A CRITIQUE ON THE CONSTITUTIONAL PROVISION FOR AN INDEPENDENT COMPLAINTS MECHANISM FOR THE SECURITY SERVICES SECTOR IN ZIMBABWE

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ABSTRACT

The increasing interaction between the civilian population and security sector institutions suggest the need for formal regulatory frameworks in the event such interaction degenerates into abuse of civilians by the uniformed forces. Although it is admitted that security sector institutions have plausible internal systems to deal with unlawful contact between civilians and security forces, the integrity and impartiality of these internal arrangements cannot be guaranteed, particularly where the stakes are high. The Zimbabwean Constitution makes provision for the establishment of an independent oversight institution to address unlawful conduct by security services that impinges on the human rights of civilians. This Chapter traces probable features that the 'complaints mechanism' must harness from comparable jurisdictions, and also from an in depth reading of the provisions of the Constitutions. It is argued that this institutional system is critical for Zimbabwe, and history provides the justifications. As a democratic state built on constitutionalism, justice and the rule of law, the independent complaints mechanism can go a long way in complementing the work of several institutions such as independent commissions and the courts. The paper concludes that certain principles for reparations must be developed by the mechanism and comparable experiences can assist in creating these

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principles to be part of the guiding jurisprudence for the independent complaints mechanism.

1. INTRODUCTION

An examination of Zimbabwe's national security history, spanning over both the colonial and post-independence eras disclose a disquieting feature relating to accountability in the security services sector. Indeed, the regulatory systems in the sector had been found wanting on several occasions,[286] despite loud and clear voices calling for substantive reforms.[287] The adoption of the 2013 Constitution ('the Constitution') reopened debate on various oversight mechanisms in a bid to enhance good governance, transparency, accountability and open government. Importantly, the Constitution now makes provision for an oversight mechanism for the security services sector in the form of an independent complaints mechanism for use by members of the public against members of the security services sector. Clearly, this oversight mechanism is a departure from internal structures for discipline of members of the security services exercised through administrative systems in these organisations.

The critical constitutional provision that addresses an independent complaints oversight institution is section 210. In specific terms, it provides as follows:

> 'An Act of Parliament must provide for an efficient and independent mechanism for receiving and

286 See for instance *Final Report of the Commission of Inquiry into the 01st August 2018 Post Election Violence*, published on 01st December 2018. One of the Report's crucial findings (at page vii) was that 'Six (6) people died and thirty-five (35) were injured as a result of actions by the Military and the Police.' Concomitantly, a recommendation made in light of this (at page vii) was 'Accountability in respect of the alleged perpetrators;' and also 'Payment through a special Committee to be set up by the Government, of compensation for losses and damages caused including in particular, support and school fees for the children of the deceased;

287 K Chitiyo, The case for security sector reform in Zimbabwe, Occasional paper, http://rusi.org/downloads/assets/zimbabwe_SSR_Report.pdf accessed on 22 April 2020.

> investigating complaints from members of the public about misconduct on the part of members of the security services, and for remedying any harm caused by such misconduct.'

There is no doubt that the basis for the oversight mechanism must be understood in relation to several national objectives underpinning the Zimbabwean Constitution. Indeed, the regulation of the security sector must be construed as essential in the achievement of a 'democratic society based on openness, justice, human dignity, equality and freedom'.[288]

Further, an independent mechanism such as that envisaged by the Constitution can act as a 'protest' mechanism in the civil-security sector relations. It goes a long way in meeting the normative principles of public administration enshrined of Chapter 9 of the Constitution, that include the need for professionalism; transparency; accountability; responsiveness; fairness and impartiality.[289]

Accordingly, and as one scholar asserts, legislative reforms for transformation of the security services sector must be embraced not only as a constructive and evolutionary process of modernisation and capacity building, but also in order to enhance accountability, inclusive participation and efficiency in the security services sector.[290] For Zimbabwe, these desired outcomes are not only noble, but serves the additional purpose of complying with the tenets of constitutionalism and the rule of law.[291]

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288 Preamble to the Constitution. See also section 46(1); section 86 (2), and section 142 of the Constitution.

289 Section 194(1) of the Constitution.

290 See E Doro 'Reviewing the debate on security sector reform in Zimbabwe and locating the role of the legislature in the reform process' Parliament of Zimbabwe (2008).

291 See section 3(1)(a-b) and section 206 (3) (b) of the Constitution.

2. Constitutional Significance

An individual complaints mechanism is important for several reasons. First, it facilitates the exercise of democratic control over the security services.[292] Second, it ensures respect for the rule of law in the security sector.[293] Third, it promotes accountability,[294] integrity[295] and transparency[296] in the security services structures. Fourth, it focusses attention on problems in security services practice requiring corrective action. This way, the external independent Complaints mechanism works as a reform catalyst. The fifth reason is that it offers fundamental protection against the development of a culture of impunity. Sixth, it aids the protection of individual fundamental human rights.[297] Finally, it strengthens public confidence in the security sector.

