Arbitration as an Ethical Alternative Dispute Resolution Mechanism in Zimbabwe: A Critique through Deontology and Utilitarianism

Qhelile Mbongiseni Mlilo
Shanghai University of Finance and Economics
Law School, No. 369 Zhongshan Beiyi Road
Shanghai, P. R. China, 200083

Abstract: At the turn of the new millennium, Zimbabwe went through a raft of socio-political changes. Largely felt through land reform, the changes translated into disputes between parties which had previously been engaged in commercial contracts. The disputes were brought before international arbitration tribunals. This paper focuses on the ethical issues which were tied to arbitration processes involving Zimbabwe and disputing parties. Using Zimbabwe as a developing world case reference, it argues that arbitration processes can be fraught with ethical challenges. A contrast between utilitarianism and deontology reveals some of these challenges. The discussion poses and answers the question ‘how do arbitrators reconcile the need to be impartial and honest with challenges on their value systems?’ Moreover, how do communal interests fare -from an ethical standpoint- when compared to private interests in arbitration?

Keywords: Arbitration, Alternative Dispute Resolution, Zimbabwe, Utilitarianism, Deontology

Introduction
From the likes of Aristotle, Socrates, Jeremy Bentham, John Stuart Mill and Immanuel Kant among others, students of moral philosophy and law have recognised variously conflicting and complementary positions on how certain practices can either be for a greater good or for a minority. These range from relativism to deontology, from egoism to utilitarianism. While the classical thinkers have revealed varying ethical positions, it is quite striking that their arguments have not been widely deployed to reveal the moral dilemmas which confront legal practitioners in contemporary settings. Moreover, it is striking that in developing countries particularly in Southern Africa, the question of ethics in arbitration has been barely attended to. The result is a shortage of academic critique on the role and interaction between ethics and arbitration. To put it briefly, little has been said about how ethics is embedded within the arbitration processes of the developing world. To determine the state of ethics in arbitration processes, the case of Zimbabwe will be used. Zimbabwe is by no means representative of the developing world. Neither can it solely represent southern African jurisdictions. However, due to the fact that the southern African state has been a leader on the African continent in adopting and implementing international arbitration systems\(^1\), the state provides a fertile ground for such analysis. In addition, as a result of contentious developments in Zimbabwe which became most marked around year 2000, Zimbabwe became a rich ground on which various ethical and moral legal questions were put to the test. These questions have been detailed in matters which were brought forth in international arbitration tribunals. Using the prominent matters which were attended to in these tribunals, this paper critiques arbitration as an ethically-laden alternative dispute resolution mechanism in Zimbabwe. In engaging in such a discussion, it casts light on an important angle which is of paramount importance in arbitration practise in general. The discussion is structured as follows: after the introduction, a brief layout of the socio-political context is presented. This will be enjoined to a brief discussion of arbitration practise in Zimbabwe. Thereafter, a short discussion of deontology and utilitarianism is made. The third section critiques arbitration from an ethical standpoint using the cases of Bernardus Henricus Funnekotter v. Republic of Zimbabwe, ICSID Case No. ARB/05/06; Bernhard von Pezold and Others (Claimants) v. Republic of Zimbabwe (Respondent) (ICSID case no. ARB/10/15); Border Timbers Limited, Border Timbers International (Private) Limited, and Hangani Development co. (Private) Limited (Claimants) v. Republic of Zimbabwe (Respondent) (ICSID case no. ARB/10/25) and; Mike Campbell (Pvt) Ltd and Others v Republic of Zimbabwe (2/2007) [2008] SADCT. An analysis and conclusions section marks the final section of the paper.

Zimbabwe: a social and political profile
Since the year 2000, Zimbabwe has been caught in a wide range of social, economic and political matters which in turn have resulted in contracts being contested in courts and arbitration tribunals. The purpose of this section is not to argue for or against the crises which emanated during the first decade of the new millennium but to merely to give a setting for developments which eventually played out in arbitration tribunals. For a start, at the turn of the millennium, Zimbabwe was a state and economy of contradictions. On the one hand was a rich class which enjoyed remarkably high standards of living. On the other hand, was a large African population which lived in poverty and squalor. The end result was a population whose population was grossly unequal in terms of socio-economic factors. In large part, the differentiation was along racial lines. However, in the twenty years of political independence, race had no longer become the sole denominator but class/power had entered the fray. This meant that while white people maintained a high standard of living, they were joined by a small economic and political elite which was amassing new wealth. Under such conditions, it was therefore little surprise that the state took populist policies to redress grotesque imbalances between classes. The policies came in the form of an attempted constitution-making process, a violent land reform exercise as well as ambiguous pronouncements on indigenous participation in resource ownership. The most prominent of matters started with sporadic land appropriations which spread across Zimbabwe. Land reform translated into state repossession of privately-owned land for the purposes of redistribution to primarily Black Zimbabwean citizens. The procedure entailed appropriation and then re-designation on the basis of a model (A1 or A2 farms) developed by the state. Unsurprisingly, the violent repossession of land translated into breaches and purported breaches of contracts between the state and contracting parties. Some of the parties were foreign entities and they in turn presented their grievances to relevant authorities for arbitration. The capital and resource accumulation project which the state has since termed ‘indigenisation and economic empowerment’ was not reliant on violence. As a result, it did not culminate in widespread, high-profile contests over contractual matters as was the case over land.

