UNIVERSITY OF ZIMBABWE

FACULTY OF LAW

INTERROGATING THE LEGAL REGIME FOR FREE, PRIOR AND INFORMED CONSENT AND COMMUNITY RIGHTS IN THE CONTEXT OF MINING ACTIVITIES IN ZIMBABWE

A THESIS SUBMIMTTED IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR THE MASTER OF LAWS IN LAND AND NATURAL RESOURCES GOVERNANCE (LMLNR) DEGREE IN THE FACULTY OF LAW

BY

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DEDICATION

I dedicate this dissertation to my (un)born baby for abusing you to work on this research even though you were not willing to cooperate. Thank God, we pulled through.

DECLARATION

By submitting this thesis, I declare that the entirety of the work contained therein is my own, original work, that I am the owner of the copyright thereof (unless to the extent explicitly otherwise stated) and that I have not previously in its entirety or in part submitted it for obtaining a qualification.

Signature: ……

……..

Date:

CASES CITED

Alexkor v Richtersveld Community 2004 (5) SA 460 (CC)

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Centre for Minority Rights Development v Kenya (2009) ACHPR

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LEGISLATION

Communal Lands Act
Constitution of the Republic of South Africa Act No.108 of 1996
Constitution of Zimbabwe Amendment (No.20) Act 2013
Environmental Management Act [Chapter 20:27]
Environmental Management Agency
Forest Act [Chapter 19:05]
Mines and Minerals Act [Chapter 21:05]
National Environmental Management Act 107 of 1998
National Water Act No 36 of 1998
Parks and Wildlife Act [Chapter 20:14]
Prevention of Illegal Eviction and Unlawful Occupation Act [Chapter
Traditional Leaders Act [Chapter 29:17]

Water Act No 108 of 1997

ACRONYMS

ACHPR	African Charter on Human and People's Rights
ADRIP	American Declaration on the Rights of Indigenous People
AMV	African Mining Vision
CAMPFIRE	Communal Areas Management Programme for Indigenous Resources
CBRM	Community Based Natural Resources Management
CBD	Convention on Biological Diversity
CLA	Communal Lands Act
EIA	Environmental Impact Assessment
EMA	Environmental Management Act
EMA	Environmental Management Agency
FAO	Food and Agriculture Organisations
FPIC	Free, Prior and Informed Consent
GDP	Gross Domestic Product
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILC 169	International Labour Conventions 169
IPILRA	Interim Protection of Informed Land Rights Act
NDS1	National Development Strategy 1
MMA	Mines and Mineral Act
MPRDA	Mineral and Petroleum Resources Development Act
NEMA	National Environmental Management Act
OAS	Organisation of American States
PIE ACT	Prevention of Illegal Eviction and Unlawful Occupation Act
SADC	Southern African Development Community
UNDRIP	United Nations Declaration on the Rights of Indigenous Persons
ZINWA	Zimbabwe National Water Act

ABSTRACT

Th concept of free, prior and informed consent has gained traction globally, particularly in states where development has clashed with communities. This research has interrogated the nature and scope of this concept, and highlighted the international, regional and domestic legal regimes for FPIC. In its entirety, the research adopted a desk study, and embraced the doctrinal analysis of the relevant legal regimes. The main argument carried throughout this research was that the conflict between mining investment operations and community rights can only resolved by a legal and institutional system that is underpinned by principles of FPIC. In following with this argument, the research made the finding that there is a comprehensive body of norms and principles underpinning FPIC in international and regional treaty frameworks. It has further demonstrated that the domestic legal regime has not accommodated principles of FPIC, despite clear guidance from international and regional treaty frameworks. Resultantly, there are massive gaps and flaws in Zimbabwe's domestic law relating to FPIC. Communities continue to be exposed to the whims of mining operations such as land dispossession, forcible relocation with paltry compensation and without full consultative processes. There are no functional dispute and conflict resolution mechanisms to address the conflict between community rights and the right of mining investors. In all situations of conflict, the strength of mining rights has dominated the communal based rights of communities. State level institutions have always worked against community rights and in favour of mining investor.

It is in light of these positions that the research made key recommendations to enhance the legal and institutional system related to FPIC implementation. The law must be reconsidered so that it is infused with FPIC principles; land rights of communities must be strengthened; consultative frameworks with real community participation must be ingrained in the law; local level dispute and conflict resolution mechanisms must be formulated and implemented at community level and regulations for the monitoring, enforcement and implementation of remedies must be developed.

TABLE OF CONTENTS

ACKNOWLEDGEMENTS.....i

DEDICATION.....i

DECLARATION.....ii

CASES CITED.....iii

LEGISLATION.....iii

ACRONYMS.....iv

ABSTRACT.....v

Chapter 1: Introduction and Background.....1

1.1Introduction……..1

1.2Background……..……2

1.3 Problem Statement…….……...…….……4

1.4 Research Question…….…….……4

1.5 Methodology……...…….……5

1.6 Literature Review……6

1.7 Chapter Synopsis……7

Chapter 2: INTERNATIONAL LEGAL REGIME AND THE CONCEPT OF FPIC

2.1Introduction……8

2.2 FPIC and the International Regime.....9

2.3 International Treaties and Instruments that have Incorporated FPIC 11

2.3.1 Indigenous and Tribal People Convention.....12

2.3.2 Convention on Biological Diversity 13

2.3.3 United Nation Declaration on the Rights of Indigenous Peoples 14

2.3.4 American Declaration on the Rights of Indigenous Peoples 16

2.3.5 African Charter on Human and Peoples' Rights 17

2.4 FPIC and the SADC Treaties 18

2.4.1 Protocol on Wildlife Conservation and Law Enforcement 18

2.4.2Protocol on Mining 19

2.4.3Protocol on Forestry 19

2.4.4Protocol on the Development of Tourism 20

2.4.5 Protocol on Fisheries 20

2.5 FPIC in the courts 20

2.6 Conclusion 22

CHAPTER 3: **FPIC AND THE DOMESTIC LEGAL AND INSTITUTIONAL REGIME**

3.1Introduction 23

3.2International Law obligations of Zimbabwe 23

3.3 National Constitution 24

3.3.1 FPIC features in local legislation 27

3.4 Legislation and regulations 28

3.4.1Communal Land Act 28

3.4.2 Mines and Minerals Act 29

3.4.3 Environmental Management Act 30

3.4.4 Environmental Management Agency 32

3.4.5 Zimbabwe National Water Authority 33

3.4.6 Communal Areas Management Programme for Indigenous Resources (CAMPFIRE) 33

3.6 Judicial treatment of community participation 34

3.6.1 Chiadzwa Diamond Mines Eviction Cases 35

3.6.2 Chiredzi Irrigation Scheme and the Chilonga Community Dispossession 36

3.6.3 Checheche Growthpoint and the criminalisation of resistance to eviction 36

3.7 Conclusion 37

CHAPTER 4: COMPARATIVE APPROACH: THE SOUTH AFRICAN FRAMEWORK

4.1 Introduction 39

4.2 South African Constitution 40

4.3 Legislative and institutional framework 42

4.3.1 Prevention of Illegal Eviction and Unlawful Occupation Act 43

4.3.2 The Minerals and Petroleum Rights Development Act (MPRDA) 44

4.3.3 National Environmental Management Act 46

4.3.4 Interim Protection of Informal Land Rights Act (IPILRA) 48

4.4 The Courts and Case laws 48

4.4.1 Bengwenyama Minerals (Pty) Ltd and Ors v Genorah Resources (Pty) Ltd and Ors . 49

4.4.2 Baleni v Minister of Mineral Resources 50

4.5Conclusion 51

CHAPTER 5:CONCLUSION AND RECOMMENDATIONS 53

5.1 Introduction 53

5.2 Summary of Major Arguments 53

5.3 Summary of Main Findings 54

5.4 Recommendations 55

5.4.1 Incorporate FPIC procedures in the Mines and Minerals Act 55

5.4.2 Establish strong institutions in the Mines law to enforce FPIC 55

5.4.3 Formulate deterrent sanctions against non-compliance with FPIC 56

5.4.4 Develop clear criteria for compensation in cases of relocation…… 56

5.4.5 Establish local level grievance and dispute resolution procedures 56

5.4.6 FPIC Consultations must include aspects of Corporate Social Responsibility by Mining Companies 57

5.0 Conclusion…… 57

BIBLIOGRAPHY 58

CHAPTER ONE

INTRODUCTION AND BACKGROUND

1.1 Introduction

The right to free, prior and informed consent FPIC, in relation to investment projects, resource extraction and other development project, has been a subject of discussionfor the past decades within the national, regional and international frameworks. The driving force for the right to free, prior and informed consent is the observance of the internationally recognised principle of self-determination.[1]The principle of FPIC tries to safeguard indigenous people from being coerced or intimidated in venturing into developmental projects before they have full information on the impacts and scope of such project. Therefore, FPIC can be expressed as an inherent right of indigenous people to their lands and resources and respects their legitimate authority to require that third parties enter into an equal and respectful relationship with them, based on the principle of informed consent."[2]

The focus on profits has seen companies convincing municipal and national authorities to speed up extractive and investment projects, without obtaining consent of indigenous peoples who in most cases endure the consequential harm. This has created some progression of infringement of indigenous peoples' basic human rights. As a result, conflicts emerge between the Indigenous people and the investors coming in local areas. Indeed, Zimbabwe is not immune to the problems that emerge from the violation of FPIC processes. As a country Zimbabwe is blessed with a significant and diversified natural resource base[3]that include agricultural land, minerals, wildlife, water, forestry and natural vegetation.[4]Further, these resources are the main sources that the majority of Zimbabweans directly dependent on for the sustenance of their livelihoods. The endowments of natural resources that Zimbabwe is blessed with attracts local and foreign investors to invest in local communities. Thus, creating possible conflicts between

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[1]Article 1 (i) All people have the right to self-determination, the right to freely determine their political status and freely pursue their economic, social and cultural development, freely dispose of their natural wealth and resources without prejudice to any obligation arising out of international cooperation, based upon the principle of mutual benefit.

[2] Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, Working Group on Indigenous Populations, Twenty-second session, 19 -13 July 2004, p.5.

[3]A Brazier,*Climate Change in Zimbabwe. Facts for Planners and Decision Makers* (2015) 9.

[4]Ibid

communities and investors. Conflicts arise where there is no agreement between communities and investors on the balancing of investment interest and the interest of communities.

It is the main go of the Zimbabwean Government to promote socio-economic development through ensuring that mining benefits local communities. The Zimbabwean Government buttressed this mandate in its National Development Strategy 1 document, which states that devolution seeks to make a system of governance community based and people centred by encouraging the involvement of local people in formulating local level decisions and issues that affect them.[5]The Constitution of Zimbabwe in its preamble recognised the richness of the countries natural resources, the equitable sharing of such natural resources,[6] and the need for community participation in the development and policy formulation of matters affecting community livelihoods.[7]

1.2 Background

Mining operations consume large pieces of land and this land is usually occupied by communities. Conflicts inevitably arise on land use. Mining licences and leases granted to mining companies provide stronger rights than land rights held by communities. Communities do not have free-hold ownership of the lands they occupy; they occupy and use their lands at the mercy of the state or local governing authorities. This means that in the conflict over land uses, communities lose as their rights are weak, less protected by legislation and have very few remedies as compared to rights held by mining companies.

There are no adequate safeguards to protect the land rights of communities before commencement of mining operations. The regime for environmental impact assessments is very unclear in mining. Spaces for effective consultations and participation of communities before mining operations commence are very limited. In particular, there are no clear legal mechanisms to challenge the award of mining licences, or to stop on-going mining operations on the basis of violations to land rights of communities.

Since huge tracts of land are involved, the livelihoods of rural communities that are based on land uses are greatly disturbed. These include small scale agriculture, livestock ranching,

[5] Government of Zimbabwe: National Development Strategy 1: "***Towards a Prosperous and Empowered Upper Middle-Income Society by 2030***" Chapter 11: 711: the latest economic blueprint running from January 2021-December 2025. It is based on key pillars namely macroeconomic stability and financial re-engagement, inclusive growth, governance, infrastructure and utility

[6] Section 3 (3) (j) of the Constitution of Zimbabwe 2013

[7]Section 13 (2) of the Zimbabwe Constitution 2013:…… must involve the people in the formulation and implementation of development plans and programmes that affect them.

hunting and gathering forest products, grazing pastures, ritual ceremonies and practises, firewood sourcing, setting up homes and small businesses.

The clash of mining with other established rural land uses often results in forcible eviction of persons residing in the vicinity of mining operations. These evictions have been common-place and have greatly affected the relationship between mining companies and local communities. Eviction implies the forcible movement of whole households that are forced to search for new settlements, enforced livelihoods, and new social amenities.

There are no compensation frameworks in mining legal regimes that can be used to determine the nature of compensation to be granted to communities who are forcibly evicted off their lands. In most cases, the amount of compensation is determined by negotiations between the State and the mining company. These negotiations always favour the mining company, with no professional valuations of households done by independent companies.

The mining law has no grievance redress mechanisms for communities to use against granite mining companies that impinge on the land rights of communities. Neither does the existing law establish effective platforms to resolve conflicts between miners and communities. There are no legal avenues for local authorities to intervene in the disputes and conflicts. Further, there are no spaces for traditional leadership institutions to seek peaceful resolution of disputes and conflicts. Thus, apart from being exposed to evictions, resettlements and forcible relocations, communities hosting mining activities are denied effective institutions to resolve disputes and conflicts in a manner that strikes a balance between competing interests.

Mining companies are not bound to adopt internationally accepted guidelines to deal with land rights issues of communities hosting their activities. They are also not prepared to adopt international guidelines on compensation, environmental impact assessments, community relationships and free and prior informed consent. Consequently, their consultative processes are not satisfactory; they exclude critical actors and does not allow for effective communication of community views.

Massive disturbances are occasioned on community lands by mining companies. The extreme noise from blasting disturbs both humans and livestock. Extreme levels of dust make habitation in the vicinity of these companies impossible. The vibrations from the trucks transporting tonnes of mineral resources cause cracking on the houses located by the roadside. Mining activities are therefore difficult to co-exist with other community activities. These other

community activities include social activities and ceremonies, gatherings, religious activities, and entertainment.

1.3 Problem Statement

Zimbabwe has not given the concept of free, prior and informed consent its full legal status. This has presented many challenges in the implementation of FPIC principles. The lack of legal definition in Zimbabwean Statutes, nor well defined scope, content and nature of appropriate approach of the FPIC means that there is no guidance for communities and investors alike. Although the Constitution and EMA contains some provisions which promote community participation, the problem remains that there is no guideline that outlines how, when and what appropriate FPIC should be done. In addition, there is no mechanism to account for effectiveness of the approaches employed in conducting FPIC process. Moreso, there is no clear enforcement measures in cases of violation of FPIC processes and violation of human rights due to extractive processes. There is simply no guidance to the judiciary, the executive, the legislature and other critically important organs of state and government on how to apply, use and make reliance on self-determination provisions for the purposes of enhancing FPIC processes.

