powers of the Commission states:

(1) The Zimbabwe Human Rights Commission has the following functions-

- (a) to promote awareness of and respect for human rights and freedoms at all levels of society;
- (b) to promote the protection, development and attainment of human rights and freedoms;
- (c) to monitor, assess and ensure observance of human rights and freedoms;
- (d) to receive and consider complaints from the public and to take such action in regard to the complaints as it considers appropriate;
- (e) to protect the public against abuse of power and maladministration by State and public institutions and by officers of those institutions;
- (f) to investigate the conduct of any authority or person, where it is alleged that any of the human rights and freedoms set out in the Declaration of Rights has been violated by the authority or person;

(g) to secure appropriate redress, including recommending prosecution of offenders, where human rights or freedoms have been violated;

(h) to direct the Commissioner-General of Police to investigate cases of suspected criminal violations of human rights or freedoms and to report to the Commission on the results of such investigation;

(i) to recommend to Parliament effective measures to promote human rights and freedoms;

(j) to conduct research into issues relating to human rights and freedoms and social justice; and

(k) to visit and inspect-(i) prisons, places of detention, refugee camps and related facilities; and (ii) places where mentally disordered or intellectually handicapped persons are detained; in order to ascertain the conditions under which persons are kept there, and to make recommendations regarding those conditions to the Minister responsible for administering the law relating to those places.

(2) The Commissioner-General of Police must comply with any directive given to him or her by the Zimbabwe Human Rights Commission under subsection (1) (h).

Section 4 of the Zimbabwe Human Rights Commission Act further provides for the functions of the ZHRC. It is apparent from section 243 that the Commission is empowered to protect and promote human rights of the people of Zimbabwe at all levels by among other things receiving complaints from the public, investigating allegations of breach of freedoms, secure appropriate redress and direct certain officials to carry out investigations on suspected criminal violations of human rights. Section 243 (1) (d) empowers the Commission to investigate any complaints received by it. The nature of the complaints received is not specified in the section leaving it open to the Commission to investigate any complaints received by it. This is good as it does not limit or direct the Commission to particular acts or complaints. The only drawback is that the section does not empower the Commission to carry out investigations at its own motion a situation that is prevalent in other Commissions elsewhere. The section can however, be used to support a complaint lodged by civil society on behalf of other people such as children, the mentally challenged or those who for any reason may not want to be at the forefront of a complaint. The section does not seem to suggest that the complaint must be made by the person affected personally. In practice ZHRC has acted on complaints made by others on behalf of the affected persons. For example the case relating to identity documents referred in the next section was referred by a Civil Society Organisation.

In terms of paragraph (i) the Commission has power to visit places of detention, refugee camps and places where intellectual incapacitated persons are detained to assess the conditions of detention at those centres. The Commission can then present recommendations to the Minister responsible for those facilities. The list of activities that the Commission carries out is indeed wide. Sarkin *supra* is of the view that this wide functions are detrimental to the prospect of proper discharge of functions since the ZHRC could be inundated by responsibilities. This position is similar to the Ghanaian experience which has also been blamed for being too diverse. In particular, he suggests that the function to inspect places of detention and refugee camps could easily be dealt with by other bodies. While this observation is true sight should not be lost to the fact that places of detention for the mentally incapacitated, refugee camps and prison raise a number human rights issues with regard to the standards found there. It is submitted that this function cannot be segregated from the general human rights responsibility of the Commission. Mentally challenged people, prisoners and refugees for example deserves protection as they fall in a special category of vulnerable people who can easily be abused by authorities without any chance of that abuse becoming public knowledge. Despite this fact, this set up still pose operational challenges for the Commission.