Arbitration practice in Zimbabwe
The statutory instrument governing arbitration in Zimbabwe is the Arbitration Act (Chapter 7:15). It is complemented by the Arbitration (International Investments Disputes) Act (Chapter 7:03) which is specifically crafted for disputes of an international nature. The law clarifies the conditions, terms and procedures under which arbitration is conducted and administered in Zimbabwe. Of importance in this paper are the aspects of procedure and effecting awards.

Procedure
Arbitration in Zimbabwe is a method of dispute resolution which is recognised at law. However, not all forms of dispute are resolved through arbitration. Section 4 of the Arbitration Act (Chapter 7:15) indicates that exceptional cases which are not presentable in arbitration are:

1) An agreement that is contrary to public policy.
2) A dispute which is legally indeterminable by arbitration.
3) A matrimonial cause or a matter relating to status without the leave of the High Court.
4) A matter affecting the interests of a minor or an individual under a legal disability without the leave of the High Court.
5) A matter concerning a consumer contract as defined in the Consumer Contracts Act (Chapter 8:03) unless the consumer has by separate agreement agreed thereto.
6) A criminal case, in terms of Sections 4 (3) of the Arbitration Act where an enactment confers jurisdiction on a court or other tribunal to determine any matter, that enactment shall not be construed as preventing the matter from being determined by arbitration.

Where a dispute is not of the above-mentioned nature, then parties can proceed into arbitration. Arbitration takes various forms which may be either voluntary or compulsory. Parties are free to select their arbitrator(s) that mutually satisfies

---

5 Public policy is defined differently in different jurisdictions, but in most, an award could be vacated if it was not consistent with fundamental notions of justice, honesty, and fairness. See: Moses, M. 2008. The Principles and practice of international commercial arbitration. New York: Cambridge University Press.
6 Article 10 indicates that parties are free to choose the number of arbitrators they so which to constitute a panel.
them when arbitration is voluntarily done. Where there is no agreement on a mutually satisfactory arbitrator, then a may appoint a tripartite panel may be appointed comprising of two arbitrators each selected by either party. However, where arbitration is compulsory, the terms differ and an arbitration panel is appointed for them. Given that arbitrator are persons with expert knowledge of a sector as well as anticipated to be savvy with the law, numerous points of ethical conflict may emerge. For example, an arbitrator may have prior engagement with either one of the disputing parties or an arbitrator may carry preconceived interests which are biased towards either one of the parties. While there is recourse for such situations, the fact that there exists no code of ethics for such scenarios implies that complexities are attended to on a case by case basis and upon the explicit communication of displeasure by an aggrieved party. The complexities are worth considering because an arbitrator is anticipated to be honest, impartial and fair. However, biases and prior contact may co-promise these positions. A detailed discussion is presented in the analysis section later.

**Awards**

The dispensation of awards is addressed under Chapter VIII of the Arbitration Act. Awards are recognised as binding upon written application to the High Court. Such application has specific conditions which it must meet as outlined in Article 35 (1). Article 36 (1) adds that:

Where no number I specified, the court shall set the number at three.

7 If there is no agreement, then for a tripartite panel, each party shall appoint one arbitrator. The two arbitrators shall have equal jurisdiction. Further, they shall not act as the parties’ representatives, but shall be part of the tribunal. There is a temptation to please the appointing authority. If a party fails to appoint the arbitrator within 30 days of receipt of a request to do so from the other party, or if the two arbitrators fail to agree on the third arbitrator within 30 days of their appointment, the appointment shall be done, upon request of a party, by the High Court.

8 Article 12 part 1 of the Arbitration Act addresses such a possibility as follows: “When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him.”

Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only -

(A) At the request of the party against whom it is invoked, if that party furnishes to the court where recognition or enforcement is sought proof that—

(i) A party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(ii) The party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iii) The award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognised and enforced; or

(iv) The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(v) The award has not yet become binding on the parties or, has been set aside or suspended by a court of the country in which, or under the law of which, that award was made; or

(B) If the court finds that-

(i) The subject-matter of the dispute is not capable of settlement by arbitration under the law of Zimbabwe; or

(ii) The recognition or enforcement of the award would be contrary to the public policy of Zimbabwe.

The concept of public policy which is outlined in the act is of particular importance in the discussion.

9 S v Zace HH-274-13 (Uchena J) (Judgment delivered 10 July 2013); Deputy Sheriff, Harare v Makechunu & Ors HH-491-13 (Zhou J) (Judgment delivered 5 December 2013); Mutanda v A-G & Anor S-55-13 (Malaba DCJ, Garwe & Gowora JJA concurring) (Judgment delivered 5 December 2013)

10 The act makes clear that “it is declared that the recognition or enforcement of an award would be contrary to the public policy of Zimbabwe if -

(a) the making of the award was induced or effected by fraud or corruption; or

(b) a breach of the rules of natural justice occurred in connection with the making of the award.
on ethics because it draws attention to the utilitarian posture of the state where matters have a bearing on the generality of the population. This dimension is clearly portrayed in the Zimbabwean government’s position in arbitration cases which were presented before the International Court for the Settlement of Investment Disputes (ICSID) as well as the Southern African Tribunal.

**Ethics in arbitration**

Questions over ethics in arbitration have been attended to by such researchers as Michael Reynolds and Jan Paulsson. These questions have also been summed up by Doak Bishop who asserts that there is an insufficiency in the prevailing code of ethics on an international platform. This shortcoming is a result of a failure to devise a universal code of ethics which legal practitioners from different jurisdictions can unanimously relate and adhere to. Hence, practitioners from Europe, Africa, America, Asia and Australasia do not have a unified ethical code to rely on in arbitration. Such general complications are of significant import when one contrasts two different ethical positions which parties may adhere to. On one hand are the consequentialists who comprise of among others-utilitarian’s; on the other are deontologists. Normative utilitarianism suggests that an act is justified if the ends are for the greater Good. They identify the Good with pleasure, happiness, desire satisfaction, or “welfare” in some other sense. The morally right choices are those that increase (either directly or indirectly) the Good. How the Good is distributed is –for the purposes of this paper- not of concern; instead, it is the basic fact that a majority of the population receives the Good. With this point in mind, it is important to recall that the arbitration matters which the Zimbabwean government became engaged in were as a result of the land redistribution exercise. A central position of the state’s argument was the utilitarian form of land redistribution.

In contrast to utilitarianism, deontological ethics hinges on the notion that actions are not justified by their consequences. Instead, being a duty-inspired set of ethics, the outcome is of lesser consequence than the process itself. In other words, factors other than good outcomes determine the rightness of actions. No matter how morally good their consequences, some choices are morally forbidden. According to Immanuel Kant, the only time that one can be certain that an act is done out of duty – and hence is truly moral- is when the act goes against one’s inclinations. Such a position is echoed by Campbell and Christopher who argue that the moral yardstick is when one’s actions are done out of moral duty and goes against one’s inclinations. Kant believed in reason and recognized the important role of the feelings in human life. He added that ‘to treat a human being as a thing, something to be simply used to further our own ends, is to violate his or her humanity’. Thus Kant concluded through the category imperative as follows: ‘so act as to treat humanity, whether thine own person or in that of any other, in every case as an end withal, never as means only’. Again, at this point, a reflection over the land exercise is important due to its centrality in the arbitration cases which are discussed in the following section. Because of the political nature of the disputes, a set of values was applied to justify and to criticize the redistribution process. Resultantly, in adjudicating over the matters, contrasting world views came to the fore and as a result, called upon the recognition of different ethical standards on the arbitrators. The sets of ethics laid out in brief herein bring forth these ethical questions, namely: what is a fair resolution in matters where the public -through the state-contests with private interests for a fair outcome? More importantly, they pose various dilemmas for arbitrators where awards are to be made in volatile conditions. In sum, utilitarianism and deontology are ethical contrasts. The former deems an act as morally appropriate if it results in improving the greater good while the former finds moral adequacy in an act if it is meets moral norms or duty. For one set of moralists, the “Good” is sufficient criteria while for others the “Right” is sufficient regardless of whether it results in good or not.