1.4 Research Questions

The research is based on the following research questions:

I. What problems affect rural communities that host mining activities in Zimbabwe?
II. What are the international and regional regimes for the recognition and protection of participatory rights of Communities affected by mining activities?
III. What are the domestic legal, institutional and administrative mechanisms that exist for the promotion, enforcement and implementation exist for effective implementation of FPIC in mining areas?
IV. What lessons can be drawn from the South African jurisdiction on FPIC approaches in mining areas.
V. What recommendations can be made to guide the implementation of effective FPIC approaches in Zimbabwe's mining areas?

1.5 Methodology

This research adopts a desktop study which is a qualitative method as opposed to a quantitative one. Desktop study refers to the investigation of primary and secondary writing, narrative surveys and analysis to get an understanding of a phenomenon. Primary sources of law include legislation constitutions, international treaties, regulations, protocols and all forms of statutory instruments. Secondary literature consisted of books, journal articles, research papers, thesis, conference papers and policy briefs and General Comments. These helped the researcher to develop and understand the scope, content and extent of community participation in mining areas within the broader context of human rights violations. Both primary and secondary literatures are useful at various stages of this study. There are various methods under desktop research but this research focuses on the descriptive approach, the doctrinal approach and the comparative approach.

The first research approach applied in this research is the descriptive method. The descriptive methodology will assist in the understanding of the scope of community participation in making decision that affect the Zimbabwean community. As result of government mantra on economic development model that has been largely driven by extractive industry, there are a lot of human rights violations that are evidenced through human displacement. The descriptive methodology will simply describe the problems caused by mining activities to the host communities in Zimbabwe. This method is applied in chapter 1 of this research.

The second method will be doctrinal analysis. Doctrinal analysis refers to analysis of primary sources of law and primary literature to determine the legal position and the meaning of the law over a particular subject. This method examines the black letter of the law, the legal doctrines and concepts, legal principle and provisions in legislation and international instruments. In particular this method will be applied in chapters two and three of this research paper.

Another methodology that will be used is comparative analysis. Some of the research questions cannot be answered through descriptive and doctrinal analysis alone thereby necessitating the use of a comparative approach. The South African jurisdiction will be analysed in comparison with the Zimbabwean frameworks. A comparative analysis will be very instructive in establishing how FPIC challenges in Zimbabwe could be addressed.

1.6 Literature Review

The concept of free, prior and informed consent has been commented by many academic writers as the most significant tool for the realization of the internationally recognised principle of self-determination of indigenous people. Writer such as Nathan Yeffe,[8]assessed the origin of FPIC processes as *'normative drift'*: a process whereby companies are adopting the process of FPIC at the same time avoiding the significant aspects of FPIC. As a result, corporate implying a thin, generous notion of consent, defective with spirit of FPIC as part of a self-determined governance process. The writer further argued that there is need for States, non-governmental organisation and other stakeholders to be involved on the negotiation table in order to curtail corporate dominance on the implementation of FPIC processes.[9]

The Danish National Research Foundation's Centre of Excellence for International Courts, in 2017, gives an assessment of the legal scope of the right to FPIC. In the assessment document the writers highlighted the conflicting interest of the host country's duty to protect foreign investment and foreign investors property rights against the host country's interest and that of the local communities. In most cases the local communities' interest and the societal costs of establishing an investment are being neglected.[10]In order to address the vulnerability suffered by the indigenous communities, the writer argued for the adoption of effective FPIC process as a game changer.

In comparative of analysis of Zimbabwe and South Africa mining legal frameworks on the effects of mining on local communities that host mining activities, the writer indicated that that the two states shared the same predicament in treating the host communities.[11]The author explained the effects of mining activities ranging from environmental, social, economic and cultural perspectives. The most prevalent effects of mining activities in all host communities are human displacements, environmental degradations and cultural disruptions. Further, the

[8]Yaffe, N. (2018). Indigenous consent: self-determination perspective. Melbourne Journal of International Law, 19(2), 703-749.
[9]Ibid
[10]J.Chaisse et al. (eds.), One Belt One Road Initiative. Law, Economics, and Politics, BRILL, Nijhoff Classics in International Law series, 2018
[11]TumaiMurombo, Regulating Mining in South Africa and Zimbabwe: Communities, the Environment and Perpetual Exploitation, 9 Law Env't & Dev. J. 31 (2013).

writer acknowledges the existence of laws in both countries that foster community participation in the decision- making that affect their communities. Nevertheless, these laws proved to be ineffective in the extractives sector. Lastly, he argues that, the ineffective of the laws in both countries has left out local communities at the whims of multi-corporation and the poor negotiations of state actors.[12]

1.7 Chapter Synopsis

Chapter One

This Chapter introduces the research problem and provides a background and context of the research. It further illustrates the problem statement, the research questions and the structure of the dissertation.

Chapter Two

This Chapter analyses the international and regional regimes for FPIC approaches relevant to Zimbabwean context. It further discusses principles from international law that strengthen the implementation of FPIC by domestic legal frameworks.

Chapter Three

This Chapter discusses the domestic legal, institutional and administrative mechanisms that exist for the promotion, enforcement and implementation of effective FPIC approaches inZimbabwe's mining areas.

Chapter Four

This Chapter compares the Zimbabwean framework with the South African regime on FPIC framework. It further draws lessons that Zimbabwe can learn from South Africa on the implementation of effective FPIC approaches.

Chapter Five

[12]TumaiMurombo, Regulating Mining in South Africa and Zimbabwe: Communities, theEnvironment and Perpetual Exploitation, 9 Law Env't & Dev. J. 31 (2013).

This Chapter concludes the research. It proffers recommendations that can be made to guide the process of FPIC and safeguard against violation of human rights in mining areas.

CHAPTER TWO

INTERNATIONAL LEGAL REGIME AND THE CONCEPT OF FPIC

2.1 Introduction

This Chapter focuses on the concept of FPIC in international law. It discusses this principle based on treaty frameworks at international and regional level. The main question to be answered in this Chapter is whether they are adequate principles in the international and regional instruments to guide states on FPIC. This question is based on the argument that, it is important to have FPIC grounded in international and regional treaties to guide the legislation at individual state level. Finally, the Chapter highlights the major international case law relating to FPIC.

"Free, Prior and Informed Consent" (FPIC) is a part of the cornerstone principle of the right to self-determination. Self-determination is a right that accrues to all peoples generally, but bears special significance to indigenous peoples in particular.[13] The principle demands of various actors who implement projects that potentially have an impact on the local environment, or which aim to exploit the natural resources therein, that they should obtain the free, prior and informed consent of indigenous peoples who have ties with the land on which projects are implemented. Barelli has noted that there is an imbalance of power between large corporations and states which have huge financial resources and indigenous peoples which has led to economic, extractive and industrial developments on indigenous peoples' lands taking place without recognition or regard for their cultural attachment to the land.[14]

In light of this realization, efforts have been made to acknowledge and address this problem, culminating in the development of a legal regime within international human rights law designed to protect indigenous peoples. Since FPIC is concerned with protecting the interests of the target group of "indigenous peoples", it is a key term to understand in order to appreciate from whom FPIC is to be sought and obtained.

"Indigenous peoples" is a term that is variously defined on one hand, and for which definition has been avoided on the other hand on account of the diversity of indigenous peoples. Among

[13] Food and Agriculture Organisation (2016) 'Free, prior, and informed consent: An indigenous peoples' right and a good practice for local communities' 12.
[14]Barelli M (2012) 'Free, prior and informed consent in the aftermath of the UN Declaration on the Rights of Indigenous Peoples: Developments and challenges ahead' *International Journal of Human Rights* 16 (1) 1-2.

those who have offered a definition is the World Bank Group, an important actor on the international economic plane that finances development projects. It has defined indigenous peoples as "distinct social and cultural groups that share collective ancestral ties to the lands and natural resources where they live, occupy, or from which they have been displaced."[15] While a definition provides certainty in an organizational context, it might exclude other groups who might properly self-identify as indigenous peoples and, in the process, disempower them.

The United Nations system has meanwhile, chosen the approach of identification, rather than definition of indigenous peoples. Among the attributes identifying indigenous peoples are self-identification as a member of an indigenous people and acceptance by the members of that community, historical continuity with pre-colonial and/or pre-settler societies, a strong link to territories and surrounding natural resources, distinct social, economic and/or political systems, distinct language and cultural belief systems, and a resolve to maintain and reproduce their ancestral environments and systems as distinct peoples and communities, among others.[16] For purposes of application of the FPIC principle, the identification approach is preferable since it affords a wider possible scope of application since it does not close the door on other possible identifying attributes. This is consistent with the fundamental criterion of self-identification.[17]

2.2 FPIC and the International Legal Regime

FPIC finds its legal force through the interpretation of certain widely subscribed international treaties such as the International Covenant on Civil and Political Rights[18], and the International Covenant on Economic, Social and Cultural Rights[19]. These two treaties, although not mentioning FPIC directly, are interpreted to incorporate the principle through the right of self-determination, which has the status of customary international law. The content of the right of self-determination includes the right of indigenous peoples to not only participate in decision-making on projects and policies that affect them, but also a right to determine their

[15] World Bank 'Indigenous peoples' (2022) – accessed at https://www.worldbank.org/en/topic/indigenouspeoples#1 on 18 May 2022.
[16] United Nations Permanent Forum on Indigenous Issues 'Factsheet: Who are indigenous peoples?' accessed at – https://www.un.org/esa/socdev/unpfii/documents/5session_factsheet1.pdf on 18 May 2022.
[17] In the human rights approach to data collection, self-identification is a key principle holding that data about personal characteristics should be provided by the individual to whom the data refers. See OHCHR (2018) 'Guidance Note to data collection and disaggregation' 11-13.
[18] Article 1, International Covenant on Civil and Political Rights.
[19] Article 1, International Covenant on Economic, Social and Cultural Rights.

outcomes.[20]It entails that they be informed of, and either consent to, negotiate consent, or withhold consent to projects that may affect their land, resource and other rights in a timely manner, that is free from coercion and manipulation.[21]

Meanwhile, more and more international treaties and instruments explicitly or implicitly and protect FPIC for indigenous peoples. One such instrument is the United Nations Declaration on the Rights of Indigenous Persons (UNDRIP), which, although not imposing binding commitments on States, makes specific reference to indigenous peoples as subjects bearing the right to FPIC on a range of issues.[22] The importance of UNDRRIP will be further bolstered by its incorporation into national laws and judicial decisions on matters concerning the protection of the rights of indigenous peoples.[23]

Another notable treaty in the discussion of FPIC is the International Labour Convention 169 on Indigenous and Tribal Peoples. Although this Convention suffers from a deficit of ratifications, it is significant because it is an internationally binding treaty which has additionally influenced the policies of many countries with respect to the recognition of rights of indigenous peoples in spite of its few ratifications.[24] It was a significant step forward as it abandoned the integrationist approach of its predecessor, International Labour Convention 107, by adopting a "modern, non-paternalistic, non-assimilative approach on one hand, and on the other, recognising "the aspirations of indigenous peoples to exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages and religions."[25]

Accordingly, the FPIC concept lends support to the promotion of the self-determination of indigenous peoples by requiring that project promoters ensure consultation with real

[20] A/HRC/18/42 'Final report of the study on indigenous peoples and the right to participate in decision-making'
[21] Legal Resources Centre (2018) 'Free, prior and informed consent in the extractive industries in Southern Africa'.
[22] Article 10 of the United Nations Declaration on the Rights of Indigenous peoples prohibits their removal from their lands or territories without their free, prior informed consent. Article 11.2 provides for redress by states for cultural, intellectual, religious and spiritual property taken without the free, prior and informed consent of indigenous peoples. Article 19 provides for consultation by states in order to obtain free, prior and informed consent of indigenous peoples before adoption or implementation of legislative and administrative measures that affect them. Article 29.2 also provides that no storage or disposal of hazardous materials shall take place on indigenous peoples' lands or territories without their free, prior and informed consent.
[23] 'Free, Prior and Informed Consent in the Philippines: Regulations and Realities' Oxfam America Briefing Paper, 2013.
[24]Yupsanis A (2010) 'ILO Convention No.169 Concerning Indigenous and Tribal Peoples in independent countries 1989 – 2009: An overview' 79 *Nordic Journal of International Law* 434.
[25]Yupsanis 'ILO Convention No.169 Concerning Indigenous and Tribal Peoples in independent countries 1989 – 2009: An overview' 436.

participation, leading up to consent from the affected communities to undertake the project, as well as respecting such communities' right to decline consent. Each word of the acronym FPIC describes the manner in which planning and implementation of development projects and other operations that may impact the lives of indigenous peoples must involve these indigenous peoples. The Food and Agriculture Organisation (FAO) has offered adapted definitions of the building blocks of FPIC as follows: 'Free' relates to the absence of coercion, manipulation or intimidation in a process that is self-directed and without external imposition of expectations and timelines. 'Prior' refers to the requirement that consent be sought well in advance of any authorization or commencement of activity. 'Informed' refers to the nature of the engagement and the information that should be provided, its form being accessible, clear and accurate, and delivered in the local language, and in a culturally appropriate format, among other requirements.[26] 'Consent', lastly, refers to the collective decision of the rights-holders, namely the affected indigenous community. Importantly, consent may be given, withheld, or withdrawn at any stage.[27]

The aspect of consent is not uncontroversial, however, as it creates the possibility of dual sovereignty residing in the State and in indigenous peoples. It creates the question whether indigenous peoples can veto development projects that potentially benefit the entire country in favour of their interests. It therefore appears that states have been hesitant to adopt an interpretation that demands of them to seek consent, but rather place an emphasis on consultation.[28]

2.3 International Treaties and Instruments that have incorporated FPIC

Several international treaties and instruments have in the last three decades developed and incorporated FPIC principles into their provisions. This is a welcome development that reaffirms the right to self-determination of indigenous peoples, as well as recognises their rights

[26] 'Free, prior, and informed consent: An indigenous peoples' right and a good practice for local communities' 15-16.
[27] 'Free, prior, and informed consent: An indigenous peoples' right and a good practice for local communities' (2016) 16.
[28]For example, in ILC 169 Article 6 requires states to "consult… with the objective of achieving agreement or consent for the proposed measures", but does not exclude the possibility of continuing if consent cannot be obtained.

to social, cultural and economic development that accords with their own needs and interests. Some of these treaties and instruments are discussed below.