3. Independent Complaints Mechanisms and the Principle of Accountability

As clear from above, complaints redress mechanisms generally promote and achieve accountability, depending on their purpose, form and mandate. Whilst accountability mechanisms come in different forms at the state level, there are four main forms of state accountability namely

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292 See S Huntington *The Soldier and the State: the theory and politics of civil-military relations* (Cambridge MA; The Belknap Press), 1957.

293 In terms of section 3 of the Zimbabwean Constitution, the rule of law is part and parcel of the founding values and principles of the Constitution.

294 Accountability is defined as a system of internal and external checks and balances aimed at ensuring that members of the Security Services carry out their duties properly and are held responsible if they fail to do so.

295 Integrity in this sense refers to normative and other safeguards that keep members of Security Services from misusing their powers and abusing their rights and privileges.

296 The principle of transparency underpins the Zimbabwean constitutional order. For instance, see the preamble to the Constitution, section 46 and Chapter 9 of the Constitution.

297 See section 206 (3) (a) of the Constitution provide that the protection of national security must be pursued with the utmost respect for— (a) the fundamental rights and freedoms and the democratic values and principles enshrined in this Constitution.

parliamentary accountability, judicial accountability, expert accountability and complaints mechanisms. There is need to explore these accountability forms in order to properly locate the accountability framework envisaged in section 210.

Parliamentary accountability is often entrenched in constitutional framework of several states across the globe. Parliament plays a crucial role as both the legislator and an oversight mechanism. As an important institution of the State, it provides a legislative framework within which the Security Services operate whilst also holding Security Services accountable.[298] This essentially prevents abuse and inappropriate use of public funds in the security services.[299]

In Zimbabwe, the legislative framework for the Security Services is fragmented. It finds expression in the Defence Act[300], the Police Act[301], and the Prisons Act.[302] Currently, there is no Act of Parliament for the intelligence services, despite section 224(1) of the Constitution providing that the intelligence services be established in terms of a statute or a Presidential or Cabinet order or directive. Zimbabwe's Central Intelligence Organization is a department in the President's Office that is not regulated by any specific statute. It lacks legislative accountability and is answerable only to the State President.[303] There is therefore potential for abuse and no individual complaints mechanism is

298 Section 207(2) of the Constitution states 'The security services are subject to the authority of this Constitution, the President and Cabinet and are subject to parliamentary oversight.' See also section 119(3); 214; 219(4) and 227(3) of the Constitution.

299 See generally A Cottey, T Edmunds & A Foster 'The Second Generation Problematic: Rethinking democracy and civil-military relations' (2002) 29:1 *Armed Forces and Society* 31.

300 Chapter 11:02

301 Chapter 11:10

302 Chapter 7:11.

303 See generally M Desch *Civilian control of the military: The changing security environment* (John Hopkins University Press, 1999).

provided for in any law to regulate the intelligence services. This weakens the chances of the public to have redress against the actions of the intelligence services.

As far as Parliamentary oversight is concerned, section 207(2) of the Constitution makes it clear that the Security Services are subject to the authority of the Constitution, the President, Cabinet and Parliamentary oversight. This essentially empowers Parliament to hold Security Services accountable. In Zimbabwe, this is mainly done through the Portfolio Committee on Defence, Home Affairs and Security Services.[304] A number of challenges bedevil Parliamentary oversight. For instance, there may be lack of expertise and professionalism on the part of Parliamentarians. Security Services may refuse to disclose classified information and Parliamentarians or staff can leak sensitive security information to the media.

A second form of accountability is judicial accountability. Judicial control of security services come in different forms. Common examples include control in court cases concerning security issues, particularly in criminal cases on security-related offences; or magistrates being given general supervisory control over ongoing security investigations or judicial proceedings.[305] Judges may also be given a role in chairing ad hoc commissions of inquiry involving security services.

In order for judicial control to be effective, the judges must be independent and possess the necessary expertise. Considerable experience and specialist training are critical. However, the ordinary courts, to the extent their formal

304 The Portfolio Committee on Home Affairs, Defence and Security Services has produced very few comprehensive reports on the national security sector in the past twenty years.

305 See section 46 of the Police Act.

competence to review decisions in this field is not blocked by procedural devices (immunity, secrecy of documentation etc.), are often faced with great difficulties reviewing in practice the large discretion which is given to the government in this area.