**Analysis**

Given the above state ethical positions and the Zimbabwean context outlined earlier, one may summarise the ethical questions which faced arbitrators as follows: what is the most ideal...
process and outcome of the disputes under consideration? Is it the greater good or is it what is right? If one assumes a utilitarian code of ethics, it is worth asking at what cost the greater good must be achieved. Where a deontological posture is adopted, one might also question whether the duty of adhering to contractual terms is sufficient grounds to give an award against marginalised people.

With public policy forming a central part of the Zimbabwean state’s argument, the questions laid out here bear increasing importance. Given the historical change of land ownership as well as growing centrality of land as a public concern, what set of values justify the right-based approach to awards? More importantly, do arbitration panels in such circumstances not defer to their adopted value forms in making a ruling. This matter is particularly pertinent when one considers the communal nature of land ownership in African countries and such ownership is contrasted with the private ownership of land in much of the developed world. Where legal codes are largely hinged on western philosophies and ideals, it is evident from Zimbabwe’s cases that the values which are employed do not yield to parties whose values and ethics are different. This requires a rethink on the ethical positions of institutions and arbitrators who are key actors in such institutions. In making such comments, I concede that the contracts which bound all parties were crafted with the full knowledge of historical imbalances and having embraced value forms which placed communal ownership as subservient to private propriety. However, it is important to recognise that the fair dispensation of justice must allow for fair contestation of matters under dispute. It is under such a strand of thought that recourse on the grounds that repossession was deemed to be in the public interest and fair ground by the state in Zimbabwe.

Related with the above presented argument is the matter of enforcement. Where an award is given in favour of one party and it is apparent that the party at loss may not honour the award due to incapacity, how do arbitrators manage such a moral complication especially if it is affects public policy? How do they tackle it where it is a question of right but not necessarily for the public good? As the experiences of the Zimbabwean situation have revealed, right appears to trump good in all cases. All of the cases in which the government was drawn to the courts resulted in awards favouring private interests (the deontologists won).

**Conclusion**

The paper has considered the question of ethics in arbitration using Zimbabwe’s experience as a case in point. It has revealed that the contractual disputes which culminated in Zimbabwe facing challenges in arbitration panels were set in a problem which brought numerous ethical questions for arbitrators. Using utilitarianism and deontology, the paper has discussed the problems which emanate from conflicts between two value propositions. On one hand, the Zimbabwean government lent on a utilitarian form of ethics which implied that the greater population’s good was at stake. In contrast, the contesting parties against the Zimbabwean government relied on deontic ethics which were in turn applied by arbitration tribunals. Such an arrangement brings to question the ethical structure of arbitration at a global level. This in turn casts doubt on whether awards are morally appropriate or they merely mirror populist positions. It is hoped that in posing such questions, a rekindling of the ethical and moral questions in arbitration can be sparked and that ‘developing world’ value sets can be accommodated in their entirety.

---

19 Point 752 of ICSID CASE NO. ARB/10/15 between Bernhard von Pezold and Others (Claimants) v. Republic of Zimbabwe (Respondent), the Respondent submitted that “on the basis of its position that the takings were consistent with public order principles or public policy, that no compensation is due. In the event any compensation is due, and as regards the date of any valuation of the Claimants’ claims, the Respondent notes that Article 4 of the German BIT stipulates that “effective compensation… shall be equivalent to the value of the expropriated investment immediately before the date on which the actual or impending expropriation, nationalization or other comparable measure becomes publicly known”.

20 For a shade of the communal ownership question in arbitration, see: Border Timbers International (Private) Limited, and Hangani Development Co. (Private) Limited (Claimants) v. Republic of Zimbabwe (Respondent) (ICSID case no. ARB/10/25)

21 Such matters bring to bear the question of whether arbitrators do not get drawn into making decisions which reflect the society in which they are bound in. In Zimbabwe, it has been recognised that some Independent Arbitrators tend to give outrageous and populists awards. See: Mahapa, M. & Watadza, C., 2015. The dark side of arbitration and Conciliation in Zimbabwe. *Journal of Human Resources Management and Labor Studies, 3*(2), pp. 65-76, doi: 10.15640/jhrmls.v3n2a5.
References


www.arbitration-icca.org/media/0/12763302233510/icca_rio_keynote_speech.pdf

Cases Cited

S v Zuze HH-274-13 (Uchena J) (Judgment delivered 10 July 2013);

Deputy Sheriff, Harare v Maketshemu & Ors HH-491-13 (Zhou J) (Judgment delivered 5 December 2013)

Bernhard von Pezold and Others (Claimants) v. Republic of Zimbabwe (Respondent). ICSID case no. ARB/10/15