Utilitarianism or Downright Bad-Faith? Arbitration in the Global South: The Case of Zimbabwe

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

Abstract: This paper discusses the ethical and moral justifications for state actions during arbitration processes. In particular, it discusses the issues from a third world perspective where violent dispossession laid the platform for massive displacement of indigenous people and is seen as a leading cause of poverty. In a country such as Zimbabwe, the resource injustices of colonial dispossession were corrected in a contemporary form of violent disturbance through land redistribution. This redistribution tampered with some terms in BITs and culminated in matters drawn in international arbitral processes. A major defence of the Zimbabwean position was restoration of resources and dignity of the indigenous people. This paper discusses such a position in light of the arbitration process. Does the position feed into suspicions of duplicity by third world countries? Is it justified at all? The paper argues that depending on the time perspective employed, various ethical conclusions can be derived.

Introduction
As the sun set on the second millennium, Zimbabwe was thrust into an economic and political darkness which lasted for more than a decade. Having commenced with the collapse of the Zimbabwean dollar and subsequent military forays plus land disturbances (Bond & Manyanya, Zimbabwe’s Plunge: Exhausted Nationalism, Neoliberalism and the Struggle for Social Justice, 2002), Zimbabwe’s nadir set at the height of political tensions between Zimbabwe and the West circa 2004/5. To make matters worse, while the economy plunged into an unprecedented abyss, political fractures hampered the already hamstrung government (Makumbe, 2009). Amidst the political challenges, disgruntled farmers and corporate interests engaged in numerous confrontations such that legal recourse – where possible- became a common resort. Given the perceived partiality of Zimbabwean courts in an atmosphere characterised by perceived collapse of the rule of law (HRW, 2008), some actors resorted to restitution and/or redress in regional and international courts. This article is not primarily concerned with the specific circumstances of each prominent case which was presented for arbitration. Neither is it focussed on the outcomes of the cases per se. Instead, it is interested in and will focus on the ethical dimensions associated with select cases. In narrowing analytical lens, it is anticipated that a nuanced understanding of the moral debate over good or bad intentions of developing country governments can be drawn out. The literature on arbitration makes note of the fact that private international entities lean towards arbitration as a dispute resolution mechanism partly because arbitration in local spaces is deemed ill-advised due to partisan local courts (Asouzu, 2004). Through select cases, this article argues that in the case of Zimbabwe, a complex of issues coalesced to make for difficulties in approaching arbitration tribunals. In the end, as the state attempted to take heed of some moral issues particularly with respect to the black African population, an aura of bad faith characterised relations. The article is arranged as follows. The following section outlines the questions, objectives and methods employed. It will be succeeded by a discussion - grounded in utilitarian ethics- around specific cases as well as content analysis of the results of select cases plus secondary data. The discussion forms the penultimate section which is then succeeded by the conclusions.

Questions, Objectives and Methods
The overarching question in this paper is “do developing country governments approach the process of arbitration in good faith?” Resultantly, the paper not only considers what transpires after the outcome but ex-ante activities as well. In the process, attention is paid to the events surrounding the arbitration process itself. The objective of engaging in such an approach is to provide an ethical perspective of arbitration in the global south situated within a deontological framework. The article therefore reveals the environment surrounding arbitration and in the same process discuss the ethical issues faced by third world states leading up to as well as during and after resolution processes.

The design is a qualitative desk research. It is based on a purposive sample of international arbitration
cases involving Zimbabwe. Cases were derived from international arbitration open portals and the Southern African Tribunal portal as well as searches on Google Scholar. Analysis of cases was done using content analysis of cases as well as secondary data of cases available on online news websites.

Discussion
Arbitration as a process is not detached from the practical and philosophical perspectives of contracting parties as well as their appointed arbitrators. Resultantly, a moral and ethical argument can be presented in support of any one of the parties involved. In this paper, a deontological approach is assumed to scrutinise the Zimbabwean state’s participation in four leading cases namely:

- **Bernardus Henricus Fannekotter 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)**
- **Mike Campbell (Pvt) Ltd and Others v Republic of Zimbabwe (2/2007) [2008] SADCT**