In Zimbabwe, special military courts are set up in terms of the Defence Act.[306] These courts include specialized Military Courts, Court Marshal and Court Marshal Appeal Court to specifically handle military cases and disputes.

The third aspect is **Expert accountability**. This is usually done through expert bodies that can be given an oversight role over the Security Services. Their mandate can be agency-specific or field-specific (e.g., only over databanks or surveillance). They can supervise certain aspects of the security work (legality, efficacy, efficiency, budgeting, conformity with human rights, policy), or certain activities (e.g. as regards security data banks). Such bodies can also be given certain control functions, e.g. as regards approving surveillance.

In Zimbabwe, the Human Rights Commission plays a crucial role in overseeing the Security Services' compliance with human rights standards in the Constitution. In terms of section 243 of the Constitution, the Zimbabwe Human Rights Commission has the mandate to ensure observance of human rights and freedoms. It can receive and consider human rights abuse complaints from the public, conduct investigations and grant appropriate relief to Complainants. It also protects the public against abuse of power and maladministration by the state, public institutions and

306 See sections 45 – 88 of the Defence Act.

officers of those institution.[307] It can therefore be argued that the Zimbabwe Human Rights Commission potentially provides for a framework for a mechanism of expert accountability for the Security Services sector especially relating to human rights violations.

The final form of accountability mechanisms are complaints mechanisms. These provide an avenue for redress to individuals who claim to have been adversely affected by the exceptional powers of security and intelligence agencies, such as surveillance or security clearance before an independent body.[308] They can further support the individual right to be heard, to privacy, to equal protection and benefit of the law and to effective remedies. Complaints may also help to lead to improved performance by the agencies through highlighting administrative failings.

Interestingly, all security services institutional systems in Zimbabwe (except the intelligence services) have internal disciplinary systems, provided for in the governing law. These systems are aimed at addressing acts of misconduct by their members in their dealings and interaction with the civilian population.[309] Further, the defence, police and prison systems have Commissions that are set up to investigate complaints made by their own members. For instance, the Police Service Commission is established in

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307 Paragraph 16 of the Sixth Schedule to the 2013 Constitution repeals the Public Protector Act (Chapter 10:18) and indicates that the Human Rights Commission takes over the role of the public protector. However, clause 17 and 18 of the proposed Constitutional Amendment Bill No. 2 seeks to bring back the Public Protector's office.

308 See for example Kenya's Independent Policing Oversight Authority Act Chapter 88; and South Africa's Independent Police Investigative Directorate (IPID) established in terms of the Independent Police Investigative Directorate Act. The UK passed the Policing and Crime Act 2017, which created the Independent Office of Police Conduct (IOPC), formerly the Independent Police Complaints Commission (IPCC) for the purpose of overseeing the police complaints system in England and Wales.

309 See sections 90 – 98 of the Prisons Act; sections 29 – 51 of the Police Act, and sections 39 – 44 of the Defence Act.

the Constitution[310] and one of its functions in terms of the Police Act is to handle individual complaints from Police members but not the public.[311]

The Defence Forces Service Commission is established in section 217 of the Constitution. In terms of section 34(1)(b) of the Defence Act, the Defence Forces Service Commission can handle individual complaints from members of the Defence Forces. It does not provide for complaints from the public. The same position prevails under the Prisons Act; in terms of section 15(1)(c) of the Prisons Act, the Prison Services Commission[312] to handle individual complaints lodged by prison officers. Clearly, the internal complains mechanisms are part and parcel of the administrative regulation of the security services. They are not independent oversight mechanisms envisaged in term of section 210 of the Constitution. Apart from this gap, the curious veil of secrecy in relation to intelligence services persists.

4. The Structure of the Independent Complaints Mechanism

What then is the form and nature of the structure envisaged in section 210? A careful analysis of the provision discloses key features that must characterise the ICM. Firstly, it is not in doubt that the Constitution envisages the establishment of a properly structured independent agency usable by the public against members of the security services. Importantly, this means the institution demanded by this provision must be provided with a clear mandate, specific powers, functions and jurisdictional limits and operational, administrative procedures. Secondly, the ICM

310 Section 222.

311 Section 55(1) of the Police Act.

312 Established in terms of section 230 of the Constitution.

must be conceptualised as complaints handling and investigation system. For the reason that the Constitution requires the ICM to 'receive and investigate', its powers to undertake reception, processing and interrogation of complaints must not raise ambiguities. Thirdly, the ICM must be empowered to consider, grant or order a set of remedies to victims of misconduct by members of the security services. This power is essential since without the power to order remedial measures, the ICM will not serve any purpose.

