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Limitation of human rights in international law and the Zimbabwean Constitution

By Innocent Maja¹

Introduction

Human rights contained in international treaties, regional treaties and national constitutions are generally not absolute but are often qualified and subject to reasonable restrictions.² Currie and de Waal argues that '[c]onstitutional rights and freedoms are not absolute. They have boundaries set by the rights of others and by important social concerns such as public order, safety, health and democratic values.³ This essentially means that not all infringement of rights is unconstitutional. Rights can be limited or justifiably infringed if the reason for infringement is justifiable 'in an open and democratic society based on human dignity, equality and freedom.'⁴

A discussion of the limitation of rights is crucial because the extent to which limitations to rights are considered legitimate determines the actual application and effectiveness of these rights. It is even more crucial in Zimbabwe where there is currently limited national jurisprudence on the extent to which rights can be limited in terms of section 86 of the Zimbabwean Constitution.

This article is divided into two parts. The first part explores the limitation of rights in international law in a bid to establish best practices. Part two analyses the limitation of rights in section 86 of the Zimbabwean Constitution in a bid to provide some best practices that the Zimbabwe can use to interpret section 86 of the Constitution.

1. Limitation of rights in International law

This section analyses the limitation of rights in international law. The focus will be on the United Nations (UN), European and African human rights systems. The aim is to establish best practices that could be used to interpret section 86 of the Zimbabwean Constitution.

1.1 Limitation of rights in the UN human rights system

The key provisions regarding the limitation of rights under the UN human rights system are article 29(2) of the Universal Declaration of Human Rights,⁵ articles 19(3) and 25 of the

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² There have been convincing arguments that some rights have become absolute and cannot be derogated from. These include the right not to be tortured or subjected to cruel, inhuman and degrading treatment or punishment; the right not to be placed in slavery; the right to human dignity, etc. This aspect is not the focus of this article.

³ Iain Currie and Johan de Waal, *The Bill of Rights Handbook*, 6 Edition, 150 Juta & Co. Ltd, Cape Town, (2014).

⁴ Currie and de Waal op cit note 3 above 151.

⁵ Article 29(2) of the Universal Declaration provides that 'In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.'

International Covenant on Civil and Political Rights⁶ (ICCPR) and article 4 and 5 of the International Covenant on economic, Social and Cultural Rights (ICESCR).⁷

There are, generally speaking, three conditions for legitimate limitation of rights provided for by the UN treaties namely:

a. The limitation must be provided by the law

This condition requires that the limitation must have a clear legal basis. The law authorising the limit of the right must be a) publicly accessible; b) sufficiently precise to enable people to regulate behaviour and c) it must not confer unfettered discretion on the state to prevent risk of abuse and arbitrary exercise of discretion.⁸

b. The limitation must serve a legitimate aim

The question that is normally asked is '*what is the problem that is being addressed by the limitation?*' The legitimate aims refer to the interests of the state and the rights of others. Some of the enumerated aims include:

- i. respect for the rights and reputations of others;
- ii. respect for public morals;
- iii. protection of public order;
- iv. promoting the general welfare in a democratic society..

c. Proportionality between end and means

The proportionality principle demands that the means used by a state to limit a right must be proportional to the aim sought. Note 4, paragraph 35 of the UNHRC General Comment No. 34 states that '*when a State party invokes a legitimate ground for restriction of freedom of expression, it must demonstrate in specific and individualized fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat.*'

⁶ Article 19(3) of the CCPR states that 'The exercise of the rights to [freedom of expression], carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary, (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order or of public health or morals.' Article 25 of the CCPR insinuates that the limitation of a right should be a reasonable restriction.

⁷ Article 4 of the CESCRC states that 'The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.'

⁸ Note 4 paragraph 25 of the UNHRC General Comment No. 34 says 'For the purposes of paragraph 3, a norm, to be characterized as a "law", must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly and it must be made accessible to the public. A law may not confer unfettered discretion for the restriction of freedom of expression on those charged with its execution. Laws must provide sufficient guidance to those charged with their execution to enable them to ascertain what sorts of expression are properly restricted and what sorts are not.'

There are a number of considerations that need to be taken into account to justify that the means used by a state⁹ to limit a right is proportional to the aim sought. In a nutshell, proportionality includes aspects of suitability, subsidiarity and proportionality in the narrow sense.¹⁰ Suitability requires that the limitation should in principle lead to the legitimate aim which is sought after. Proportionality in the narrow sense requires a reasonable relationship between the infringement and the legitimate aim. It essentially follows that a greater infringement should further a heavier legitimate aim. The subsidiary test reviews whether there are other alternative less restrictive means to reach the legitimate aim.¹¹

1.2 Limitation of rights in the European human rights system

It has been established above that human rights do not apply absolutely but may be restricted through legitimate limitations. This section analyses how the European Convention on Human Rights (ECHR) limits human rights. There are, generally speaking, three¹² conditions for legitimate limitation of rights provided for by the ECHR.