Moral Questions and Arbitration
The ethical matters surrounding arbitration demand that we employ various value systems in our discussion of what is ‘right’ in the settling of a dispute. This in itself is fertile ground for major contradictions, key among them being the fact that disparate value systems are presented in an attempt to define an internationally accepted rights. For example, in cases where a people have cultural claims over land which has been apportioned by the state for commercial use, what common value system can be employed with universal consent? Evidently, this may be difficult to work out as some cultures place a premium on corporate interest in contrast to others which employ individual interests. Even where parties share similar cultures or ideologies, a perfect arbitral process is not guaranteed. As Gregory Raymond observes in democratic countries, sharing similar values is no predictor for positive outcomes on all party sides. To quote directly:

‘joint democracy is an important predictor of whether states will choose a binding method of third-party conflict resolution, but it does not predict whether a salient outcome will emerge from the arbitration (Raymond, 1996,p.1)

Discussing some of the ethical dilemmas in arbitration, Rogers presents a list of sites of possible tension. As a start, she observes that in international arbitration, ‘there is no regulatory competition’. International arbitration occurs in an a-national space internationally disassociated with any sovereign’ (Rogers, 2005,p.356). Such conditions allow for the proliferation of diverse ethical positions which if left unchecked or to the devices of legal minds from all countries, may create a raft of procedural challenges. As an example, she notes that:

‘in the absence of authoritative ethical guidance at the international level, attorneys show up believing that they are still bound by the ethical obligations imposed by their home jurisdictions, or at least they come with advocacy techniques and professional habits formed by practicing in accordance with those rules. (p.357)

So what then are the ethical issues worth noting? The ethical matters identified include truthfulness, fairness, independence, loyalty and confidentiality.

Questioning the ethical matters surrounding arbitration does not suggest that arbitration is a tainted platform for seeking redress. Kenneth DeVille makes emphasis of this dimension by noting that “given the potential benefits of voluntary arbitration in specific situations and the ethical and societal respect that is due freedom of contract, abolition of all private sector alternatives to the litigationsystem would not only be unwise, but wrong” ((DeVille, 2007, p.379).

In so far as outcomes are concerned, values and political philosophies account for little –according to Raymond (1996) -in the way of agreeability of arbitral outcomes. This suggests that there are other more salient features which define the success of and consensus derived from arbitration processes. To this end, other aspects worthy of scrutiny as parties contemplate on arbitration as a resolution platform include enforceability, neutrality, confidentiality, technical expertise and experience, procedural simplicity and flexibility, choice of arbitrators, cost, joinder of parties and related disputes, pre-emptive remedies (Latham & Watkins, 2015). Practical dimensions of moral issues in arbitration have been discussed in juridical platforms in Zimbabwe1. As Talkmore Chidede notes, for a foreign arbitral

---

1 Tiiso Holdings (Pty) Ltd v Zimbabwe Iron & Steel Company Ltd
award to be recognised and enforced in Zimbabwe, it must be consistent and in accord with the public order or morals in Zimbabwe (Chidede, 2015, p.164). In the heat of the land restitution and reform exercise and tense political climate starting from 1999, what then were the moral and ethical platforms on which the Zimbabwean state couched their defence in arbitration processes? After all, whatever the political motives may have been for land redistribution, it was packaged as a utilitarian restitutive effort for the majority poor, black populace which was largely land-starved (Selby, 2006; Alexander, 2007; Muzondidya, 2007; Makura-Paradza, 2010).

Zimbabwe in arbitration: a case by case analysis

This section provides the background to earlier-mentioned individual cases involving Zimbabwe. Each case will be addressed individually with key actions of the Zimbabwean government cited to draw out the extent of *bona fides* in their participation.

*Bernardus Henricus Funnekoetter v. Republic of Zimbabwe*

In this matter, a group of Dutch farmers sought recourse over the alleged ‘invasion’ or repossession of their land by some state-sanctioned persons. The said land had been acquired for commercial use by the Dutch consortium under a Bilateral Investment Treaty (BIT). In essence, facts presented by the claimants were that through sanctioning the invasion of the land, and failure to protect properties of the investors, Zimbabwe was in breach of contract namely, the 1998 ‘Agreement on encouragement and reciprocal protection of investments between the Republic of Zimbabwe and the Kingdom of the Netherlands’. Specific submissions were that among others, Zimbabwe had largely breached the following terms:

Neither contracting party shall subject nationals of the other contracting party to any measures depriving them, directly or indirectly, of their investments unless the following conditions are complied with:

(a) the measures are taken in the public interest and under due process of law;
(b) the measures are not discriminatory or contrary to any undertaking which the former contracting party may have given;
(c) the measures are accompanied by provision for the payment of just compensation. [Article 6 of the BIT]

In essence, the argument was that the Republic of Zimbabwe had not honoured contractual terms, had failed to protect properties of the complainants, denied claimants the fair and equitable treatment required by Article 3(1) of the BIT and that actions did not constitute “legal expropriations” of the Claimants’ investments pursuant to Article 6.