Several other aspects emerge from analysis of current laws. Importantly, in order to locate the ICM in the legal system, there is need to consider the nature of relationship that must exist between the ICM and other national legal institutions and agencies such as the National Prosecuting Authority, the Judiciary and the Zimbabwe Human Rights Commission.

5. THE ICM, THE JUDICIAL SYSTEM AND REMEDIES

The relationship between the ICM and the judicial system is important. Prominently, there is need to consider whether the power to order a particular remedy is purely administrative, or semi-judicial in nature. The question extends to enforcement of the remedy or order granted by the ICM. The options revolve around direct enforceability and registration in the formal courts to make the ICM remedy an order of court. Accordingly, the question is whether there is need for 'transformation' of the ICM remedy into a court order by following a registration process, or the remedy is directly enforceable as if it is an order of court.

In order to arrive at the appropriate regime of remedies that must characterise section 210, it is submitted that the kind of remedies envisaged in the provision have a transitional justice characteristic, rather than a judicial form of justice. To that extent, such remedies must be understood from a transitional justice perspective since they are based on reparative theories, and not criminal justice theory.[313] McCarthy observes that remedies under this regime are a departure from 'the traditional outcomes of the criminal justice process, namely the acquittal or punishment of the accused' which are more concerned with 'society's needs, most obviously for incapacitation and deterrence, than with addressing the harm suffered by victims through the transgressor's conduct.'[314] Reparative justice, he asserts, is based, on this fact that the 'justice process is said to take insufficient account of, and to respond inadequately to, the needs of the victim, the character of the harm done to that victim and the complexity of the harm done to wider social bonds by the transgressor's conduct.'[315]

It is submitted that the remedy expressed in section 210 must seek to 'adequately respond to the needs of the victim' and the consequences of the harm to the victim. It is not a remedy similar to the orders issued by the judicial process on a daily basis. In contrast, it is a remedy that seeks to repair broken societal bonds between civilians and the security services sector in a manner that does not 'depersonalise or industrialise' the justice process.[316] In

313 C McCarthy 'Reparations under the Rome Statute of the ICC and reparative justice theory' (2009) 3 *The International Journal of Transitional Justice*, 250–271.

314 C McCarthy above, 253.

315 C McCarthy above, 253.

316 See R Henham, 'Some Reflections on the Role of Victims in the International Criminal Trial Process,' *International Review of Victimology* 11 (2004): 201–224.

essence, the remedy must be reparative, and therefore, sui generis, rather than judicial in nature.

Does the Zimbabwean Constitution recognise other forms of remedies, other than judicial remedies? A study of other non-judicial institutions in the Constitution can provide guidance on the nature of the remedy to be awarded by the ICM. Section 239(k) outlines that one of the functions of the Zimbabwe Electoral Commission is to 'receive and consider complaints from the public and to take such action in regard to the complaints as it considers appropriate'. The same provision is duplicated in relation to the functions of the National Peace and Reconciliation Commission.[317] Arguably, this kind of power appears non-judicial; it is not akin to the power to 'remedy any harm' caused by the misconduct of a state institution.

Another provision is section 243(1) (g) that gives the Zimbabwe Human Rights Commission the power to 'secure appropriate redress, including recommending the prosecution of offenders where human rights or freedoms have been violated'. The same language and diction are used on the functions of the Zimbabwe Gender Commission.[318] There is no clarity on the parameters of 'secure appropriate redress', and there is need for comprehensive interpretation of these terms. However, it would seem that there is some reluctance to give the ZHRC powers akin to judicial powers that can see it making orders and awarding remedies akin to judicial remedies. The ZHRC appear to follow this interpretation. A case in point is the 2018 *Election Report* by the ZHRC, which noted various acts

317 See section 252(1)(f) and 249(1)(e) of the Constitution.

318 Section 246(1)h gives the Commission power to secure appropriate redress where rights relating to gender are violated.

of misconduct by the military forces.[319] Interestingly, one of the key recommendations by the Commission was that the Government of Zimbabwe should '*put in place the legal mechanisms for the establishment of the long awaited Independent Complaints Mechanism which must be set up in terms of section 210 of the Constitution to allow citizens to lodge their complaints against members of the security services, especially in situations where their rights would have been violated.*'[320] What can be concluded from all this is that the Constitution left it to Parliament to design the set of remedies or forms of redress that could be issued by the Commissions. Comparative studies of the South African and Kenyan systems illustrate that their systems establish a purely investigative agency without any power to issue out remedies; the structures established by the Kenyan IPOA Act and the South African IPID Act critically rely on national prosecuting authorities and the judiciary for remedies and their enforcement.