a. Law of general application

The limitation of rights provided for in the ECHR should have a basis in national law to avoid arbitrary limitations to rights.¹³

b. Legitimate aim

The limitation's object should belong to one of the explicitly enumerated legitimate aims. Even though the enumerated goals are broadly formulated, they all refer to the interests of the state and the rights of others.¹⁴

c. Proportionality between end and means

The limitation should be necessary in a democratic society to meet the legitimate goal. The European Court interpreted the characteristics of a democratic society to include pluralism, tolerance, broadmindedness and respect for human rights.¹⁵ An example includes article 10(2) of the ECHR that permits limitation of the right to freedom of expression if it is limited by 'law' that is 'necessary in a democratic society' to serve certain circumscribed interests such as 'the protection of health or morals' and 'the reputation or rights of others.'

⁹ States are afforded some margin of discretion in this regard. The concept of margin of appreciation is discussed in section 1.2 below because its origins are traced in the European system and it is predominantly applied in that system.

¹⁰ Henrard, The right to equality and non-discrimination and the protection of minorities in Africa in S Dersso (ed) *Perspectives on the rights of minorities and indigenous peoples in Africa* (2010) 220.

¹¹ JH Gerards Judicial review in equal treatment cases (2004) 49-55 52.

¹² The fourth instance where rights may be temporarily limited is found in article 15 of the ECHR which allows temporary limitation of rights when there is a state of emergency.

¹³ See *Kopp v Switzerland Eur. Ct. H. R.*, 25 March 1998 55-75 where the European Court stated that the regulation should be sufficiently precise in its formulation and accessible for the subjects.

¹⁴ K Henrard Devising an adequate system of minority protection: Individual human rights, minority rights and the right to self-determination (2000) 133.

¹⁵ *Dudgeon v UK ECHR* (22 October 1981) Ser A 45.

The jurisprudence of the European Court introduced two key principles to regulate the justification of state interference with human rights namely the proportionality principle and the deference or margin of appreciation principle. This section analyses these two principles to evaluate how they impact the limitation of human rights provided for in the ECHR.

ci. Proportionality principle

It has already been established above that a state can limit a right if there is an objective and reasonable justification and the justification has to be evaluated taking into account its goal, as well as its effect, assessed against the background of the principles inherent in democratic societies. The limitation has to have a legitimate aim and there must be a reasonable and proportional relationship between this aim and the means used to limit the right. The required proportionality is evaluated using the basic values of a democratic society such as tolerance, diversity and broadmindedness.¹⁶

The proportionality principle was introduced in the Belgian Linguistic Case¹⁷ where it was established that the means used by a state to limit a right must be proportional to the aim sought. Ever since then, the proportionality principle has been developed by the European Court to police the justification of state interference with human rights, ensuring that the state places no greater limitation on rights than necessary.¹⁸ Examples include *Olsson v Sweden*¹⁹ and *Glaser v Germany*²⁰ where the European Court reiterated that the means used by a state to limit a right must be proportional to the aim sought.

The proportionality test is used to assess the means and side effects of state action. For instance, in *Dudgeon v UK*,²¹ the European Court assessed the proportionality of the means used by the state to 'preserve public order and decency' in regulating homosexual conduct in criminal law. It is minimally used to assess the legitimacy of the state's aims.²²

Because human rights are based on interests, the assessment employed by the proportionality principle involves a flexible balancing of the competing interests of an individual and the state as a whole.²³ In *Hatton v UK*, the European Court explained that in assessing whether the means used by the state to limit rights is justifiable, '*regard must be had to the fair balance that has to be struck between the competing interests of the*

¹⁶ See the recent cases of *Tanase v Moldova* ECHR (27 April 2010) 41-44 and *Animal Defenders International v United Kingdom* ECHR (22 April 2013) 39-43.

¹⁷ *Belgian Linguistic case* (1968) 1 EHRR 252 specifically states that '*Article 14 is violated when it is clearly established that there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised.*' See also the 2002 Inter-American Court decision of *Cantos v Argentina* Series C No. 97 (2002) IACtHR [54].

¹⁸ A Legg, *The margin of appreciation in international human rights law: Deference and proportionality*, (2012), Oxford University Press, 178.

¹⁹ *Olsson v Sweden*, ECHR (24 March 1988) Ser A 130 67.

²⁰ *Glaser v Germany*, ECHR (28 August 1986) Ser A 104 90.

²¹ *Dudgeon v UK* ECHR (22 October 1981) Ser A 45. See also *Christine Godwin v UK* No. (2002) EHRR.

²² *Thlimmenos v Greece* No. 34369/97 (2000) EHRR where the European Court found that, as a result of disproportionality, the state's conduct lacked a legitimate aim.

²³ S Tsakyrakis, 'Proportionality: An assault on human right?' (2009) 7 (3) *International Journal on Constitutional Law* 468 expresses concern that rights can be overridden by other interests when placed in the balance, then human rights are themselves at risk.