2.3.1 Indigenous and Tribal Peoples Convention

Adopted in 1989, the Indigenous and Tribal Peoples Convention, also called the International Labour Convention 169 (ILC 169), was specially crafted with indigenous peoples' interests at the forefront of considerations. It is an important text in that for the countries that are party to it, it imposes binging obligations in respect of indigenous and tribal peoples. It nonetheless is influential in as far as its standards are adopted in subsequent instruments both at international, regional, and national levels.

Its preamble explicitly marks a departure from earlier approaches to the affairs of indigenous peoples that tended to impose development standards in an assimilationist manner. This meant that states would impose a way of doing things without regard for the impact on the possibility of the continued survival of the cultural values, spiritual, political, and economic well-being of indigenous peoples. Abandoning the assimilationist approach was therefore an important development brought by ILC 169 in the approach of states to the affairs of indigenous peoples as a matter of international law.

ILC 169 also recognised the contributions of indigenous and tribal peoples to the diversity and social and ecological harmony of humankind and international cooperation and understanding. This is key to the respect of the dignity of indigenous and tribal peoples.

While ILC 169 makes some strides in imposing obligations on states to develop mechanisms for participation of indigenous and tribal peoples in various aspects of development, policy, administrative action among others, it still falls short in respect of actually requiring free, prior and informed consent. In Article 6.2., for example, while states are required to undertake any such consultations in good faith they are only to do so "with the objective of achieving agreement or consent to the proposed measures." This leaves room for states to impose the measures if agreement fails, or if indigenous peoples are unwilling to give consent.

ILC 169 also brings important developments in respect of recognition of the special relationship between indigenous peoples and their lands and territories which they occupy, and the existence of non-conventional relationships to land that are akin to ownership, particularly

the collective aspects of these relationships.[29] This does away with the chauvinism that characterises land relationships based on western notions of ownership. In addition, ILC 169 also prohibits, as a starting point, the removal of indigenous peoples from the lands which the occupy.[30] However, where relocation is considered necessary, then it should only be pursued with the free and informed consent of the indigenous peoples concerned. Again, this provision provides an escape for states for when consent cannot be obtained, provided that procedures should be followed that permit effective representation of indigenous peoples concerned. The Convention thus falls short of giving a veto power to indigenous peoples when they will not consent. This possibility is balanced by the obligation to compensate with alternative quality land "with the agreement, or if not possible, through appropriate procedures", with at least equal legal status as was enjoyed on the lands previously occupied by the indigenous peoples concerned.[31] The Convention also mandates states to provide for the right to return to the lands where indigenous peoples were relocated from, when the grounds for relocation cease to exist.[32]

2.3.2 Convention on Biological Diversity

Adopted in 1993, this Convention recognises the "close and traditional dependence of many indigenous and local communities embodying traditional lifestyles on biological resources" and the "desirability of sharing equitably the benefits arising out of the use of traditional knowledge, innovations, and practices relevant to conservation of biological diversity and sustainable use of its components."[33]

In its substance, Article 8(j) of the Convention recognises the role of indigenous and local peoples' knowledge and traditional lifestyles in conservation and sustainable use of biological diversity. In doing so, it obliges states to promote the wider use of such means with the approval and involvement of indigenous peoples who are the holders and users of such knowledge, innovations and practices. The benefits arising from that use should be shared equitably. The Nagoya Protocol to the Convention on Biological Diversity goes further to require that traditional knowledge associated with genetic resources that is held by indigenous and local communities is accessed with the free, prior and informed consent or approval and involvement

[29]Article 13.1, Indigenous and Tribal Peoples Convention, 1989.
[30]Article 16.1, Indigenous and Tribal Peoples Convention, 1989.
[31] Article 16.4, Indigenous and Tribal Peoples Convention, 1989
[32]Article 16.3, Indigenous and Tribal Peoples Convention, 1989.
[33] Preamble, Convention on Biological Diversity, 1993.

of indigenous peoples and local communities, and that mutually agreed terms should be established. This protects the intellectual property as such, of indigenous communities by giving them a voice in its dissemination and in the sharing of its wider benefits.

Elisa Morgera and Elsa Tsioumani[34] have argued that the concept of community participation in sharing their genetic knowledge has indeed been subject to evolving interpretation by the CBD Actors. However, it is clear that there is need for cooperation between States, indigenous and local communities, and the private sector. Effective mutual cooperation of the said actors enhances the attainment of community involvement in sharing genetic information on biological resource in their communities with free and informed consent.

Scholars have argued that community participation strengthen cultural integrity. This allows Indigenous communities to preserve, develop and transmit to future generations their ancestral territories and their ethnic identity.[35] Further, empowering indigenous people to formulate policies and manage biodiversity in their own territories has resulted in more sustainable and cost-effective biodiversity protection.

2.3.3 United Nations Declaration on the Rights of Indigenous Peoples

One hundred and forty-four states in the General Assembly voted in favour of this Declaration in 2007, and since then, it has become a majorly influential, albeit non-binding instrument concerned with the rights of indigenous peoples. It is especially consequential in the formulation of FPIC as a minimum standard in certain circumstances for the ensured survival, dignity and well-being of indigenous peoples. This means that not provisioning for FPIC in certain cases falls short of respecting the human rights of indigenous peoples and in fact threatens the possibility of their survival as distinct indigenous peoples.[36]

The background of the Declaration was the recognition of the forms of discrimination faced by indigenous peoples, characterized by oppression, marginalisation and exploitation. At the same time, its negotiation was fraught with concerns by states regarding the right to self-determination of indigenous peoples, as groups existing within sovereign states, and control over natural resources existing on indigenous peoples' traditional lands. However, states, in

[34]Elisa Morgera and Elsa Tsioumani, "Yesterday, Today and Tomorrow: Looking Afresh at the Convention on Biological Diversity," Yearbook of International Environmental Law 21 (2011): 3, 9–11
[35]Indigenous and Tribal Peoples Rights Convention, 1989.
[36]Article 43, United Nations Declaration on the Rights of Indigenous Peoples.

the preamble to the declaration, expressed an urgent need to respect and promote the rights of indigenous peoples, especially their rights to their lands, territories and resources.

Article 10 of the Declaration, for example, is uncompromising on prohibiting the relocation of indigenous peoples without their free, prior and informed consent, and only then after agreement on just, fair compensation, and where possible with the option of return.[37]

Unlike the ILC 169 discussed above, the UNDRIP requires states to consult and cooperate in good faith with indigenous peoples concerned *in order to* obtain their free, prior and informed consent before adopting legislative or other administrative measures that may affect them.[38] This seems to be a higher standard that is required of states that implies that adoption of such measures is not possible if it is rejected by the indigenous peoples concerned. This opens the way for an important affirmation of the agency of indigenous peoples in the approval or disapproval of measures that have the potential of affecting their way of life, including their relationship with their lands, territories and resources. It gives indigenous peoples a more effective means to counter the adoption of measures and implementation of projects that tend to conflict with their enjoyment of their collective rights.

Where dispossession, confiscation, occupation, or use of lands belonging to indigenous peoples has been undertaken without their free, prior and informed consent, the Declaration provides that indigenous peoples have the right to redress in such circumstances. Such redress should take the form of lands, territories and resources of equal quality, size and legal status or of monetary compensation or other appropriate redress, unless otherwise has been freely agreed upon by the indigenous peoples concerned.[39]

Preservation of environmental wellbeing of indigenous communities is also addressed by the Declaration. States are requested to take measures to ensure that no storage or disposal of hazardous materials is to take place in lands or territories of indigenous peoples without their free, prior and informed consent. [40]

Article 32 presents a notable commitment by states concerning the exploitation of surface and subterranean mineral resources, as it asserts the right of indigenous peoples to determine and develop strategies for the development or use of their lands or territories or other resources.

[37]Article 10, United Nations Declaration on the Rights of Indigenous Peoples, 2007.
[38]Article 19, United Nations Declaration on the Rights of Indigenous Persons, 2007.
[39]Article 28, United Nations Declaration on the Rights of Indigenous Peoples, 2007.
[40]Article 29, United Nations Declaration on the Rights of Indigenous Peoples, 2007.

Again, a higher standard is requested of states, that requires consultation and cooperation in good faith in order to get free, prior and informed consent prior to approval of projects affecting their lands, or territories and other resources connected with development, utilization or exploitation of mineral, water and other resources.[41]

Military activities of the state, however, require only consultation, but not necessarily consent, despite their potentially damaging impact on the local environment.[42] This reflects the conservatism of states in matters of national security.

Overall, the Declaration makes important strides in guaranteeing the rights of indigenous peoples in sustaining their way of life that is strongly intertwined with their lands, territories and natural resources.

2.3.4 American Declaration on the Rights of Indigenous Peoples

On 15 June, 2016, the Organisation of American States (OAS) adopted the American Declaration on the Rights of Indigenous Peoples (ADRIP). It was adopted by thirty-five states, including the United States of America, marking a positive step in the future of rights of indigenous peoples in North America, Central and South America, and the Caribbean. The Declaration affirms the rights of self-determination, education, health, self-government, culture, lands, territories and natural resources of indigenous peoples.

It notes the important presence of indigenous peoples in the Americas and their "immense contribution to development, plurality and cultural diversity." Importantly, states also express their concern over the historic injustices faced by indigenous peoples, brought about by colonisation, dispossession of lands, territories and natural resources, which prevents indigenous peoples from exercising their rights to development in accordance with their own needs and interests.[43]

In its substance, some additional gains over and above those of UNDRIP are delivered. The

declaration prohibits states from adopting or supporting or favouring any policy of assimilation of indigenous peoples or of destruction of their cultures.[44] This prohibition is affirmed by further steps in assuring that states provide redress for the infringement of the right of

[41]Article 32, United Nations Declaration on the Rights of Indigenous Peoples, 2007.
[42]Article 31, United Nations Declaration on the Rights of Indigenous Peoples, 2007.
[43]Preamble, American Declaration on the Rights of Indigenous Persons, 2016.
[44]Article X, American Declaration on the Rights of Indigenous Persons, 2016.

indigenous peoples to cultural identity through cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent, or in violation of their laws, traditions and customs.[45] One area in which the Declaration is somewhat uncertain or weak is with respect to the protection it gives against harmful substances that may be introduced into the environment with potentially adverse effects on indigenous communities, lands, territories and resources. Unlike the UNDRIP, free, prior and informed consent is not required from indigenous communities in the first place, but they are to rely on protection by the state as a matter of right.

The Declaration also seems inadequate in that while it protects rights to preserve, protect and access their spiritual sites including burial grounds, to use and control their sacred objects and relics, and to recover their human remains[46], it is unclear how they are to do so in the absence of the possibility of giving or withholding consent to engage in operations that may tend to interfere with these rights.

2.3.5 African Charter on Human and Peoples' Rights

The African Charter on Human and Peoples' Rights is an important continental instrument providing for both the rights of individuals and the collective rights of peoples. The African Charter on Human and Peoples' Rights (ACHPR), signed and ratified by fifty-four African states, also reaffirms the right of self-determination as an "inalienable and unquestionable" right that accrues to "all peoples".[47] The interpretation of this right by the African Commission on Human and Peoples' Rights has included calls for states to respect the FPIC principle in their approaches to natural resource governance.[48] It is argued that without construing self-determination to include FPIC in such issues, that right loses its meaning as allowing development projects regardless of consent may be inconsistent with the purposes of the emergent international legal rules protecting indigenous peoples.[49] While the Charter does not speak directly to the FPIC principle, the African Commission on Human and Peoples' Rights has interpreted it in a manner that imposes obligations on states to protect communities of

[45]Article XIII, American Declaration on the Rights of Indigenous Persons, 2016.
[46]Article XVI.3, American Declaration on the Rights of Indigenous Persons, 2016.
[47]Article 20, African Charter on Human and People's Rights.
[48] ACHPR/Res.224(LI)2012 'Resolution 224 on A Human Rights Based Approach to Natural Resources Governance' (2012) – accessed at https://www.achpr.org/sessions/resolutions?id=243 on 21 May 2022.
[49]Barelli M 'Free, prior and informed consent in the aftermath of the UN Declaration on the Rights of Indigenous Peoples: Developments and challenges ahead' 4.

citizens' rights vis-à-vis corporations in the aftermath of colonisation, as reflected in the *SERAC v Nigeria* case discussed below.

Article 21 of the African Charter provides specific protections for peoples allowing for them to freely dispose of their wealth and natural resources. Interestingly, the African Charter does not repose this right in the state in this instance, but specifically in "all peoples".[50] The Charter also provides for dispossessed peoples, who, on despoliation, shall reserve the right to the recuperation of their property as well as to satisfactory remuneration. States are granted a separate right to free disposal of their wealth under Article 21, and are charged with an obligation to protect peoples from foreign economic exploitation.

2.4 FPIC and SADC Treaty.

The Southern African Development Community (SADC) treaty is a state-centric document speaking little to issues of human rights, including socio-economic rights. However, in its preamble, States indicate a mindfulness of "the need to involve the people of the Region centrally in the process of development integration particularly through the guarantee of democratic rights, observance of human rights and the rule of law".[51] It is therefore right to read into the provisions of the treaty the particular aims of participation of the "people of the Region" and the observance of human rights as being central in the concerns of the Community. Article 22 of the Treaty empowers Member States to conclude Protocols as may be necessary in each area of cooperation contained in Article 21 of the Treaty. These include trade, industry, finance, investment and mining[52], social and human development and special programs[53], natural resources and the environment[54], and social welfare, information and culture[55], among others. The areas of cooperation enumerated here are potentially relevant for the rights of indigenous peoples in as far as they affect the right to development and the exploitation of natural resources. Select of these Protocols discussed hereunder underscore possibilities, actual and potential, for the incorporation of the FPIC principle.

2.4.1 Protocol on Wildlife Conservation and Law Enforcement

[50]Article 21(1), African Charter on Human and Peoples' Rights (1981).
[51]Preamble, SADC Treaty.
[52]Article 21.3 (c), SADC Treaty.
[53] Article 21.3 (d), SADC Treaty.
[54]Article 21.3 (f), SADC Treaty.
[55]Article 21.3 (g), SADC Treaty.

One of the notable objectives of this Protocol is to facilitate community-based natural resources management practices for management of wildlife resources.[56] Article 6.2 (f) of the Protocol enjoins Member States to harmonise legal instruments governing the conservation and sustainable use of wildlife resources, pertaining in particular to measures facilitating community-based natural resources management practices and wildlife law enforcement. Article 7.4. provides that States shall establish or introduce mechanisms for community-based wildlife management, "and shall integrate principles, and techniques derived from indigenous knowledge systems…"[57] It is submitted that although the Protocol does not make mention of it, consultation, community participation, and consent in as far as such measures affect the satisfaction in the natural resources of indigenous peoples would be indispensable.