Notwithstanding the foregoing, it is submitted that the legislation to give effect to the ICM provision must clarify the various remedies envisaged under section 210 of the Constitution. These remedies, it is further submitted, must have their own effective enforcement framework. This could be done by linking that framework with the judicial framework, which currently works effectively in relation to enforcement. Further, the ICM law must also provide a clear definition of victims entitled to either financial or non-financial remedies. Related to this, the law must address the issue of whether financial reparations will be given individually or collectively to victims and whether only

319 See ZHRC Election Report (2018) at https://www.veritaszim.net/sites/veritas_d/files/ZHRC - 2018 Elections Report.pdf.

320 *ZHRC 2018 Election Report*, para 8.4.2.

material or also symbolic measures can be ordered. Importantly, the legislation must clarify the distinction between remedies for compensation, restitution and rehabilitation in relation to victims and their families, and what the ICM can do to support other forms of reparative justice and guarantees of non-repetition. Finally, the legal provisions must address how the views of victims and needs are recognized in both the proceedings and the outcome of the remedial proceedings.

6. Specific Remedies for the ICM

From the discussions above, the ICM must have power to make several orders of a final or interlocutory nature. These must include the following:

(i) order the responsible person/s to stop violations, misconduct or acts complained of;

(ii) order the responsible person to compensate, restitute and rehabilitate any victim of the violations, misconduct or unlawful acts complained of, whether in money or services or in any other manner that the Commission may order;

(iii) where the violation, misconduct or acts complained of has resulted in the death of a person, order the responsible person to compensate dependants of the deceased person;

(iv) order the return of any property unlawfully taken in the course of or as a consequence of the violations, misconduct or unlawful acts complained of;

(v) order the release of any person who has been illegally detained as a result of the violation, misconduct or unlawful acts complained of;

(vi) direct that disciplinary action be taken by the responsible organisation against the person responsible for the violation, misconduct or unlawful acts complained of;

(vii) recommend to the Prosecutor-General that criminal proceedings be instituted against any person responsible for the violation, misconduct or acts complained of;

(viii) draw the attention of the Government or any other appropriate authority to the violation, misconduct or acts complained of, and recommend measures to prevent its recurrence and redress its effects;

(ix) take any other action which the Commission considers will put an end to the violation, misconduct or acts complained of or will provide any victim with redress or relief.

(x) For purposes of compliance and enforcement, the orders of the Commission must be registered in the High Court to become an order of court.

Apart from this, the ICM legislation must accommodate judicial oversight over the decisions of the ICM, such a review and an appeal procedure. A common approach under this is to subject the ICM decisions to the review and appeal powers of the Supreme Court, whilst enforcement of the award must make use of the High Court.

It is further submitted that, in granting remedies of a financial nature,[321] the ICM must be guided by certain factors. These include the extent of the physical harm suffered; whether there was non material damage resulting in mental or emotional suffering; whether there was material damage, including lost earnings and the opportunity to work; loss of, or damage to, property, unpaid wages or salaries; whether there was lost opportunities, including those relating to employment, education and social benefits; loss of status; and

321 These are envisaged as reparatory in nature, and include compensation, restitution and reparations.

interference with an individual's legal rights;[322] costs of legal or other relevant experts, medical services, psychological and social assistance, including for vulnerable, ill and other disadvantaged social groups.

7. INDEPENDENCE OF THE ICM

The issue of independence is key for Zimbabwe's ICM to perform effectively. Comparative research is least helpful since most such agencies are established for a specific arm of the security services. For example, in South Africa, there is the Independent Police Investigative Directorate Act of 2011 that has the responsibility to investigate all deaths arising from police action or occurring in police custody, as well as alleged or suspected acts of brutality, criminality, corruption and misconduct on the part of members of the South African Police Service. Its investigators have the same powers as police officers to arrest and question people and to conduct searches to unearth misconduct.

In Kenya, investigative powers are given to Independent Policing Oversight Authority ('IPOA') in terms of the IPOA Act, whilst there is an Independent Broad-based Anti-Corruption Commission in Victoria, Australia.[323] For Scotland, there is the Police Investigation and Review Commissioner;[324] an Independent Complaints Authority in Denmark;[325] the Enforcement Agency Integrity Commission in Malaysia;[326] the Independent Commission of

322 See the jurisprudence of the ECtHR (*Campbell* and *Cosans v United Kingdom*, Just Satisfaction, App No 7511/76; 7743/76, Judgment of, 23 March 1983, para. 26; TP and KM v United Kingdom, App No 28945/95, Judgment of 10 May 2001, para. 115; Thlimmenos v Greece, App No 34369/97, Judgment of 6 April 2000, para. 70).

323 www.ibac.vic.gov.au.