What requires more scrutiny is the remedies and activities that the Commission can play in cases where they find violation of rights. The Commission can investigate and must also “secure appropriate redress, including recommending prosecution of offenders”. This is a good provision which does not go far enough since the Commission is limited to providing recommendations and does not allow it to act on its own. It can however, be argued that securing “appropriate redress” empowers the Commission to take whatever steps it deems necessary to redress a human right violation. This may include carrying out a hearing of a case. This is because providing recommendations is just one of the redresses that the Commission can provide. However, granting the ZHRC clear power to hear and determine cases would have been a better arrangement than the present scant provisions on the matter. The approach in Uganda where the Commission is given direct powers to hear cases and to provide several remedies such as interdicts, releasing a detained person or the payment of compensation would have been better. Hatchard

(supra, 42) justifies granting Human Rights Commissions such hearing powers on the following grounds;

The judiciary is not necessarily equipped to handle such matters for, despite increasing judicial activism in Commonwealth African countries, there still remains the prospect of judges observing self-limitations that insulate them from dealing with troubling issues with human rights dimensions. In addition, the cost, delays, procedural complexities and strict rules of evidence make it impractical to expect the courts to act alone as 'guardians of human rights'. As a result, the NBHRCs enjoy a range of other remedial powers including bringing proceedings to a court on behalf of complainants and bringing proceedings to restrain the enforcement of legislation or regulation by challenging its validity.

The drawback of such a situation is that of creating a parallel process of handling human rights cases. Citizens would have a choice between the ordinary courts and the Commission. That approach has its own challenges such as observing the separation of powers principles. This is because the Commission could hypothetically start by investigating a case then finally sit in judgement over the same case. Such a situation is hardly ideal and may have implications on the rule of law and fairness.

By contrast paragraph (h) is better phrased in so far as it requires the Commission to direct the Commissioner-General of Police to investigate cases of suspected criminal violations and the Commissioner of Police is bound to report to the Commission on the findings of the investigation. This provision is binding and leaves the Commissioner-General without any discretion in the process. The only challenge will be where the Police carry the investigations but do so in a shoddy way that no case will be sustainable in court from such investigations. Again, giving the Commission criminal investigation powers would have been contrary to the Constitution hence this requirement was an acceptable compromise. In any event, the Commission as a body would not have the necessary expertise in carrying out such investigations on its own.

One interesting observation on the powers of the Commission is that there is no office or person which is immune from investigation and other powers of the Commission. Both the Constitution of Zimbabwe and the ZHRC Act does not contain any specific restriction upon who can be investigated. Unlike in ordinary civil process where the president of the Republic has immunity from civil prosecution, there is no similar provision in terms of

suspected human rights violations. This position can be defended in that any person can be the cause of human rights violations hence excluding certain persons or offices can lead to a situation where the rights of the people will be at the mercy of such offices or persons. The situation as it is in the Constitution is therefore good for the protection of human rights in the country.

4. Achievements of the ZHRC

Despite the initial challenges that the Commission faced at inception the ZHRC has been able to weather them with the passage of time. The resource challenges were abated to an extent that the Commission now has its own offices and a functional secretariat. From an access point of view the Commission has to date established an interactive website from which citizens can lodge complaints from anywhere in the world. This is a very good development that makes the ZHRC accessible to the public. After all internet access is key in the digital environment of today's world. Despite the presence of the Commission's offices being in Harare and Bulawayo only a presence on an internet platform ensures access to a larger audience. It also allows a wider number of people to interface with the Commission.

Secondly, since 2016 more and more Zimbabweans have become aware of the ZHRC as a human rights watchdog. This can be credited to the Commission's awareness campaigns in all the provinces of the country. Complaints and other requests for assistance increased within this period. According to the ZHRC website in 2016 the ZHRC carried out 1 investigative report, while the number rose to 4 for 2017 and shot to 5 investigative reports by June 2018. Of course the rise of the investigations in 2018 can also be attributed the general elections that took place in the year. Indeed, out of the 5 complaints made by 26 June 2018, 3 of the cases were related to the elections. In general though, the rise of the complaints made is a good indication on the efficacy of the ZHRC as a body and the methods they use to reach the public. A survey of the complainants' shows that the bulk of them were rural people complaining about discrimination on issues such the allocation of food aid and farming inputs by traditional leaders and evictions from land without due process. This therefore mean that while there are no brick and mortar offices in the rural areas, the rural people are still able to access the ZHRC for

redress of their complaints. This is a great achievement on the part of the Commission, since institutions of this nature should benefit the ordinary members of our societies who cannot otherwise vindicate their rights through the courts on their own.