2.4.2 Protocol on Mining

Article 1 of the Mining protocol recognises among historically disadvantaged groups disabled people, women, and indigenous people.[58] Article 2.8 provides that Member States shall promote economic empowerment of the historically disadvantaged in the mining sector. Article 2.10 further requires Member States to jointly develop and observe internationally accepted standards of health, mining safety and environmental protection.[59] This latter provision may properly speak to the international standards on the environmental rights of indigenous peoples, including the full FPIC process before new mining operations are commenced in indigenous peoples' lands and territories.

2.4.3 Protocol on Forestry

In terms of promoting participation of communities and local people, the Protocol on Forestry is very progressive among other Protocols. In its Article 8, it provides that national forestry programmes and policies of states shall ensure that national processes and procedures for preparing and revising national forest plans, classifying forests and establishing management plans for forests and protected areas containing forests involve consultation with affected communities, alongside private sector enterprises engaged in forest-related activities.[60] Article 11 protects ecologically representative or unique examples of forest type, as well as forests that

[56]Article 4.2 (g) Protocol on Wildlife Conservation and Law Enforcement.
[57]Article 7.4, Protocol on Wildlife Conservation and Law Enforcement.
[58]Article 1, Protocol on Mining.
[59]Article 2.10 SADC Protocol on Mining.
[60]Article 8.3 SADC Protocol on Forestry.

have a cultural, spiritual, historic, or religious values, and also endangered forest species.[61] This protection would not make sense except where it is accompanied by consultative processes involving input from communities attaching these importance to the forest resources. Article 11 further gives affected and interest parties the right to participate in decision-making regarding natural forests and forests on public or state land, and to have access to any information held by public or private bodies that is necessary for this right to be exercised effectively.[62] This particular provision clearly provides for, at the very least, prior, informed consultation for affected parties that may include local communities.

Article 12, meanwhile, provides that states shall adopt national policies and mechanisms to enable local people and communities to benefit collectively from the use of forest resources, and to ensure their effective participation on forest management activities. Article 16 protects the intellectual property of individuals and communities over their traditional forest-related knowledge. The benefits flowing from the use of this knowledge must be shared among those who hold it.

2.4.4 Protocol on the Development of Tourism

Among the principles of the Protocol on the Development of Tourism, Member States are enjoined to "formulate policies that promote the involvement of local communities and local authorities in the planning and development of tourism."[63] As far as investment in tourism is concerned, the Protocol mandates Member States to develop and pursue tourism investment policies and strategies that give consideration to the private sector involvement of local communities in the tourism development process. [64]

2.4.5 Protocol on Fisheries

The only notable provision with a bearing on the protection of the rights of indigenous peoples or local communities is Article 12 the Protocol on Fisheries. In instituting legal, administrative and enforcement measures for the protection of artisanal and subsistence fishing rights, tenure, and fishing grounds, it would be rational that consultative procedures should be integrated to fully appreciate the needs of those communities.[65]

[61]Article 11 SADC Protocol on Forestry.
[62] Article 11.1. c) SADC Protocol on Forestry.
[63]Article 3.4. SADC Protocol on the Development of Tourism.
[64]Article 12 b) SADC Protocol on the Development of Tourism.
[65]Article 12.1 SADC Protocol on Fisheries.

2.5 FPIC in the courts

The jurisprudence of courts around the world has also provided some useful interpretations and elaboration of fundamental rights contained in various international instruments, in light of the requirements of the principle of FPIC.

In the Canadian case of *Delgamuuwk v British Columbia*, the court reaffirmed not only the duty to consult in situations where the sovereign stands in fiduciary relationship to aboriginal peoples who hold title to land, but acknowledged that the duty may in some cases be significantly deeper than mere consultation. The court held further that some cases even require full consent of an aboriginal nation, "particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands."[66] This contention by the court indicates that where an interest of great importance to the indigenous people itself that is attached to an indigenous people's land is concerned, the level of engagement required is such that full consent should be obtained.

In the case of *SERAC v Nigeria*, the African Commission on Human and Peoples' Rights (ACHPR) gave a consequential ruling on the interpretation of Article 21 of the African Charter on Human and People's Rights. The Commission found that Nigeria had violated Articles 2, 4, 16, 18(1), 21 and 24 of the African Charter. While falling short of requiring free, prior and informed consent of local communities, and while holding that the Government of Nigeria "undoubtedly" had a right to produce oil, the income of which would be used to fulfil the economic and social rights of Nigerians, the Commission still found that care should have been taken to protect the rights of the Ogoni villagers, who were the victims of ecological damage and attacks by state forces. It further found that the Nigerian government had failed to provide adequate opportunity for community participation in decision-making. The Commission noted that the provision of Article 21 of the African Charter imposed a positive duty on the state to protect citizens from damaging acts perpetrated by private parties, and failure to do so constituted a breach of its obligations under the Charter.[67]

In *Centre for Minority Rights Development v Kenya*, the ACHPR furthered its record of decisions interpreting Article 21 and Article 22 to construe a duty to consult on the basis that the decision to remove the Endorois people from their ancestral land interfered with various rights intrinsically linked with the people's occupation of that land, including their community

[66] *Delgamuukw v British Columbia* (1997) Supreme Court of Canada, para. 168.
[67] *SERAC and CESR v Nigeria* (2001) ACHPR 155/96.

property rights, and spiritual, cultural and economic way of life.[68] In that case, the ACHRR found that the conditions of consultation failed to rise to the standard required in a form appropriate to the circumstances. The ACHPR found particularly that it was incumbent upon Kenya to conduct the consultation process in such a manner that allowed the representatives to be fully informed of the agreement, and participate in developing parts crucial to the life of the community."[69]

2.6 Conclusion

This Chapter has shown that the concept of Free, Prior and Informed Consent is a feature of the well-established international law principle of self-determination. The concept is an important one for the protection of the right of self-determination of indigenous peoples in particular, as they have strong links to the land in which there is special cultural, spiritual, economic and natural resource significance. It also marks a departure from the paternalism of previous paradigms in the affairs of indigenous persons and affirms their agency. This protection is necessary in light of the power imbalance that obtains between corporations and states on the one hand, and indigenous peoples on the other. In view of this imbalance, the international human rights system has sought to address this problem through several international instruments which create both binding obligations, and non-binding, but nonetheless important standards for project promoter's vis-à-vis indigenous peoples in proposed project areas.

Several treaties have progressed the FPIC principle, while in some cases, States have shown a level of conservatism in interpreting FPIC. A cursory view of other regional instruments reveals further scope for integration of FPIC. This integrative approach is supplemented by a developing jurisprudence of adjudicative bodies, tribunals, and courts, incorporating FPIC into the interpretation of the human rights of indigenous peoples.

[68]Centre for Minority Rights Development v Kenya (2009) ACHPR
[69]Centre for Minority Rights Development v Kenya (2009) ACHPR, para 282.

CHAPTER THREE

FPIC AND THE DOMESTIC LEGAL AND INSTITUTIONAL REGIME

3.1 Introduction

Free, Prior and Informed Consent is a principle that enters into the Zimbabwean domestic legal and institutional regimes via different means. Firstly, on the international plane, Zimbabwe has signed onto several treaties that impose binding international obligations which translate through transposition into domestic law. Secondly, Zimbabwe has domesticated several international, non-binding standards providing for the FPIC principle in one form or another. Some of these standards are sector-specific, and serve as guidelines for best practice by the state and by private actors regulated by the state. Sectors that are impacted are those that affect the relationship between communities and resources such as land, water, mineral resources, flora and fauna in the areas which they live. These could include extractive industries such as mining development, development in the tourism sector, forestry, and agriculture.

Thirdly, in its own constitutional order, Zimbabwe has committed to a participatory democracy underpinned by a people-centric approach to government. This necessarily includes obligations to consult in view of creating various new legislative and administrative measures. What follows is an overview of various sources and manifestations of FPIC provisions in Zimbabwe's domestic legal and institutional regime.

3.2 International Law obligations of Zimbabwe

Zimbabwe is party to a number of treaties to which it is bound under international law. Under these treaties, Zimbabwe has incurred obligations to domesticate the norms embodied therein, and otherwise not to act contrary to its own indications by signature. Zimbabwe is party to the International Covenant on Economic, Social and Cultural Rights (ICESCR), which is profoundly influential on Zimbabwe's national legislative regime.[70] This treaty sets the standards for economic, social and cultural rights worldwide. Additionally, Zimbabwe is a party to the International Covenant on Civil and Political Rights (ICCPR). These two treaties

[70] 'Review of national laws & policies that support or undermine indigenous peoples and local communities: Zimbabwe' 15.

recognise the right to self-determination, which is a right of customary international law.[71] Impose binding obligations on state parties to respect certain rights, among them, the rights to dignity of every person, and self-determination of all peoples. According to the ICCPR, this right entails the free determination by all peoples of their own political status and their free pursuit of their economic, social and cultural destinies. The right to self-determination is closely linked with the right to dignity. These rights are transposed into national law through the Constitution.

Zimbabwe is also party to other treaties on the international level such as the Convention on Biological Diversity of 1992, informally called the Biodiversity Convention, which is important for its recognition of the dependence of indigenous peoples on biodiversity and their role in sustainable use and conservation of biodiversity. Zimbabwe has also signed up to other instruments that do not impose binding obligations, but are nonetheless important sources of standards in the area of natural resources management.

On the continental and regional levels, Zimbabwe is party to the African Convention on Human and Peoples' Rights, as well as to several Protocols of the Southern African Development Committee which place several consequential obligations on state parties with respect to consultation of indigenous and local communities.

3.3 National Constitution

The Constitution of Zimbabwe (Amendment No. 20) Act of 2013 is the point of departure for any human rights discourse in the domestic legal system. It is the supreme law of the land, and any law, conduct or custom that is inconsistent with it, is void to the extent of its inconsistency.[72] Its enactment in 2013 came after a process of broad consultation, leading to the inclusion of issues affecting communities at the local level, including concerns about preservation of local cultures, languages, protection of the environment, and participation in development. The Constitution imposes certain obligations of note on the state, as well as on all of the state and government's agencies and institutions. In some cases, the Constitution also imposes duties on natural and juristic persons as well. The Constitution of Zimbabwe lists among its founding values some important overarching principles, including respect for the

[71]Article 1, International Covenant on Civil and Political Rights; Article 1 International Covenant on Economic, Social and Cultural Rights.
[72]Section 2, Constitution of Zimbabwe 2013.

rule of law, fundamental rights and freedoms, the diverse cultural, religious and traditional values of Zimbabwe, the inherent dignity and worth of every human being, the equality of all human beings, and good governance.[73] These values have been picked out for their proximity to what is demanded by the concept of FPIC for indigenous peoples. It is noted that the Constitution does not actually refer to indigenous peoples except in section 295(1) where it refers to "any indigenous Zimbabwean". The term is not defined. However, the Constitution does recognize local communities, but fails to define them. In the ordinary sense, however, a local community would be a group of people living together in an area, who are bound by, among other things, social and economic ties.

The Constitution further elaborates on the principles of good governance, which include respect for the people of Zimbabwe, from whom authority to govern derives.[74] This aspect of good governance sets the stage for a participatory relationship between the people of the country, as the governed, and the institutions of government. Furthermore, good governance, according to the Constitution, also requires transparency, accountability, and responsiveness, the recognition of the rights of, among others, ethnic, racial, cultural, linguistic and religious groups, the equitable sharing of natural resources, due respect for vested rights, and devolved government.[75]

The manner in which national development is to be achieved is also addressed in the Constitution, requiring the measures towards development to involve the people in the formulation and implementation of development plans that affect them.[76] This is a positive inclusion in the national Constitution which makes it compulsory for the state to engage local communities in both the formulation prior to, and the implementation of development plans and programmes that affect them. The word "affect" here is broad enough to include development programmes and projects that do not benefit the communities directly, but potentially impact their ability to continue to live according to their culture and customs, as well as to fulfil their spiritual lives. In the same provision, the state is enjoined to ensure that local communities benefit from the resources in their areas.[77]

The Constitution also demands of the state and all the institutions and agencies of government to promote and preserve the cultural values and practices which enhance the dignity and well-

[73]Section 3(1) Constitution of Zimbabwe, 2013.
[74]Section 3(2)(f) Constitution of Zimbabwe, 2013.
[75]Section 3(2) Constitution of Zimbabwe, 2013.
[76]Section 13(2) Constitution of Zimbabwe, 2013.
[77]Section 13(4) Constitution of Zimbabwe 2013.

being and equality of Zimbabweans, and to protect Zimbabwe's cultural heritage, while respecting the dignity of traditional institutions.[78] This not only places positive duties on the state and all its institutions, but also negative duties, to wit, refraining from courses of action that tend to destroy or interfere with the ability of communities to live out their cultural values and practices, so long as those cultural values and practices do not conflict with the Constitution. Without naming them, this speaks to the preservation of the way of life of indigenous peoples, and recognition of the role of their traditional institutions. It recognizes that doing so is to affirm the rights of dignity[79] and equality[80] that are also enshrined in the Constitution.

Importantly, the Constitution also binds the state to its international law obligations, including customary international law.[81] In the context of community participation, this has the result that national legislative provisions can be suffused with international law norms and developments that support participation of local communities.

Read together, these provisions clearly foster participation of communities in projects and activities that have an impact on them and the areas that they live. Among the measures that the state can take is to enact targeted legislation, formulation of policies and implementation of programmes in consultation with the indigenous peoples who make up communities within the country.

Further to the obligations placed on the state, the declaration of rights in Chapter 4 of the Constitution places obligations on all persons to respect the rights therein. Importantly, this places certain obligations on not only the state, but also other juristic entities as well as individuals not to infringe the rights of any person or group that is protected by the Constitution.[82] Importantly, the declaration of rights is justiciable, and the national courts are empowered to interpret and give effect to the rights enshrined therein.[83] Some of the most important rights that relate to community participation or FPIC as it were, are the right to

[78]Section 16 Constitution of Zimbabwe 2013.
[79]Section 51 Constitution of Zimbabwe 2013.
[80]Section 56 Constitution of Zimbabwe 2013.
[81]Section 46 of the Constitution places a duty on the courts to take into account international law and all treaties and conventions to which Zimbabwe is a party in interpreting the rights contained in the Declaration of Rights (Chapter 4). Section 326 explicitly mentions that customary international law is part of Zimbabwean law and obliges courts and tribunals to adopt any reasonable interpretation of legislation that is consistent with customary international law in preference to any interpretation that is inconsistent with customary international law.
[82]Section 44 Constitution of Zimbabwe 2013.
[83]Sections 46 and 85 Constitution of Zimbabwe 2013.

human dignity[84], the right to equality and non-discrimination[85], the right to language and culture of own choice[86], property rights[87], environmental rights[88], freedom from arbitrary eviction[89], and the right to food and water[90].