324 http://pirc.scotland.gov.uk/.

325 http://www.politiklagemyndigheden.dk/english.

326 http://www.eaic.gov.my/.

Investigations in Jamaica;[327] Police Public Complaint Authority in Zambia;[328] Police Ombudsman in Northern Ireland;[329] Civilian Complaint Review Board in New York[330] and the People's Law Enforcement Board in the Philippines.[331]

There is however no discussion on the independence of the ICM. It must be independent from the Executive arm of the State. Without doubt, this means that it must not be an internal agency within the security services sector, or be controlled by the Executive. It must strike a balance between national security imperatives, human rights protection, access to justice, access to remedies and redress for human rights violations, the rule of law and accountability. The Executive Director is nominated by the Minister of Police and confirmed by a parliamentary committee. Per new amendments passed in September 2018, the Executive Director can now only be suspended by a two-thirds vote in the National Assembly, removing that power from the Minister of Police.[332] This is seen as creating more independence for the agency, and gives effect to a Constitutional Court judgment that the Minister of Police was given too much power to suspend or remove the Executive Director.[333]

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327 http://www.indecom.gov.jm/.

328 www.homeaffairs.gov.zm/?q=police_public_complaints_authority.

329 http://www.policeombudsman.org/.

330 http://www.nyc.gov/html/ccrb/html/home/home.shtml. accessed 20 October 2022.

331 See de Guzman 2008; Nalla & Mamayek 2013.

332 https://www.iol.co.za/news/politics/amendments-to-ipid-act-approved-in-national-assembly-16887076 accessed on 28 September 2022.

333 https://www.iol.co.za/news/politics/amendments-to-ipid-act-approved-in-national-assembly-16887076 accessed on 28 October 2022.

8. JURISDICTION OF THE ICM

The jurisdiction of the ICM must be clarified. Comparative research illustrates that bodies of this nature possess the general jurisdiction to investigate all forms of misconduct by the security services sector. However, there is need to define the term 'misconduct'. It is submitted that there is a choice between a narrow definition and a broader definition. From a broader view, section 208 of the Constitution indicates the conduct acceptable in the Security Services; it may be argued that any conduct inconsistent with this section constitutes misconduct envisaged in section 210. For example, acting in a political and or partisan manner, acting contrary to the Constitution or law, violating fundamental human rights, furthering the interests of a political party or cause and being employed or engaged in civilian institutions would constitute misconduct that the Security Services Individual Complaints Mechanism can investigate.

It is argued that from a narrow perspective, the kind of misconduct envisaged by section 210 is one that causes physical injury and loss of property. This is a narrow conceptualisation of section 210. This means that not all acts of misconduct currently envisaged under security specific legislation will qualify. For instance, Part V of the Police Act governs 'discipline', whilst Part XV of the Prisons Act Chapter 11:07 addresses same issue. Part XI of the Defence Act Chapter 11:02 deals with issues of conduct and discipline. It is argued that there is need for a narrower definition of misconduct, instead of a wider one commonly used in disciplinary proceedings.

Comparative analyses[334] disqualify certain forms of 'misconduct' by members of the security services. For instance, the ICM may not have jurisdiction in the following scenarios: (i) any alleged violation, misconduct or unlawful acts complained of, that occurred outside Zimbabwe;[335] (ii) any scenarios involving the exercise of the President's power of mercy under section 112 of the Constitution; and, any matter that is pending before a court of competent jurisdiction in Zimbabwe or before an international or regional court or tribunal which has power, under an international or regional human-rights instrument to which Zimbabwe is a party, to adjudicate over the matter.[336]

9. INVESTIGATIONS

Comparative research illustrates various options in relation to investigations. The most common approach is where the ICM has subsidiary units or sub committees responsible for (a) complaints handling (b) investigations (d) remedial actions and/or redress.[337] Inevitably, the powers to investigate must come with corollary powers of search, entry and seizure.

There are several aspects that must characterise the ICM law substantively and procedurally, in relation to

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334 See section 24 of Kenya's Independent Policing Oversight Authority Act.

335 This remains controversial.

336 Ordinarily, there is the proviso that,

(i) if proceedings are instituted in such a court or tribunal after the ICM has commenced an investigation into the same matter, the ICM may continue its investigation and issue such order or direction or make such recommendation in the matter as it is empowered to;

(ii) The ICM is not precluded from investigating undue delay in the finalisation of the matter or undue delays in the judicial system generally.