The Zimbabwe Human Rights Commission (ZHRC) in 2018 successfully intervened in the case of 94 Hopley residents who were being denied their right to acquire national identity documents and birth certificates on the alleged basis that they were aliens. This was in the context where Zimbabweans were registering as voters for general elections. (ZHRC, 2018). Hopley is a settlement in Harare. The ZHRC wrote to the Registrar General to issue the required documentation. A total of 94 residents were able to use that intervention to obtain the identity documents and ultimately to register as voters in the elections.

The ZHRC through regulations has somewhat ‘expanded’ the remedies it can provide to complainants. Part IV of the Zimbabwe Human Rights Commission (General) Regulations, 2016 (Statutory Instrument 77 of 2016) makes provision for resolution of complaints through negotiation, conciliation or mediation. This is another positive development which enables the public to have their complaints raised with the ZHRC system resolved through alternative dispute resolution (ADR) methods such as negotiation and conciliation. This is very good. Negotiation and mediation are generally confidential approaches to resolving disputes. Confidentiality can make the disputing parties easily find common ground. This is particularly so where the parties want to maintain a relationship after the resolution of the dispute. Many scholars point out that ADR is generally accessible, less formal and efficient in terms of time (Matsikidze, 2013, Watadza (2015, Trudeau 2002). It is also worth noting that ADR is closely related to the traditional method of resolving disputes in the customary Zimbabwean context. As a result the availability of these types of remedies makes dispute resolution easier and more accessible to Zimbabweans. The non-adversarial approach of ADR is important and provides greater room for tailor made remedies by the Commission. In the CHRAJ context 70% of the complaints lodged with the Commission are resolved by mediation.

The ZHRC has collaborated and partnered with similar bodies across the world. For example the Commission is a member of the Global Alliance for National Human Rights

Institutions (GANHRI) and ZHRC was accorded “A” status by this Alliance in 2015. ‘A’ status means that NHRI is operating in compliance with the Paris Principles. This is assessed by the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights. This status is not a mean achievement for ZHRC and for Zimbabwe at large. Within the African context, the Commission joined the African National Human Rights Institutions (NAHRI) an association of 44 strong NAHRIs. What is critical is to note that associating with these international bodies is not automatic upon application, rather applicants have to meet set criteria in terms of their operations and other considerations before they are admitted into membership. The ZHRC is also a member of the International Ombudsman Institute, a global institute with 28 African members. Membership to these associations help in capacity building, training and access to key resources such as library material. These kind of partnerships help to bridge the knowledge and resource gaps that may exist in the ZHRC. From a human rights point of view it also allows scrutiny of the work of the ZHRC as it associates and work together with similar entities.

5. Conclusion

Zimbabwe did well to establish the ZHRC to help in the protection, promotion and expansion of human rights observation in the country. Being an independent Commission set up by the government the ZHRC is immune to the attacks often raised against civil society bodies involved in the human rights activities in Zimbabwe by some political players. The creation of such an institution through the constitution of the land is a major achievement which deserves commendation. The ZHRC has to weather a number of challenges to operate at the optimum level for an institution of that nature. The major challenges and shortcomings observed by commentators revolves around the independence of the body in terms of autonomy, staffing, accountability, budget and other resources necessary for the fulfilment of its full mandate. In addition, the ZHRC does not have power to enforce many of its decisions relying instead on other bodies such as the police and the courts to do so. This is a challenge if the other bodies or persons tasked with certain human rights responsibilities do not have a human rights protection agenda in their overall mind set. For example, police can deliberately carry out shoddy investigations on complaints raised to frustrate recommendations from the Commission.

They can refuse to cooperate or promise to cooperate but do nothing. Therefore, it can be said with force that the general human rights culture of a country has major role to play in the success or failure of the operations of ZHRC. Some challenges can be resolved easily by simple amendments of the Act and the Constitution while others are connected to the overall socio-economic performance of the whole country. Such challenges can be resolved when the fortunes of the country changes. Despite some of these teething challenges ZHRC has generally performed its mandate well despite a difficult operating environment.

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