It is therefore clear that there is nothing in the Constitution that is against provisions supporting an FPIC system in legislation. The Constitution has several positive principles that promote sustainable development, community participation and several rights and freedoms. What is left is to determine whether legislation has taken up the positive spirit in the Constitution to give effect to FPIC in practical terms. Various pieces of legislation and standards give more specificity to the interactions between the state and private capital on the one hand and local communities on the other. In the section to follow, an overview of these is given.

3.3.1 FPIC features in local legislation

From the definition of FPIC in Chapter Two, certain features of FPIC must be reflected in legislation. In brief, the first principle is that of freeness of consent in the consultative process. The question is whether frameworks for community participation in decision making enable free contributions from community members. This is critical in determining whether the consent was given freely; forced agreements are vitiated by duress or misrepresentation or undue influence. Secondly, the principle of prior consent. In terms of this, the consent must be granted by communities prior to the commencement of any developmental operations. The third principle is that of informed consent. Under this, the consent must be given subject to the availing of all relevant, necessary and important information to communities so that they are able to make informed choices. Finally, the principle of consent must be provided for. The question is whether the consultative framework that has been created produces genuine consents or credible community agreement.

[84] Section 51 Constitution of Zimbabwe 2013.
[85] Section 53 Constitution of Zimbabwe 2013.
[86] Section 63 Constitution of Zimbabwe 2013.
[87] Section 71 Constitution of Zimbabwe 2013.
[88] Section 73 Constitution of Zimbabwe 2013.
[89] Section 74 Constitution of Zimbabwe 2013.
[90] Section 77 Constitution of Zimbabwe 2013.

3.4 Legislation and regulations

3.4.1 Communal Land Act

The Communal Land Act is a piece of legislation governing land that was previously designated "tribal trust land" under the Tribal Trust Land Act 6 of 1979, and any subsequent additions thereto. The Act vests communal land in the President, in his or her official capacity. However, it has been argued that this does not mean that the president can do as he pleases with respect to communal land. Certain aspects of the Communal Land Act, however, are of concern to local communities. The President is empowered to redesignate any part of communal land, but is required to consult the rural district council. After gazetting of such land, it ceases to be part of communal land and becomes state land. There seems to be no obligation created by the Act to consult the local community, not least through their own traditional leadership.

The Act also makes displacement of communities from communal land set aside for other purposes by the Minister responsible for the administration of the Act through statutory instrument, without making any provision for a consultative process. This is a deficiency in the Act that is potentially prejudicial to local communities occupying such land under customary tenure, and conflicts with constitutional imperatives and Zimbabwe's international law obligations. The provisions of the Act do make provision for compensation for any person whose use and occupation rights are extinguished or diminished by the gazetting of communal land, and suggest that this compensation in the form of alternative land is negotiable. If the alternative land is not accepted, and no other agreement is reached, then the rules in the Land Acquisition Act would apply. In essence, this provision leaves room for negotiation on suitable compensation and the possibility of third-party dispute resolution, but there is no right to veto the acquisition of communal land that can be exercised by any person or community.

From the above highlights on what constitutes FPIC, it is clear the CLA is very bare. It does not provide for a consultative framework. It is centred on the power of the Minister, and not on community views or considerations. The only actions that may be taken by communities are to seek remedies after the action of the Minister, not prior. There is no obligation on the Minister to seek the consent or views of the community at all. To this extent, there is no FPIC system integrated in the CLA. This is a sad reality, in light of the fact that communal land possession and use rights are hinged on this Act, and no other legislation.

3.4.2 Mines and Minerals Act

The Mines and Minerals Act is by all means an antiquated piece of legislation having been enacted in 1961, but is the primary legislation governing mining activities in Zimbabwe. It applies to all minerals found in Zimbabwe. The Act vests all mineral wealth in the President in his or her official capacity.[91] For one to obtain the right to prospect, explore or mine, a license is required. It has been suggested that industry would be transparent and good mining governance would be achieved if monitoring and correct application of the Act were implemented.[92] However, it is of concern that there is no effective mining policy in Zimbabwe, and this lacuna means that the Act is devoid of any sound policy backing or rational direction. The result is a mining industry relying on fragmented sources of regulation and policies that are in dire need of harmonisation in order to be fit for purpose.

One of the areas in which the mining sector in Zimbabwe is lacking is the participation of civic society and communities as stakeholders in mining activities and their consequences.[93] This means that the concerns of communities are absent from the negotiation table when natural resource management is discussed. This is inconsistent with the African Mining Vision[94] which identifies communities, the state, civic society organisations, and private sector actors as the stakeholders who should participate in policy and decision-making for the mining sector. This is especially important in view of the impact of mining on the natural environment, which includes pollution of water resources, scarring of the natural landscape, and destruction of wildlife habitat and forests, and disturbance of sacred sites on which the livelihoods and spiritual lives of local communities may rely.

The Act also generally tilts the balance in favour of mining activities over the interests of landowners and occupiers, or users otherwise of land. While the Act seeks to limit the disturbance of dwellings by mining-related activity by imposing limits on the proximity of prospecting to dwellings, consent of the owner or occupier, or user of land otherwise is not required outside of the parameters set out in Section 31(1)(a) of the Act. This is despite the fact that land use, particularly in communal landholdings, is often broader than mere dwelling purposes.

[91]Section 2 Mines and Minerals Act.
[92]Mlambo L 'Extractives and Mining Development in Zimbabwe' 28.
[93] 'Review of national laws and policies that support or undermine indigenous peoples and local communities: Zimbabwe' 60.
[94] Adopted in 2009 by the African Union, the African Mining vision envisions a "new social contract for mining", spotlighting input from local communities and civic society organisations in mining decision-making, balancing local benefits and national development imperatives.

It is thus evident that the Mines and Minerals Act in its current form does not adequately take into account environmental rights and human rights. These norms are to be found elsewhere other than in the Mines and Minerals Act. The mining sector is undoubtably influenced by the Constitution as well as related legislation, particularly the Environmental Management Act.

The question remains whether FPIC is integrated in the MMA. Firstly, it is clear that there is a modicum of consultative processes envisaged in the context of the MMA and ideally, communities are freely consulted. To that extent, the MMA retains the principle of freedom to consent on paper. The regulation of EIAs through regulations have gone a long way in compelling mining companies to undertake consultative processes prior to the commencement of mining operations. The difficult question is on whether there are features to guarantee informed choices. There is nothing in the Act to guarantee that mining companies present correct information to communities before they decide. In reality, consultations are done by consultants on behalf of mining companies and the general feeling is that these consultants are biased in favour of their clients. Accordingly, the regime in the MMA is very weak and susceptible to manipulation. This negates the principle of community participation integral to FPIC.

3.4.3 Environmental Management Act

The Environmental Management Act is an important piece of legislation in as far as it champions the environmental rights of local communities. The language of the Act, though focusing on the environment as a good in itself, recognises an anthropocentric rationalisation of environmental management, claiming to place the concerns of people and their needs "at the forefront of environmental management" as a general principle of environmental management.[95] The most important attribute of the Act in relation to extractive industries and development projects and their potential effects on local communities is the requirement for Environmental Impact Assessment Certificates for certain projects.[96] The contents of an EIA report submitted by a project proponent include, among other things, a detailed description of the likely impact of the project on the environment.[97] Compliance with this requirement, should a project promoter properly seek it, would not be able to be achieved without consultation with stakeholders such as local communities who rely on the natural environment.

[95]Section 4(2)(c), Environmental Management Act.
[96]Section 98 Environmental Management Act.
[97]Section 99(c) Environmental Management Act.

A deficiency in the environmental management legislation is that it is somewhat paternalistic of local communities. The Minister responsible for its administration and officials of the Environmental Management Board created under the Act do not have an obligation to consult local communities who are affected by environmental administration decisions. Instead, while consultations are mandatory in coming up with a National Environmental Plan, the matter of who must be consulted is entirely in the Minister's discretion.[98] It is also disappointing from the perspective of participation in decision-making on environmental impact assessment certificates, the Director-General who issues the certification merely has a discretion to consult the community that may be affected by the grant of such certification, and not an obligation to do so.[99] This means that community concerns about the impact of a project that might affect the environment and in particular, land, to which the community has ties, may ultimately be ignored. This is particularly concerning in the case of extractive industries and other consequential development agendas that may not necessarily respect existing customary land rights. In Zimbabwe this has manifested in the attempts to urbanise rural communities through the establishment of "growth-points", thereby imposing a model of development on local communities without an appreciation of the pre-existing agrarian land uses that were the lifeblood of the communities.[100] Recently in 2021, this was manifest in the attempts at dispossession of the Chilonga Community to make way for a Lucerne grass project for dairy cattle.[101]

African states that have signed up to the African Charter on Human and Peoples' Rights have incurred human rights obligations as a matter of international law. It has been submitted that even if the provisions in national law do not provide for public participation, the obligation to consult is a human rights obligation that is binding on all states in order to give effect to the rights in the African Charter.[102] Therefore, the provisions of the Environmental Management Act, although seeming to give a discretion to the various functionaries on whether to consult local communities or not, should be interpreted to give no such discretion.

[98]Section 87(2)(a) Environmental Management Act.
[99]Section 100(3)(c).
[100]Zamchiya P, Dhliwayo O, Gwenzi C, and Madhuku C 'The "silent" dispossession of customary land rights holders for urban development in Zimbabwe' accessed at – The 'silent' dispossession of customary land rights holders for urban development in Zimbabwe | Plaas on 31 May 2022.
[101]Land Portal 'Zimbabwe: 12 000 Chilonga villagers face eviction after losing High Court battle', 6 January 2022 accessed at - https://landportal.org/news/2022/01/zimbabwe-12-000-chilonga-villagers-face-eviction-after-losing-high-court-battle on 30 May 2022.
[102]*SERAC and CESR v Nigeria*, African Commission on Human and Peoples' Rights, 155/96, para 53.

The adaptation of national organs and agencies of state as well as its institutions to implement well-defined policies that centre around participatory decision-making with local communities could result in better outcomes in development projects that find the balance between equitable sharing of resources with local communities and national economic growth.

It must be noted that the EIA regime under EMA ends at the doorstep of the Ministry for Environment, and there is no feedback with communities. The Minister considers the EIA, but has no platform under the law to cross-check the findings in the report with the wishes of the people. What this means is that community representations may be downplayed or suppressed in the EIA report by the consultants and the Minister's final say can override any objections. In reality therefore, there are good provisions for the EIA system to incorporate community participation and FPIC, but the law does not match practise. Mining companies play hide and seek with regulatory bodies and several stratagems are employed to deflect attention from EIAs

3.4.4 Environmental Management Agency

The Environmental Management Agency (EMA) was created through the Environmental Management Act. Its mandate is to formulate various environmental quality standards, as well as to participate in any matter pertaining to the management of the environment. It has the potential of being an influential body in the formulation of environmental management policies as well as the legislation on environmental law at the national level. Its operations are controlled by an Environment Management Board which is formed in terms of the Act. On the board sit fifteen members who are appointed by the Minister in charge of administering the Act, after consultation with the President. It consists of various experts, who may also have recourse to consultation with any other expert on technical matters as they deem necessary. EMA has staff that serve under a Director-General, who is appointed by the Environment Management Board. These see to the day-to-day operations of EMA.

Inspectors are part of the staff who serve under the Director-General. They have the power, in terms of the Act "to enter any land, premises, vessel, vehicle or any other place in Zimbabwe to determine whether the provisions of the Act are being complied with." This is an incursion on the right to privacy, which is tampered only by the requirement that to enter a dwelling, the consent of the occupier of the dwelling place is reqquired. It is submitted that this limitation is inadequate when it comes to local communities who may in some cases attach religious and

spiritual significance to certain parts of their lands. FPIC principles should probably apply in such cases so as to safeguard the rights of such communities.

3.4.5 Zimbabwe National Water Authority

The Zimbabwe National Water Authority is a government entity that is tasked with managing the country's water resources. The ZINWA Act which establishes the Authority lists the central functions of ZINWA as the exploitation and conservation of Zimbabwe's water resources in order to secure equitable, accessible, efficient allocation, distribution and development.[103] As the Constitution enshrines the right to water[104], water is approached using the human rights approach that demands participation of the stakeholders who rely on the resource. Unfortunately, the prevailing legislation, consisting of the Water Act, and the ZINWA Act, provide no explicit role for community consultation notwithstanding the great importance of water resources to life in those communities. This is also especially important in view of the necessity, sometimes in the public interest, to reserve land for the damming of water[105], to control of the water resource through reservation[106] , and to develop water development restriction areas. The Minister responsible for administration of the Act has sweeping powers in this regard, yet the Act does not give a role to community rights in the lands where the water resource is found. This is a grave deficiency in the legislation in as far as it produces effects for communities in terms of the land which they use, as well as their access and use of water resources.

3.4.6 Communal Areas Management Programme for Indigenous Resources (CAMPFIRE)

The Zimbabwe's Communal Areas Management Program for Indigenous Resources (CAMPFIRE) which came into existence in 1989 and become a reference point informing regional and global discussions on Community Based Natural Resource Management (CBNRM). Frost and Bond (2008) refer to it as "*the flagship community-based natural resource management programme in southern Africa*". CAMPFIRE contributed significantly to CBNRM policy and practice through its experience, technology, and lessons and CBNRM is now generally accepted and practiced widely across SADC. Its primary focus is the

[103]Section 5 ZINWA Act.
[104]Section 77 Constitution of Zimbabwe, 2013.
[105]Section 56 Water Act.
[106]Section 57 Water Act.

implementation and support of activities in the development of communal areas through the sustainable use of wildlife and other natural resources in communal areas.[107]

Mutandwa and Gadzirayi have said that for the intended results, communities have to be granted the right to use resources, to determine the mode of usage, benefit fully from use, to decide on the distribution of those benefits, as well as to determine the rules of access.[108] This is achieved through a structure which includes, at grassroot level, six members from each village on a CAMPFIRE subcommittee, which is chaired by a councillor from the Rural District Council.[109] This structure ensures participation of communities who are the custodians of land in decisions on conservation of wildlife resources that are found in their areas of habitation, while giving an appreciation of wildlife as a resource by devolving the benefits from its utilisation at the community level. CAMPFIRE is a success story in community-based wildlife management which is considered a model for other indigenous conservation projects in Africa.[110]

3.5 Judicial treatment of community participation

The courts of Zimbabwe have also at various stages been called upon to interpret community rights to land and natural resources. On many occasions communities have been pitted against the will of the state and the interests of private capital. Non-governmental organisations have been instrumental in assisting communities to navigate the minefield of constitutional litigation to varied success. Since the advent of the 2013 Constitution, with a progressive declaration of rights, there is hope that the rights of local communities might be better protected vis-à-vis state and private interests in their lands. Several cases highlight opportunities for the judiciary to illustrate the relevance of community participation and involvement in development projects that affect them, and some of the cases are discussed below.