337 See both Kenya's IPOA and the Independent Office of Police Conduct (IOPC), formerly the Independent Police Complaints Commission (IPCC) that oversees the police complaints system in England and Wales in terms of the Policing and Crime Act 2017 (PCA 2017. PCA 2017 amended Police Reform Act of 2002, which remains to be the main legislation for the police complaints system. While some of the amendments came into effect immediately, (*e.g.*, the transition from IPCC to IOPC), several provisions were yet to take effect by end of 2019. The discussion in this study is primarily based on the amended PRA 2002 (amendments by virtue of PCA 2017).

investigations. The following aspects are key: (i) definition, form and lodging of complaint; (ii) the structure of the complaints receiving and handling system; (iii) the initiation and conduct of investigations; (iv) the decision to investigate and refusal to institute investigations; (v) the nature of powers of entry, search and seizure for purposes of investigations. (vi) holding of hearings; the format of hearings, evidentiary issues, confidentiality and protection of witnesses; (vii) procedural formalities and administrative justice aspects.

10. Dispute Settlement and Administrative Issues

The dispute settlement function is semi-judicial and quasi-adjudicatory in nature. Studies show that the ICM incorporate dispute resolution mechanisms. Accordingly, it is suggested that where the ICM considers it appropriate for the purpose of expediting the resolution of issues arising out of complaints and investigations of misconduct and human-rights violations by the security services, the ICM must have power to employ alternative dispute resolution mechanisms such as mediation, conciliation and arbitration. Further, clear provisions must be inserted in the ICM legislation on the immunity of ICM personnel and staff; the contours of the relationship with sector specific legislation or justice systems.

11. Principles for Reparatory Remedies

The ICM is an entirely novel oversight institution in Zimbabwean law and there is no guide as to the nature of principles it will embrace in granting remedies of a reparatory nature. Guidance can be sought from existing laws of delict, criminal law and constitutional law. However, it is submitted that the ICM must not be encumbered by the limitations inherent in the principles of

these branches of law. It is at liberty to develop its own principles through considering human rights law, international law and comparative law.

There are several principles from international human rights law that can assist in determining the principles the ICM can follow in granting financial and non-financial remedies.[338] This is because the right to a remedy is strongly recognised under international and regional treaty law. Article 8 of the Universal Declaration of Human Rights provide for the right of every individual to an "effective remedy" for acts violating fundamental rights. Article 9(5) of the International Covenant on Civil and Political Rights makes reference to an enforceable right to compensation whilst Article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination recognises the right to seek just and adequate reparations or satisfaction for any damages suffered. Article 14(1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment provides for an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. There are also important guidelines from the United Nations General Assembly Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power,[339] and the UN General Assembly Declaration Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.[340]

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338 See for instance, Eva Dwertmann *The Reparation System of the International Criminal Court: Its Implementation, Possibilities and Limitations* (2010), page 43.

339 Resolution A/RES/40/34,29 November 1985.

340 Resolution A/ *(A/60/509/Add.1)*] adopted on 21 March 2006 available at https://www.un.org/ruleoflaw/files/BASICP~1.PDF accessed on 18 October 2022.

Regional treaty frameworks follow the norms of these global treaty regimes. For instance, Article 21(2) of the African Charter on Human and Peoples' Rights refers to a right to recovery of property and adequate compensation. Article 63(1) of the American Convention on Human Rights calls for the situation giving rise to the breach of a right or freedom be remedied and that fair compensation be paid to the injured party. For Zimbabwe, violation of fundamental rights and freedoms in the Declaration of Rights gives rise to a claim for compensation.[341]

A study of these several treaty regimes uncovers certain common standards or values that can be regarded as principles to be followed in awarding remedies in the form of compensation, reparations, restitution, among other similar forms. The first principle is that financial remedies such as compensation and restitution must be adequate, effective, appropriate and prompt.[342] The second is the principle of non-discrimination. Accordingly, granted to victims without adverse distinction on the grounds of gender, age, race, colour, language, religion or belief, political or other opinion, sexual orientation, national, ethnic or social origin, wealth, birth or other status.[343] The ICM must avoid replicating discriminatory practices underlying the injustice, or promote further stigmatization of the victims.

The third principle is that the ICM must consider the need to make remedies in section 210 available to direct and indirect victims, including the family members of direct

341 Section 85(1).

342 See UN Basic Principles, Principle 2(c), which states that states should strive to make available adequate, effective, prompt and appropriate remedies. See also the Lubanga Reparations case, para 242.