In its defence, the respondent made reference to historical claims to land. With specific reference to the merits of the case, the respondent claimed that, “Article 9(3) of the BIT “provides for the laws that should be applicable in the event the parties do not agree on which law to apply. Since there is no agreement between the parties as to which law should apply Respondent submits that its laws should apply.” Moreover, respondents claimed that “in the public interest and under due process of law. They were not discriminatory.” As far as respondents interpreted the facts presented, only part ‘c’ of Article 6 merited arbitration.

*Bernhard von Pezold and Others v. Republic of Zimbabwe*

In this matter, the claimants submitted that the terms to the 1996 “Agreement between The Republic of Zimbabwe and The Federal Republic of Germany concerning The Encouragement and Reciprocal Protection of Investments” had been violated by the respondent. In particular, Article 4 “Protection and Safeguards” of the treaty read as follows:

1. Investment—by nationals or companies of either Contracting Party shall enjoy full protection and security in the territory of the other Contracting Party.
2. Investments by nationals or companies of either Contracting Party shall not be expropriated, nationalised or subjected to any other measure the effect of which would be tantamount to expropriation or nationalisation in the territory of the other Contracting Party except for a public purpose and against prompt, adequate and effective compensation. Such compensation shall be equivalent to the value of the expropriated investment immediately before the date on which the actual or impending expropriation, nationalisation or other comparable measure becomes publicly known. Such compensation shall be paid without delay, shall carry the usual commercial interest until the date of payment and shall be effectively realisable and freely transferable. Provision shall have been made in an appropriate manner at or prior to the time of expropriation, nationalisation, or other comparable measure for the determination and payment of such compensation. The legality of any such expropriation, nationalisation or other comparable
measure and the amount of which compensation shall be subject to review by due process of law.

(3) Nationals or companies of either Contracting Party whose investments suffer losses in the territory of the other Contracting Party owing to war or other armed conflict, revolution, a state of national emergency or revolt shall be accorded treatment no less favourable by such other Contracting Party than that which the latter Contracting Party accords to its own nationals or companies or to nationals or companies 6 (any third State, whichever is the more favourable, as regards restitution, indemnification, compensation or other valuable consideration. Such payments shall be freely transferable.

Apart from the structural make-up of contracts and timing of the land repossessions, the von Pezold case in many ways mirrored that of the Funnekotter matter. A key difference was that land in the von Pezold matter was marked for redistribution by the Zimbabwean government after the constitutional amendments of 2005 allowing the state to repossess land for redistribution without compensation. Main claims were that Zimbabwe had engaged in breaches of the Swiss BIT, customary international law and domestic law that had caused the claimants to suffer damage.

Again the Zimbabwean government presented the land reform programme as a broadly corrective exercise. In its defence, the state claimed that ‘the Land Reform Programme was and remains a genuine exercise for the redistribution of land and the resettlement of the landless majority’. Moreover, it claimed that the matter of control lay at the heart of the legal dispute particularly because such ‘control’ determined extent of enforceability in the BIT and therefore breach.

Border Timbers Limited, Border Timbers International (Private) Limited, and Hangani Development co. (Private) Limited (Claimants) v Republic of Zimbabwe

The matter was directly tied to the von Pezold case. Claimants submitted claims to cultural rights which they sought protected by the Republic of Zimbabwe contra the claims of the von Pezolds. The petitioners (custodians of indigenous culture) were deemed to have dubious loyalties given their association both with the Government of Zimbabwe and its head of state. The key difference between this case and the other three is that claimants were indigenous people who -in contrast to the other cases- did not make claims to private property but were concerned over their cultural rights to land used in commune. In a sense therefore, they were not contractually negatively affected by the land reform programme but aggrieved by relatively favourable terms towards private parties and the government under a BIT.

Mike Campbell (Pvt) Ltd and Others v Republic of Zimbabwe

The matter involving Mike Campbell was both similar to other cases considered thus far but equally unique. It was similar because it touched on disputes emanating from the land reform programme and questions over the sanctity at law of private property in Zimbabwe. However, it was different in the sense that claimants were not nationals of a bilateral partner but citizens of Zimbabwe. Moreover, they had sought legal recourse in the local courts but were aggrieved due to the partisan tone of the courts in their matter as well as the belligerent attitude of the state and perceived state agents towards them. An equally telling difference was the tribunal in which the matter was held. Instead of the International Court for the Settlement of Disputes (ICSD), the matter was heard in the SADC Tribunal.