[107] 'About' CAMPFIRE accessed at – About | Campfire Association Zimbabwe (campfirezimbabwe.org) on 31 May 2022.
[108]Mutandwa E and Gadzirayi CT (2007) 'Impact of community-based approaches to wildlife management: case study of the CAMPFIRE programme in Zimbabwe' 14*International Journal of Sustainable Development and World Ecology* 337.
[109]Mutandwa and Gadzirayi (2007) 'Impact of community-based approaches to wildlife management: case study of the CAMPFIRE programme in Zimbabwe' 339.
[110]Callahan S 'CAMPFIRE Project Zimbabwe' accessed at - CAMPFIRE Project Zimbabwe | Environment & Society Portal (environmentandsociety.org) on 31 May 2022.

3.5.1 Chiadzwa Diamond Mines Eviction Cases

The case of *Malvern Mudiwa and Ors v Mbada Mining Private Limited* is a long-running tale that illustrates the so-called "resource curse" – a term used to describe situations where resource-rich countries are unable to improve the lot of their people. In this case, the discovery of diamonds on the local level led to the dispossession of village communities in Chiadzwa from their homesteads where they were settled, to a farm that did not have amenities, and to the extent of being accommodated in tobacco drying barns. The applicants challenged their impending relocation on an urgent basis, claiming that they had not been consulted, and in any event, there had been no environmental impact assessment completed before diamond mining operations by the state and other entities had begun. Compensation had also not been agreed. The applicants further sought the interdiction of their eviction and resettlement on another piece of land where housing, health, and social amenities had not yet been completed.

The initial application was dismissed on the basis that it was not urgent, and the matter proceeded on the ordinary roll. The matter was later dismissed on a technicality of standing, but from a strategic litigation standpoint, the litigation served a truth-finding purpose which can be considered a success, namely that the state had to concede that the places to which it intended to relocate the community members had not, in fact, the necessary completed facilities to accommodate them. In 2016, the Zimbabwe Environmental Law Association (ZELA) continued its assistance to the Chiadzwa communities securing an interdict against the Zimbabwe Consolidated Diamond Company to stop mining activities because it had not received a permit from the Environmental Management Agency to commence operations. In this case, the Marange Development Trust, which had been at the centre of previous applications on behalf of the Chiadzwa communities, benefitted from expanded locus standi in the Zimbabwean courts under the 2013 Constitution. A combination of environmental laws and the protection of fundamental rights therefore was effectively utilised to protect community interests through strategic litigation.

3.5.2 Chiredzi Irrigation Scheme and the Chilonga Community Dispossession

In the case of *Livison Chikutu and 2 Ors v Minister of Lands and Ors*,[111] the High Court declined to declare certain provisions of the Communal Land Act unconstitutional. The background of the case is that the Government of Zimbabwe issued Statutory Instruments to the effect that it

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was setting aside land in Chiredzi District for an irrigation scheme. The land had been inhabited by the HlengweXangani community, called the Chilonga community, since before 1890. Members of the community now faced eviction to pave way for the irrigation scheme.

The factual argument over whether or not consultation took place was sidelined for the constitutional matter of the Communal Land Act, whereas the court held that there was nothing unconstitutional about communal land vesting in the President. The matter was dismissed on this basis. The material effect of the judgment is that the court found that the impugned provisions of the Communal Land Act were not unconstitutional and therefore paved the way for the eviction of members of the community, with the only recourse being resettlement and compensation which the government undertook to pay.[112]

3.5.3 Checheche Growthpoint and the criminalisation of resistance to eviction

The case of the Checheche dispossessions highlight the disproportionate of power between the state and local communities, yet at the same time, shows that there is an unspoken determination to resist forced eviction. Zamchiya et al documented in a study the paradox of the anti-colonial rhetoric of the post-independence government of Zimbabwe on one hand, and its willingness to use the law to dispossess local communities without engaging the affected people in good faith consultative processes.[113] The case shows two contrasting expressions of violence. The one expression of violence is that of the system of dispossession, using the might of the state, and the other is the violence of resistance against such measures. The state is able to use criminal law to criminalise those who, faced with the violence of law enforcement, decide to fight back in kind, as was the case with Sekai, Duncan and Shylock that was chronicled by Zamchiya et al. The authors observed that FPIC principles can be used to shift from "dictatorship of the planner" to participatory and inclusive planning that also accounts for the realities of communities who have agrarian-based livelihoods. This way, violent clashes between customary land rights holders and the state can be avoided.

It is clear that all these cases did not comprehensively rely on the pure principles of FPIC to pass decisions despite the applicability of the principle. At the heart of FPIC is the need to involve affected and impacted communities in the decision-making process. The principle of subsidiarity means that decisions are made at the lowest level, and with the involvement of

[112]Masvingo Centre for Research and Advocacy 'Chilonga Court Case Summary and Update' accessed at - CHILONGA UPDATE.cdr (kubatana.net) on 31 May 2022.
[113]Zamchiya et al, 'The 'silent' dispossession of customary land rights holders for urban development in Zimbabwe' accessed at - The 'silent' dispossession of customary land rights holders for urban development in Zimbabwe | Plaas on 31 May 2022.

those communities impacted by the decisions. Accordingly, solid policy positions on public participation must be entrenched in law and policy. Not only must provisions be inserted in applicable laws and policy, but a practicable, effective monitoring toolkit be adopted to ensure that public participation is not ignored. Government departments must insist on public participation in practise, so that it becomes the norm, and not an inconvenience to investors.

3.6 Conclusion

In this chapter, the domestic legal and institutional framework for Zimbabwe in the context of community participation and FPIC principles was explored. It was argued that Zimbabwe, as party to multiple international treaties, is bound to an interpretation of its domestic law that reaffirms the principles that it has signed up to. These treaties tend to enrich the interpretation of rights that are contained in the national constitution. The Constitution of Zimbabwe, since its enactment in 2013, has also progressively expanded the rights of local communities, and provided an avenue and a basis to assert the right to participate in decision-making on the use of resources in the lands that they occupy and use. This is based on an affirmation of several rights including human dignity, equality and a set of justiciable socio-economic rights including, environmental rights and the right to food and water.

Legislation also exists that may be interpreted so as to expand the requirements of consultation and community participation, but often this legislation is either outdated or places disproportionate power in the hands of executive decision-makers at the expense of participation. Consultation in many cases is made discretionary, although it may be possible to construe provisions requiring consultation as being mandatory instead of discretionary in light of Zimbabwe's international law obligations.

This chapter has also explored the roles played by a number of important institutional role-players in the mediation of rights of local communities and the imperatives of the state, and explored some case law showing the approach of the courts in interpreting the rights of local communities. It would appear that the advent of the 2013 Constitution has given new purpose to local communities in defending their customary land rights through the matrix of the declaration of rights of the Constitution.

CHAPTER FOUR

COMPARATIVE APPROACH: THE SOUTH AFRICAN FRAMEWORK

4.1 Introduction

Zimbabwe and South Africa are two states that are similar in their economic reliance on extractive industries for a large part of their gross domestic product (GDP). The extractives sector in South Africa contributed ZAR480.9 billion to GDP in 2021, translating to 8.7% of GDP in the South African economy.[114] In contrast to Zimbabwe, the mining industry contributed approximately 60% of Zimbabwe's export earnings in 2021[115], and totals approximately 8% of GDP.[116] The government of Zimbabwe has set its sights on a mining sector worth US$12 billion by the year 2023.[117] This signifies that Zimbabwe is upbeat about expanding exploitation of subterranean resources as a key driver for economic development. However, what is common to both Zimbabwe and South Africa are a poor population relative to the rich natural resources that both countries are endowed with.

There are contentions that the two countries are arguably examples of the so-called "resource-curse" – despite being endowed with rich mineral reserves, the states have not managed to harness these for the collective benefit of their people by achieving economic growth.[118] Significantly, communities where resources are found do not always benefit from resource exploitation, and in some cases, where the interests of communities are disregarded in favour of natural resource extraction activities, it can have dire consequences for the livelihoods of community members.[119]It has been suggested that the implementation of community

[114] Minerals Council South Africa 'Facts and Figures' 2021.
[115] International Trade Administration 'Zimbabwe – Country Commercial Guide: Mining and Minerals' accessed at – https://www.trade.gov/country-commercial-guides/zimbabwe-mining-and-minerals on 4 June 2022.
[116] Ministry of Mines and Mining Development Homepage accessed at – http://www.mines.gov.zw/# on 4 June 2022.
[117] African Mining Market 'Zimbabwe edges closer to US$12 billion target' 3 January 2022 accessed at – https://africanminingmarket.com/zimbabwe-edges-closer-to-usd-12-billion-target/12168/# on 4 July 2022.
[118] Mlambo C (2022) 'Politics and the natural resource curse: Evidence from selected African states' 8 (1) *Cogent Social Sciences* 2-3.
[119] United Nations Interagency Framework Team for Preventive Action (2012) 'Toolkit and Guidance for preventing and managing land and natural resource conflict: Extractive industries and conflict' 6. The UNIFTPA cites among the drivers of conflict in natural resource areas: poor engagement of communities and stakeholders, inadequate benefit sharing, excessive impacts on the economy, communities and the environment, mismanagement of funds and funding war, inadequate institutional and legal framework, and the unwillingness to address natural resource question in peace agreements. Read further 'Toolkit and Guidance for preventing and managing land and natural resource conflict: Extractive industries and conflict' pp 12-20.

participation in sustainable resource management can prevent or mitigate the harmful effects of extractive industries.

Mining is acknowledged as an activity that always involves disturbing or destroying the natural environment to some degree.[120] The by-results of mining may include surface degradation, deforestation, and chemical pollution of water sources and of the soil. The aim of this unit is to compare the approaches of the South African state to the Zimbabwean state in balancing resource exploitation with community needs. In particular, this unit will explore how South Africa's domestic legal and institutional regimes incorporate FPIC principles and/or community participation in sustainable resource management with a special focus on the extractive industries as well as some select development-oriented projects that may interfere with community rights.

4.2 South African Constitution

The South African Constitution, similar to the Zimbabwean Constitution, enjoys supremacy over all other sources of law internal to South Africa[121]. It also binds South Africa to the observance of international law, including customary international law. The South African Constitution enshrines a broad Bill of Rights which guarantees certain socio-economic rights, which are qualified by "progressive realisation" clauses.

South Africa's constitutional jurisprudence is replete with rights-affirming judgments on various issues, including socio-economic problems using the interpretive model of transformative constitutionalism.[122] This model of constitutional interpretation aims at using the law to achieve social and political change. Changes on the social and political plane also influence economic outcomes, and vice versa, as is established by political economy theory.[123] Therefore a constitutional jurisprudence of transformative constitutionalism has the potential to temper political expedience and excess in favour of giving greater fulfilment to those

[120] Chauhan R (2018) 'Social justice for miners and mining-affected communities: the present and the future' *Obiter* 345.
[121] Section 2, Constitution of South Africa 1996.
[122] For a discussion , see E Christiansen (2010) 'Transformative constitutionalism in South Africa: Creative use of Constitutional Court authority to advance substantive justice' 13 *Journal of Gender, Race & Justice* 575.
[123] Grossman GM and Helpman E (1996) 'Electoral competition and special interest in politics' 63 *Review of Economic Studies* 265-286. The authors argue that informed voters tend to influence elections by financing candidates who hold their preferred policy position in order to sway the votes of uninformed voters, or offer funding in return for a shift in policy position that more closely aligns with their preferred position in order to spend funding on advertising to uninformed voters. These positions may have economic implications, but their uptake depends on political factors, particularly political decision-making.

constitutional rights that tend to promote social and political change in favour of the petitioner(s).

The substantive provisions of the South African Constitution of 1996 that are key to the defence of socio-economic rights of local communities are similar to those in the Zimbabwean Constitution of 2013. First and foremost, it is considered that on the international sphere, the right to self-determination of indigenous peoples has been coupled with the respect for their dignity. This is particularly consequential in countries with a settler-colonial history such as Zimbabwe and South Africa, where indigenous populations were denied their fundamental rights, humanity, and customs collectively on the basis of their race.[124] In post-1996 South Africa, the Constitutional right to human dignity is a core right of the South African Constitution and has swayed the pendulum in a number of constitutional cases in favour of groups whose political power has been historically weakened under colonial rule.[125] The result of the dehumanisation and denial of dignity translated to socio-economic inequality on racial lines. Those who had access to national resources were a minority favoured on the basis of race. Therefore, mineral wealth accrued to a minority of the population, while the majority was reduced to labourers in the extractives sector.

Often, the exploitation of mineral resources took no account of the indigenous population's relationship with the land, and therefore resulted in the ruthless dispossession of whole communities, and when dispossession was not affected, the wanton destruction of the natural environment took place without consideration for the calamitous effects for occupiers or users otherwise of the land. In recent times, the justiciability of socio-economic rights has come to the fore, with environmental rights being centre stage of contestation between local communities on one hand, and extractive industries and the state on the other hand.

Key to the defence of community customary land rights in South Africa is a judicio-legal framework that is firmly rooted in transformative constitutionalism. The courts have taken seriously their obligation to read legislation through the prism of the bill of rights, especially in cased where legislation affects the enjoyment of those rights, and to apply interpretation that

[124] E Cameron (2012) 'Dignity and Disgrace – Draft' *Understanding human Dignity: Oxford*, 26-29 June, 2.
[125] The Constitutional right to dignity has been suffused into other rights in the Constitution of South Africa. For example, with respect to the right to freedom from unfair discrimination, the Constitutional Court in *Prinsloo v Van der Linde* as a preamble referred to how a majority of the population had been stripped of their dignity as being the essence of the discrimination suffered during the apartheid era. In *Harksen v Lane*, the Constitutional Court held that discrimination is where there is differentiation that tends to impair the fundamental dignity of persons as human beings or to affect them adversely in comparably serious manner.

supports international law.[126] The Bill of Rights itself contains certain key rights, such as the right to equality[127], including the right not to be unfairly discriminated against, the right of every person to have their dignity respected and protected[128], as well as socio-economic rights such as the right to an environment that is not harmful to health and wellbeing[129], as well as sustainable development and use of natural resources while promoting justifiable economic and social development that takes in to account persons living now as well as future generations.[130] The Constitution of South Africa also enshrines a right to access to adequate housing, as well as a right not to be evicted from a home, or to have it demolished without an order of the court after considering all relevant circumstances.[131] This right is important in as far as it distinguishes mere housing from the more abstract term of "home", which extends to more than just the four walls and roof of a house. It is also important in as far as it protects persons and communities with no secure title from eviction from land. This significantly limits the power of the common law owner over other possible relationships with land, the latter of which usually belong to indigenous communities and communities that were dispossessed under colonial and apartheid laws.