343 See UN Basic Principles, Principle 10.

victims. This extends to those who suffered personal harm as a result of these offences, regardless of whether they participated in the proceedings of the ICM or not. The relationship between the direct and indirect victim is of essence; family and cultural and social connections have to be considered. Thus, where members of the security services assault a person, leaving them disabled, the ICM must consider granting a financial remedy that benefits their dependents, as currently permissible under the law of delict.[344] This approach is entrenched in the UN Basic Principles which states that in appropriate situations and in terms of domestic law, the term "victim" also includes the immediate family or dependents of the direct victim and persons who have suffered'[345]

Another important principle is that priority may need to be given to certain victims who are in a particularly vulnerable situation or who require urgent assistance, such as the victims of sexual or gender-based violence, individuals who require immediate medical care (especially when plastic surgery or treatment for HIV is necessary), as well as severely traumatized children, for instance following the loss of family members. This means that the ICM may need to adopt measures in terms of the concept of 'affirmative action' in order to guarantee equal, effective and safe access to reparations for particularly vulnerable victims.[346] In the case of *The Prosecutor, ICC versus Thomas*

344 See generally, Corbett, Buchanan & Gauntlett *The Quantum of Damages in Bodily and Fatal Injury Cases*; G Feltoe Guide to the Zimbabwean Law of Delict, (2009), 87 – 95.

345 See UN Basic Principles, Resolution *(A/60/509/Add.1)*], Principle 5.

346 See Convention on the Elimination of All Discrimination against Women (1979), article 4 and Nairobi Declaration, para. 7.

Lubanga,[347] the International Criminal Court followed this approach. The court stated as follows:

> The Court should formulate and implement reparations awards that are appropriate for the victims of sexual and gender-based violence. The Court must reflect the fact that the consequences of these crimes are complicated and they operate on a number of levels; their impact can extend over a long period of time; they affect women and girls, men and boys, together with their families and communities; and they require a specialist, integrated and multidisciplinary approach.

The principle of gender inclusivity must be mainstreamed in the award of remedies. It is submitted that a gender-sensitive approach is necessary in order to properly respond to challenges faced by women and girls in accessing justice in the context of harm or injury by members of the security services. Further, the principles of participation must be respected. As the International Criminal Court stated in the *Lubanga reparations case*[348], victims of the crimes, their families and communities should 'participate throughout the reparations process and should receive adequate support in order to make their participation substantive and effective'.[349]

In situations involving children, the principle of the best interests of the child must be adopted.[350] Again, a gender sensitive approach must be mainstreamed herein. Further, where children are concerned, the ICM system must

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347 *Decision establishing the principles and procedures to be applied to reparations*, No.: ICC-01/04-01/06, para 207.

348 *Lubanga Reparations case*, *supra, para 207.*

349 *Lubanga Reparations case*, para 203.

350 See section 19(1) and section 81(2) of the Constitution. See also Convention on the Rights of die Child, articles 12 and 29; Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime, para. 8(d).

'consider providing medical services (including psychiatric and psychological care) along with assistance as regards general rehabilitation, housing, education and training.'[351]

In summation, there is no shortage of literature on the principles to underpin the remedies in section 210. Clearly, the principles from international human rights law complement the principles and norms in the Constitution. Comparative legal regimes, particularly of Kenya, South Africa and the UK enrich the jurisprudence from international law relating to remedies. These several sources of literature imply that the ICM has great potential in contributing a specialized jurisprudence to the field of constitutional law in Zimbabwe.

12. Overview and Conclusion

The independent complaints mechanism envisaged section 210 is clearly an oversight institution. There is no doubt that it will go a long way in promoting the ideals of constitutionalism, rule of law, transparency, access to justice and open government. The fact that it will be located in the national security apparatus of the state means that it will shape behaviour in the security services sector. Further, the requirement for its independence implies that it will not be at the mercy of the Executive, or other government actors. These attributes are critical since their absence can either make or break the ICM. Of course, caution must be exercised since, currently, there are no indicators on the probable nature of the mechanism that government prefers, apart from the skeletal guidance in section 210. Having stated this, it is inescapable that the Zimbabwean Constitution has a clear human rights

351 See *Lubanga Reparations* case, para 221.

trajectory. It is also underpinned by sound values and principles that enhance democratic government, the promotion of the rule of law and constitutionalism. This context must shape the contours of the independent complaints mechanism proposed by section 210 of the Constitution.

The structure of the agency, its substantive, administrative and procedural aspects must further be informed by the need to achieve justice for victims through effective, prompt and adequate remedies. Without doubt, there is need to respect and implement the values of national security entrenched in Chapter 11 of the Constitution, which establishes the independent complaints mechanism. Importantly, there is need for the development of special principles for the ICM and, in the near future, the judicial courts to use in handling complaints, conducting investigations and granting effective remedies. It is hoped that the legislature will not only adopt the proposals in this paper, but seek to create a progressive, independent oversight institutional system that effectively responds, in theory and in practice, to the human rights agenda underpinning the Zimbabwean Constitution.