Utilitarian Lens on the arbitration process

Commenting on the ethical positions states assume in an attempt to ensure justicicy, Amartya Sen notes that, ‘There are theories of justice and of social choice that take extensive note of the social states that actually emerge in order to assess how things are going and whether the arrangements can be seen as just. Utilitarianism takes such a view […]’ (Sen, 2009, p.86). In this section, a look at the ethical justifications of actions in the cases presented above is made.

In the Funnekotter matter, the legal positions were that Zimbabwe was indeed in breach of the terms of Article 6 of the BIT. Furthermore, it had to recompense claimants the value of their investments plus interest. For the purposes of this paper though, the question worth answering is, did the republic of Zimbabwe have a valid moral argument? Alternatively, were their actions ethical? Kantian utilitarian approaches would suggest that the actions of the state would be justified if they were done for the greater good. Act utilitarianism for example states that when faced with a choice, we must first consider the likely consequences of potential actions in that particular case and, from that, choose to do what we believe will generate the most overall happiness. This would suggest that repossession of land for redistributive purposes to majority, land-hungry black people would be sufficient moral grounds to engage in land grabs. However, because the defence was couched within a discourse of constitutional legality, the state...
placed itself in a dubious moral position. On one hand, it claimed to be a morally upstanding person who honoured the law. On the other, it broke legally binding instruments to meet the needs of citizens. Moreover, the utilitarian argument is questionable when we consider two dimensions to the land problematic which have been drawn out in the literature on Zimbabwe’s land reform namely:

1. That in the long term, many poor farmers have struggled to derive broad economic benefit from the process due to limited resources. As such, the greater good depends on the time horizon one assumes when assessing the processes and outcomes of the land reform exercise. If one assumes that the process has reached its end through transfer of land from one class to another, then perhaps the ethical justification is flawed because living standards in Zimbabwe have plummeted since 2000 with very few success stories (Scoones, 2014) amidst challenges by many new farmers;

2. Some recipients of the farmland have failed to put land to productive use out of negligence. In other words, for some, land was an end and not a means to an end.

Over the numerous arbitral processes, the state was accused of employing various strategies in bad faith in the Mike Campbell case as well as in the von Pezold case. Whether such approaches are legitimately sanctioned state strategies is not the subject of this discussion. Instead, again we delve into the ethical question related to the strategy. The state reiterated in all cases that it was guided by a moral duty to restore dignity to indigenous people including over the matter of national resources. Consequently, a utilitarian perspective would justify the state’s handling of matters, in spite of the questionable legality of measures taken. But would it justify blatant refusal to honour terms of contracts even when such refusal had negative implications for ‘the greater number’? Such a question is worth considering given that most rulings in the arbitrations went against Zimbabwe and further delays/refusals culminated in more juridical processes with added sanctions attached.

Utilitarian justifications are therefore problematic in some cases as a greater good at one moment may prove to be a long-term bad in others. Although the Zambabwean government may have been morally justified to engage in some of its actions, the long-term impacts and outcomes may yet prove the greater good, a broader evil. Alternatively, it may be the case that the arbitration processes and the government’s unshakeable posture will reap great rewards.

**Conclusion**

The paper has discussed arbitration approaches by Zimbabwe through Kantian utilitarian lens. It laid out the background to the problems and discussed through four cases, the legal questions presented and how the Zambabwean state responded by broadening the discussion into a moral question. As a result, the paper revealed that a utilitarian posture allowed the state to justify its various approaches regardless of the legality of measures taken. Perceived in such light, one may determine that the process has various means of vindication. When perceived in the short term, transfer of land from one class to another may prove a justified approach whatever the actions taken to do it. However, if long-term horizons are employed and contemporary outcomes are anything to go by, then the jury may yet be out on the state’s efforts both during and after the arbitration procedures.

**References**


---

5 For example dubious counter-claims such as FungaMutize and others – Case SADC (T) No. 08/2008; Nixon Chirinda and others – Case SADC (T) No. 09/2008.

For example by encouraging alternative claims such as 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)

5 Funnekotter et al., v Republic of Zimbabwe in the United State District Court, Southern District of New York.