All of these rights are supported by a superstructure of legislation that gives content and expression to the rights, and which is suffused in the general rights afforded by the Constitution.

4.3 Legislative and institutional framework

The most important South African Acts of Parliament that speak to the preservation of land rights of local and previously dispossessed communities are the Prevention of Illegal Eviction and Unlawful Occupation Act (PIE Act), the Mineral and Petroleum Resources Development Act (MPRDA), and the Interim Protection of Informal Land Rights Act (IPILRA). Together with the customary law, now considered to be a living customary law[132], and the Constitution, this arsenal of laws can be interpreted transformatively in favour of local communities in

protecting their tenure, and in giving them a voice in the exploitation of resources in the lands they occupy or otherwise use.[133]

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[126] Section 233 of the Constitution of South Africa, 1996. See also *Baneli&Ors v Minister of Mineral Resources and Ors* [36]-[37] for praxis regarding the interpretation of Section 233.
[127] Section 9, Constitution of South Africa, 1996.
[128] Section 10, Constitution of South Africa, 1996.
[129] Section 24(a) Constitution of South Africa, 1996.
[130] Section 24(b), Constitution of South Africa, 1996.
[131] Section 26(3) Constitution of South Africa, 1996.
[132] *Shilubana and Ors v Nwamita*2009 (2) SA 66 (CC), [55]-[56].
[133] Oxfam 'Free, prior and informed consent in the extractive industries in Southern Africa' 61.

4.3.1 Prevention of Illegal Eviction and Unlawful Occupation Act

This Act has curtailed the exercise of the *rei vindicatio*, which refers to the right of the common law owner to vindicate his or her property from a person or persons who have a right of "inferior" quality who may be found in unlawful possession of the property.[134] This is particularly significant in light of the history of dispossession which affected indigenous black South Africans, depriving them of 93% of the land and settling them on 7% of the land. This level of dispossession and replacement of customary modes of land tenure with the introduction of the western mode of ownership as the dominant relationship with property by law left indigenous populations in mere possession and vulnerable to arbitrary displacement using the force of the law.

The Prevention of Illegal Eviction and Unlawful Occupation Act therefore seeks to strike a balance by protecting persons and groups of persons in possession of land from arbitrary deprivation without judicial scrutiny, taking into account all of the relevant circumstances. Prior to this intervention by the legislature in the South African context, the right of ownership was absolute and superior to any other relationship with property. As has been highlighted, in the context of widespread dispossession and supplantation of the regime of property with a western conception of property, the legal paradigm favoured the white owner and beneficiary of the dispossession of the indigenous black population and enabled arbitrary evictions on this basis.

The PIE Act has altered the landscape of ownership rights with respect to the common law owner of land in that it protects possession where there is inferior title but occupants are in undisturbed possession. However, the PIE Act is not the only legislation that interferes with the right to property to achieve some socio-economic interest. The Minerals and Petroleum Development Rights Act has also changed the way in which land owners, other rights-holders, and authorised private players in industry relate to land under which mineral deposits are to be prospected or mined.

4.3.2 The Minerals and Petroleum Rights Development Act (MPRDA)

Another peculiarity of the common law ownership system was that subterranean resources also accrued to the common law property owner. This situation made it possible for local communities to be placed at the mercy of the common law owner, not having a say in the

[134]Chetty v Naidoo 1974 (3) SA 13 (AD)

mining activities undertaken by the owner, or by any party to whom the right to exploit mineral resources had been ceded. This has turned around to some extent through the enactment of the MPRDA. The Act brings about some important developments in regulating mining activities and the rights of persons or groups affected by mining activities. Among the important interventions under the act is the acknowledgment by the State of its obligation to protect the environment and to ensure the ecologically sustainable development of mineral and petroleum resources that takes into account both the present and future generations. In enacting the MPRDA, the Parliament of South Africa also acknowledged previous discriminatory practices in the sector.[135]

Under the MPRDA, the mineral resources of the country now vest in the state to be administered on behalf of all South Africans.[136] This change waters down the absolute nature of the common law owner's right, as only surface rights now accrue to the owner, and these must be negotiated in order to permit access to prospecting and mining subterranean resources. Significantly, this also allows the Minister in charge of the administration of the Act the power to regulate the standards necessary for sustainable development of the extractives sector, which is a key obligation of the state. This has to be done in the framework of a national environmental policy, standards and norms, while balancing this interest with the thrust towards economic and social development.

Similar to Zimbabwe, mining can only be conducted strictly as part of an appropriately licensed operation.[137] In order to attain a license, an applicant must meet particular requirements, that now include among other things an approved environmental management programme or plan, as well as notification and consultation with the land owner or lawful occupier of the land in question.[138] It is notable that the protection under this Act is given to persons who lawfully occupy land under some kind of legally recognised right which includes customary land rights, but this does not take into account persons who unlawfully occupy land. Such persons, it is submitted, would be protected by the PIE Act, including against constructive eviction.

Regarding the manner of consultation, the Act provides that the Regional Manager, being an official designated that function under the Act, has to follow a prescribed procedure of

[135] Preamble, Mineral and Petroleum Resources Development Act.
[136] Section 3(1), Mineral and Petroleum Resources Development Act.
[137] Section 5(3), Mineral and Petroleum Resources Development Act.
[138] Section 5(4), Mineral and Petroleum Resources Development Act.

consulting with affected parties, including making known the receipt of an application for a prospecting right, mining right or mining permit as the case may be in respect of the land concerned, and calling upon interested or affected persons to submit comments on the proposal. It is apparent though that this does not amount to a right to veto the grant of such a mining permit, since the objections need only be considered by the Regional Mining Development and Environmental Committee, but the final decision on the grant of the license in any event lies with the Minister advice of the Committee.[139] A criticism that can be raised against this method of consultation is that it may not be context appropriate and it imposes a method and means of consultation that may not accord with the traditional fora of the varied types of communities.

However, another positive development of the Act is that the Minister does not have a discretion in all instances whether or not to grant a permit or licence, since under certain conditions the Minister must refuse the grant of an application for a permit or licence. These conditions include when the proposed mining activity will result in "unacceptable" pollution, ecological degradation or damage to the environment.[140] It is not immediately apparent from the wording of the Act in whose opinion the degradation, pollution or damage is unacceptable. A useful guide to clarifying these issues could be the interrelationship between the MPRDA and the National Environmental Management Act discussed below. Under the MPRDA, the environmental management principles of the NEMA are applicable in all prospecting and mining operations, as well as "any matter related" to these operations.[141]

Access to information is also one of the welcome provisions made by the MPRDA. It mandates that information may be disclosed to any person, including for purposes of exercising the right of access to information that is provided for in the Constitution's Section 32.[142] This is key to enabling communities that may be affected by mining activities to request full information so that they may make informed decisions in their consultations with persons seeking permits and licences in order to carry out mining operations.

On the whole, the MPRDA does indicate an improvement from the status quo ante, which entailed an absolute right of the common law owner. The Act goes a long way to address imbalances of the past, but does not go far enough in protecting local communities if read in isolation – it appears to favour state-led development agenda over a participatory process.

[139] Section 10, Mineral and Petroleum Resources Development Act.
[140] Section 23, Mineral and Petroleum Resources Development Act.
[141] Section 37, Mineral and Petroleum Resources Development Act.
[142] Section 30, Mineral and Petroleum Resources Development Act.

Criticism of the Act and calls for its reform include assertions by Mnwana*et al* that it has "reproduced apartheid-style interpretation of community property rights" including by empowering chiefs "to become custodians of communal and other resources."[143]Mnwana et al also contend that these precepts of the Act "go against many rural peoples' understanding of the authority of chiefs (and) it can also violate the cultural meanings attached to and connections with the land."[144]

Other critics also point out that attempts at reforms to the MPRDA have been characterised by a lack of commitment to listen to the voices of affected communities.[145] The Mining and Environmental Justice Community Network of South Africa has opined that progress in addressing past injustices and power imbalances vis-à-vis mining-affected communities requires the amendment of the MPRDA to incorporate FPIC principles. This would increase the standard of engagement with communities by enhancing a partnership rather than a top-down relationship between extractive industries, the state and mining affected communities.[146] At the moment, the MPRDA is inadequate on its own in this regard, and the danger of extractive industry players following the bare-bones guidelines of the Act only would certainly be met with resistance in a context where local communities are justifiably more assertive of their rights.[147]

4.3.3 National Environmental Management Act

The National Environmental Management Act (NEMA) plays a significant role in regulating mining activities, and in promoting the involvement of local communities in the processes that lead up to the granting or refusal of prospecting and mining licences and permits, particularly when these activities affect the environment. Pape has noted that NEMA has received environmental justice as a relevant factor in environmental decision-making in pursuit of sustainable development and the fulfilment of environmental rights.[148]

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[143]Mnwane S, Mutero F, and Hay M (2018) 'Dispossessing the Dispossessed? Mining and Rural Struggles in Mokopane, Limpopo' Working Paper 7: Society, Work and Development Institute 13.
[144]Mnwane et al. (2018) 'Dispossessing the Dispossessed? Mining and Rural Struggles in Mokopane, Limpopo' 13.
[145] Huizenga D (2019) 'Governing territory in conditions of legal pluralism: Living law and free, prior, and informed consent (FPIC) in Xolobeni, South Africa' *Extractive Industries and Society* 713.
[146] Huizenga 'Governing territory in conditions of legal pluralism: Living law and free, prior, and informed consent (FPIC) in Xolobeni, South Africa' 717.
[147] See also Yewande (2020) 'Community engagement and participation in mining projects: a South African case study' *African Mining Brief*, accessed at - https://africanminingbrief.com/2020/02/10/community-engagement-and-participation-in-mining-projects-a-south-african-case-study/ on 10 June 2022.
[148] Pape UB (2021) 'A critical analysis of the evolution of public participation in environmental decision-making in the South African mining sector' LLM Thesis, University of Pretoria.

The Act incorporates some basic principles that are analogous to FPIC principles, but are watered down to a degree from the high standards of FPIC. However, in interpreting the Act along with the Constitution and South Africa's international obligations, it can be a formidable tool in favour of the interests of mining-affected communities leading to a requirement of FPIC.

Firstly, the Act provides for self-identification of communities, which departs from the phenomenon of state-defined communities. This has the double effect of widening the application of the principles specific to community consultation, and excluding the possibility of grouping together peoples who do not identify as a single community together for purposes of applying the provisions of the Act. Secondly, the Act, similar to its Zimbabwean counterpart Act, enunciates that Environmental Management "must place people and their needs at the forefront of its concern", but also adds that it must "serve their physical, psychological, developmental, cultural and social interests equitably."[149] In so-articulating the aims of environmental management, the NEMA recognises the implications of environmental management on the different facets of human life.

NEMA further states that the concept of sustainable development requires that the negative impacts on the environment and on peoples' environmental rights be anticipated and prevented. Against this background, the Act demands the participation of all interested and affected parties in environment governance must be promoted, and that all people must be capacitated to participate effectively and equitably.[150] Section 4(2)(g) also states that all decisions must take into account the interests, needs and values of all interested and affected parties, including recognising all forms of knowledge, including traditional and ordinary knowledge. Du Plessis states that public participation in environmental decision-making is about linking the citizen to environmental governance and providing the means by which environmental rights are exercised.[151] The Act succeeds in this aim in as far as the regulations issued under it mandate "meaningful consultation", which envisions more than mere consultation as a formality.

4.3.4 Interim Protection of Informal Land Rights Act (IPILRA)

This Act was enacted in 1996 as a stop-gap measure, but remains in force and enforceable. It prohibits the deprivation of land or rights in land otherwise than under the Expropriation Act

[149] Section 2(2) National Environmental Management Act.
[150] Section 2(4)(f) National Environmental Management Act.
[151] Du Plessis A (2008) 'Public participation, good environmental governance and fulfilment of environmental rights' 2 *Potchefstroom Electronic Law Journal*22.

"or any other law which provides for the expropriation of land or rights in land" from any person without his or her consent.[152] The novelty of the Act is that for the first time it makes deprivation subject to the consent of the affected party where that party or parties are holders of informal land rights. Since its enactment, there has been a shift towards centralising power in the hands of traditional leadership in subsequent legislation, while seeming to forsake the affected parties and customary decision-making by community members themselves.[153]

High Court found as such in the case of *Baleni*where it held that the MPRDA has to be read together with the IPILRA to determine the level of consent required when applying for a mining right over an applicant's property where that applicant holds an informal right in that land.[154] The court however cautioned that the protection only lasts as long as the IPILRA has been renewed, and urged the legislature to make the Act permanent binding law.[155]

Instead, the Traditional and Khoi-San Leadership Act was enacted and threatens the protections under the IPILRA by granting traditional leaders the power to consent on behalf of whole communities to the deprivation of their land rights without their own consent. The IPILRA's possible application has therefore been reduced by the Traditional and Khoi-San Leadership Act.

4.4 The Courts and Case laws

The courts have been an instrumental avenue for local communities affected or potentially affected by mining activities, as well as in general in the development of South African law. Immediately, the interpretive work of the courts with respect to the Constitution has seen the elevation and confirmation of customary law to be at the same level as the common law and legislation as equal sources of law under the Constitution.[156] In view of this, the Constitutional Court in *Tongoane* has found that the customary law "is a system of law that gives rise to rights

[152] Section 2(1) Interim Protection of Informal Land Rights Act. This provision makes for a very limited scope of application of the legislation since Parliament can pass any law that negates the effectiveness of the protection provided under this Act. This would leave reliance only on the general protections under the Constitution against expropriation that is not in accordance with the law. This is probably a feature of the intended temporary nature of the Act.

[153] 'Free, prior and informed consent in extractive industries in Southern Africa' 56.

[154]*Baleni v Minister of Mineral Resources*2019 2 SA 453 (GP)

[155] Meyer Y (2019) '*Baleni v Minister of Mineral Resources* 2019 2 SA 453 (GP): Paving the Way for Formal Protection of Informal Land Rights' 23 *Pochefstroom Electronic Law Journal*

[156]In *Alexkor v Richtersveld Community* 2004 (5) SA 460 (CC) the Consitutional Court noted that previously indigenous (customary) law was seen through the lens of the common law, but now was an integral part of the law on its own. The Court found that the indigenous law "feeds into, nourishes and fuses with and becomes part of the amalgam of South African law." See para 51 of the cyclostyled judgment.

parallel to the statutory framework that should be considered, incorporated and regulated by the legislature when designing resource governance systems."[157]

What follows is an overview of how the courts have dealt with the conflict of rights stemming from legislation on the part of extractive industries and customary land rights supported by the provisions of legislation such as NEMA and IPILRA.

4.4.1. Bengwenyama Minerals (Pty) Ltd and Ors v Genorah Resources (Pty) Ltd and Ors

In *Bengwenyama*, the Constitutional Court held that the MPRDA replaced the common law requirement of the prospector to conclude a prospecting contract with the landowner before a prospecting right could be obtained. Under the Act, consultation with the affected party is now a requirement preceding the granting of a prospecting right. The court held that while the provisions of the Act did not require agreement on the issues as such, it did require engagement in good faith to seek accommodation in respect of the impact of the prospecting activities on the rights of the owner, occupier or user otherwise of the land.[158]

The court also highlighted that the consultation requirement was also a useful source of information for the land owner, occupier or user otherwise, as to what was to be done on the land, that would enable the land rights holder top make an informed decision on the representations either in the internal appeals procedure or to take the administrative action concerned on review, if the application was granted over their objection.[159] The review in this case therefore succeeded on the basis that there was no proper consultation in compliance with the prescribed procedures under the Act.

The principle in this case was that consultation is not merely a box to check off under the provisions of the MPRDA, but must be undertaken in good faith in order to allow for the informed exercise of the right to make representations or take administrative action on review.

4.4.2 Baleni v Minister of Mineral Resources

In this case the High Court found that in dealing with a community holding informal rights to land, the IPILRA and the MPRDA must be read together to determine the level of consent

[157] See Tongoane and Ors v National Minister for Agriculture and Land Affairs and Ors2010 (6) SA 214 (CC); See also 'Free, prior and informed consent in the extractive industries in Southern Africa' 51.
[158]Bengwenyama at para
[159]Bengwenyama at para [66].

required to obtain a mining right held by a community with customary tenure. The case has a bloody history which has been of concern to human rights groups, gaining international notoriety particularly on account of threats against the life of a woman human rights defender of the Umgungundlovhu community (also called Xolobeni Community in some media, after the area in which they are settled), Nonhle Mbuthuma, and those of colleagues from the Amadiba Crisis Committee. Certain members of Amadiba were murdered after it was revealed that their names had been included on a hit-list.[160]

However, in the same year, the Umgungudlovhu community won an important victory for communities with informal tenure of land relying on both the IPILRA and MPRDA. The court reaffirmed the principle in *Benwgenyama* (above), namely that consultation as required in the MPRDA is not a mere formality, and that although it falls short of requiring agreement, it requires good faith engagement with the landowner (or other rights holder) in respect of possible interference with rights in the property.[161]

The court made reference to the Constitution of South Africa's section 25(6) giving a right to persons or communities affected by insecure tenure resulting from past racially discriminatory law to redress through an Act of Parliament to tenure which is legally secure or to comparable redress. The post-1996 dispensation enacted various pieces of legislation to achieve this redress. The court found that the IPILRA was applicable to the Umgungu ndlovhu Community. It further found that the grant of mining rights was, in the circumstances of the case, a deprivation as intended by the IPILRA. The court reaffirmed the meaning of deprivation expressed in *Mkontwana v Nelson Mandela Metropolitan Municipality*, namely that deprivation is a matter of degree, and it is a question of whether it entails a "substantial interference or limitation that goes beyond the normal restrictions on property use and enjoyment found in an open and democratic society."[162] The court further found that the IPILRA, in the context of the previous disadvantage that was experienced by communities such as the Umgungundlovhu Community, affords broader protection than that afforded to common

[160] Amnesty International Write For Rights (W4R) 2018 case sheet 'Nonhle Mbuthuma: Death threats for protecting her community' accessed at – https://www.amnesty.org.uk/files/2018-10/W4R%20case%20sheets%20NONHLE.pdf?VersionId=1BfPsG4VN0AD.clmCNUdxEGd.EhoJVOd on 11 June 2022.
[161] *Baleni v Minister of Mineral Resources*, para [45].
[162] *Baleni v Minister of Mineral Resources*, para [58]. See also *Mkontwana v Nelson Mandela Metropolitan Municipality*2005 (1) SA 530 (CC).

law owners when mining rights are considered by the Minister under the MPRDA. Therefore, the two Acts operate alongside one another.[163]

Lastly, referring to the Constitutional Court's judgment in the case of Maledu, the court concluded that the consent of the community is a requirement of the IPILRA over what should happen to their land, and if they are to be deprived of that land. The court further held that this position was consistent with international law, noting the *General Recommendation No. 23: Indigenous Peoples* under the Convention on the Elimination of All Forms of Racial Discrimination. The court therefore concluded that on reading the MPRDA and IPILRA together, the applicants had the right to decide what happens with their land. Moreover, the court in essence recognised the requirement of free prior and informed consent in requiring that where land is held on a communal basis, "the community must be placed in a position to consider (prior and informed) the proposed deprivation and be allowed to take a communal decision (free) in terms of their custom whether they consent or not (consent) to dispose of their rights to their land."[164]

4.5 Conclusion

In this unit, it was established that Zimbabwe and South Africa have several points of similarity based on a shared history of colonial domination and dispossession, inequality occasioned by that dispossession, and an interest in harnessing mineral and other natural resources to spur on development. In both countries, exploitation of mineral resources accounts for a significant part of the Gross Domestic Product of the economy, and that contribution is growing. However, where exploitation of resources occurs, so to do effects on the natural environment appear, often with deleterious effects on local communities which have to be deprived in some cases of their use of land, or suffer the ill results of pollution from mineral processes.

Since the end of the twentieth century, both Zimbabwe and South Africa have recognised the need to protect mining affected communities, but at the same time have maintained an interest in the pursuit of economic growth by exploiting natural resources. This unit sought to compare the legal and institutional frameworks of South Africa to those of Zimbabwe in achieving this balance. It has been noted that since asserting custodianship of mineral resources, state policy

[163] *Baleni v Minister of Mineral Resources*para [76].
[164] *Baleni v Minister of Mineral Resources*, para [79].

in South Africa has more often favoured the exploitation of resources, and in some cases reproducing the exploitative conditions of the apartheid state at the expense of local communities. However, the legislative framework, taken together with legal developments surrounding the interpretation of customary law, and against the backdrop of a progressive national constitution, has presented adequate ammunition for local communities to defend their communal rights to land.

Among this arsenal of laws and legal developments are the curtailment of the absolute right of the common law owner by the PIE Act, the recognition of environmental rights and standards under the NEMA, and that statute's effect on the MPRDA, as well as the protection of informal land rights under the IPILRA which has led to, for the first time, an explicit recognition of FPIC principles in relation to landholders under communal landholding rights.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.1 Introduction

This research set out to interrogate the legal framework for Free, Prior and Informed Consent in Zimbabwe and to determine whether Zimbabwe has an effective system to protect host communities against mining operations. The dissertation discussed international and regional frameworks to assess whether those regimes have good principles to guide domestic systems. Further the research analysed the domestic legal regime to evaluate whether national laws guarantee effective FPIC processes and approaches. Finally, the researcher interrogated the South Africa legal regime in order to draw lessons that Zimbabwe can learn from in relation to FPIC. Having interrogated all these issues several arguments and findings were made through out the research. This chapter highlights the major arguments, findings and recommendation of the research.

5.2 Summary of Major Arguments

Several arguments are made throughout the research. In Chapter One the research demonstrated that the author highlighted several problems faced by host communities caused by mining activities. The argument made in this chapter is that mining operation disturb and disrupt rural livelihoods. Most mining operations have been done without effective consultation and participation of communities. In Chapter Two the major argument made was that the international and regional systems contain several principles and norms that can guide domestic system in relation to FPIC. These principles support the implementation of consultative and participatory processes for communities prior to the commencement of mining operations.

Chapter Three interrogated the domestic legal system, focusing on certain legislation that must incorporate FPIC procedures in the interests of host communities. The major argument made was that domestic legal regimes must make clear provisions for FPIC procedures and institutions that implement FPIC. The provisions of the law accommodating FPIC in this regard must be clear, comprehensive and not difficult to implement for affected communities. It was argued that FPIC procedures must be accommodated in mining legislation so that mining

companies are aware of these requirements prior to commencement of mining operations. In Chapter Four, the South African legal regime was illustrated. The major argument justifying this comparative analysis was that Zimbabwe needed to consider foreign laws to buttress weak legal frameworks in its national laws. Thus, there are lessons that Zimbabwe needed to draw from the South African legal regime in relation to accommodating FPIC in the law.

5.3. Summary of Main Findings

Key findings were made in this research. The first finding was that both large scale and small-scale mining operations are being conducted without comprehensive consultations and participation of communities in Zimbabwe's mining areas. This reality has meant several problems for host communities, including dispossession of their lands, forcible evictions and relocations, land and environmental degradation, disruption of livelihoods and social conflicts.

The second finding that was made is that there is a comprehensive international and regional legal framework to guide the Zimbabwean legal regime in instituting FPIC procedures in its law. It is clear that international and regional frameworks support community participation in decision making processes leading up to commencement of mining activities.

The third finding made in the research is that there are serious gaps in Zimbabwe's legal framework related to FPIC. The mining law is generally weak on effective consultative processes, and clearly favour the commencement of mining operations. There are very weak substantive human rights provisions in mining law, and the current system puts host communities in grave danger from mining activities.

Finally, the research made the finding that the South African regime has better and reasonably comprehensive framework for FPIC in its law, and Zimbabwe need to draw lessons from such jurisdiction.

From the findings made, several recommendations were made and these are given below.

5.4 Recommendations

5.4.1 Incorporate FPIC procedures in the Mines and Minerals Act

There is need to revise the provisions of the Mines law and incorporate clear and comprehensive provisions on FPIC. Such provisions must provide for effective consultative frameworks prior to commencement of mining activities by independent institutions; penalties for non-compliance with the legal requirements, and a general prohibition of mining before all consultative and participatory procedures are completed. A certification must be granted to companies to certify that all FPIC procedures have been completed and communities must be central in the granting of the certification to mining companies.

It is recommended that the FPIC procedures to be included in the law must be acceptable to communities, simple and easy to understand and culturally appropriate to indigenous communities. Accordingly, the procedures must not be cumbersome, sophisticated, costly or laborious to host communities. They must be inclusive of all affected social groups, including women, persons with disabilities, the elderly, youths, traditional leaders and local administrative and social institutions such as representatives of educational, health, law enforcement and religious groups.

5.4.2 Establish strong institutions in the Mines law to enforce FPIC

Once the position of FPIC is guaranteed in the law, there is need to establish strong enforcement institutions in the Mines law to ensure that the law is effectively implemented. Two options exist for this to happen; firstly, new institutions may need to be created for this specific purpose. Secondly, existing institutions may be given this extra responsibility. It is important for the chosen institution to be in the mines law, not any other law. The work of a mines law institution needs to be complemented by similar responsibilities of other institutions such as environmental bodies. Without strong monitoring, effective inspections and investigative work, FPIC provisions will not be given seriousness by mining companies.

5.4.3 Formulate deterrent sanctions against non-compliance with FPIC

Several sanctions need to be considered in order to ensure that FPIC is implemented by companies. The common of these area criminal sanctions and these must be deterrent enough. Criminal sanctions may be in form of fines, imprisonment of company personnel or related

sanctions. To complement criminal sanctions, civil remedies must be added and these can include cancellation of mining licence; non-renewal of licence; suspension of mining activities; immediate compensation of affected communities and other innovative remedies. Criminal sanctions and civil remedies need to be effectively deterrent so that they shape the behavior of mining companies and become an unsustainable cost. Once the cost of non-compliance is higher than the cost of compliance, mining companies will reconsider their behavior and actions prior to engaging in the activity.

5.4.4 Develop clear criteria for compensation in cases of relocation

There is need to formulate criteria for compensation of community members in cases of relocation. The compensation thus becomes integral in the development of a FPIC process. Compensation is inevitable since FPIC does not mean refusal to proceed with development – communities may agree to be resettled with adequate compensation. Accordingly, there must be comprehensive provisions on compensation in the law, with regulations giving flesh to the framework of how, when and why compensation should be paid.

5.4.5 Establish local level grievance and dispute resolution procedures

Since FPIC involves people's rights and livelihoods, there is need to establish a proper grievance redress and dispute resolution procedural system at the lowest community level. The grievance system addresses any grievances that communities and mining companies might have against each other in the process of implementing FPIC, or in the process of mining activities. The system will resolve disputes and grievances, and assist communities. Currently, the only system for redress are the formal courts which are expensive, cumbersome, rigid and not easily accessible to communities. Communities can raise grievances on failure to implement FPIC by mining companies, or failure to adhere to agreed standards or procedures, or dishonest actions.

5.4.6 FPIC Consultations must include aspects of Corporate Social Responsibility by Mining Companies

A framework for FPIC must also include aspects of corporate social responsibilities of the mining company. The reason for this is that FPIC must embrace all pre-mining consultative processes involving communities. This means that discussions around the appropriate CSR activities by the mining company must also be done within the FPIC consultative framework.

Communities must be consulted on what CSR projects and amenities they need, how such amenities shall be implemented and the timeline for their completion. Mining companies must not impose what to offer since they could present unsustainable projects without practical use for communities.

5.6 Conclusion

This research demonstrated that consultative and participatory processes are critical before commencement of mining operations in host communities affected by mining activities. It argued that without effective FPIC procedures to protect several rights and interests of host communities, mining operations continue to ravage and destroy rural livelihoods. Social conflict in inevitable in these circumstances. For Zimbabwe, the legislative framework is very weak – FPIC procedures are not comprehensive and do not seem to offer strong protection to communities. There are no effective institutions to insist on FPIC procedures, or to monitor implementation of FPIC by mining companies. Neither does the law provision for effective punitive sanctions against companies that ignore FPIC, or that proceed with fictitious FPIC procedures.

With this in mind, the research called for the revision of the legal and institutional framework in order to institute an effective FPIC system. As it stands, the law is inadequate, and need strong and clear provisions. Without strong laws and effective institutions, the economic and political power of mining companies is too strong for rural, and oftentimes poor communities desiring to confront mining companies. FPIC thus becomes a legal instrument and weapon for these communities, and must be integrated in the mining law to give mining investors fair warning.

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