*individual and of the community as a whole.*²⁴ According to *Young, James & Webster v UK*, ‘democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position.’²⁵

cii. The margin of appreciation or deference principle

Related to the principle of proportionality is the concept of margin of appreciation or deference.²⁶ The margin of appreciation refers to the discretion given State Parties to the ECHR to strike a balance between the common good of society (national interests) and the interests of the individual (individual rights) when they restrict human rights.²⁷ It allows states a ‘margin’ or latitude to determine issues that sovereign national institutions are better placed to ‘appreciate’ such as the exact content of rights and the necessity of a restriction.²⁸

It is important to note that the discretion given to states is limited in that the European Court supervises it. In *Handyside v UK*, the European Court made it clear that the state does not have unlimited power of appreciation and the margin of appreciation has to be supervised.²⁹ *Sunday Times v UK* makes it clear that in supervising the state’s margin of appreciation, the European Court applies the proportionality principle³⁰ to ascertain whether the means used

²⁴ *Hatton v UK* No. 36022/97 (2003) (ECtHR) (GC) [98]. See also *Cossey v UK* No. 10843/84 (1990) (ECtHR) [41] that highlights that ‘... the notion of proportionality between a measure or a restriction and the aim which it seeks to achieve. Yet that notion is already encompassed within that of the fair balance that has to be struck between the general interest of the community and the interests of the individual.’

²⁵ *Young, James & Webster v UK*, ECHR (13 August 1981) Ser A 44 63.

²⁶ The precise definition of the margin of appreciation is illusive. A number of authors have attempted to describe it. For example, P Mahoney, ‘Universality versus subsidiarity in the Strasbourg case law of free speech: Explaining some recent judgments’ (1997) EHRLR 364, 370 describes it as an interpretational tool that determines which human rights matters require a uniform international human rights standard and which one require variation from state to state. JG Merrills, *The development of international law by the European Court of Human rights*, (1993) 2 ed, Manchester UP, 74-5 describes it as a doctrine that establishes whether it is a matter of national sovereignty or for Tribunals to demarcate the contours of a particular human rights standard.

²⁷ M Tümay, ‘The “margin of appreciation doctrine” developed by case law of the European Court of Human Rights’ (2008) 5(2) *Ankara Law Journal* 202.

²⁸ *Handyside v UK*, ECHR (7 December 1976) Ser A 24 48-49 argues that ‘It is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals... By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the ‘necessity’ of a ‘restriction’ or ‘penalty’ intended to meet them.

²⁹ *Handyside v UK*, ECHR (7 December 1976) Ser A 24 49 states that ‘Article 10(2) does not give the Contracting States an unlimited power of appreciation. The Court... is responsible for ensuring the observance of those States’ engagements, [and] is empowered to give the final ruling on whether a ‘restriction’ or ‘penalty’ is reconcilable with freedom of expression... The domestic margin of appreciation thus goes hand in hand with a European supervision. Such supervision concerns both the aim of the measures challenged and its ‘necessity’...’

³⁰ *Sunday Times v UK* (1991) EHRR 242 242 holds that ‘[t]he Court’s task, in exercising its supervisory jurisdiction, is not to take the place of the competent national authorities but rather to review under Article 10 the decisions they delivered pursuant to their power of appreciation. This does not mean that the supervision is limited to ascertaining whether the respondent State exercised discretion reasonably, carefully and in good faith; what the Court has to do is to look at the interference complained of in the light of the case as a whole and determine whether it was ‘proportionate to the legitimate aim pursued’ and whether the reasons adduced by the national authorities to justify it are ‘relevant and sufficient.’

by a state to limit a right is proportionate to the legitimate aim pursued. *Chassagnou v France*³¹ establishes that in a democratic society marked with pluralism, tolerance and broadmindedness, the state's margin of appreciation should be exercised in a way that ensures the protection of minorities.

However, the European Commission and European Court jurisprudence reveals that state interests often prevail in the balancing process.³² Although the state's margin of appreciation varies depending on the legitimate goal relied upon, the (non) existence of a European standard³³ and the nature of the right infringed,³⁴ states have generally been given a wide margin of appreciation regarding the actual implementation of rights enshrined in the ECHR.³⁵ In *Ireland v UK*, the European Court established that in article 15(1) of the ECHR gives the state a wide margin of appreciation when limiting rights during a state of emergency. Such a broad margin of appreciation has the effect of limiting the enjoyment of the rights concerned.

In *Sidiropoulos and five others v Greece*,³⁶ the European Commission accepted that the state's margin of appreciation concerning the assessment of the need in a democratic society for a limitation is wide where matters of national security are concerned.

Henrard³⁷ observes that the state's wide margin of appreciation is strongly influenced by textual constraints and the way state interests and existent state structures often prevail in the balancing process inherent in the assessment of a possible violation of a provision of the ECHR. This has led to the supervision by the European Court and European Commission to be criticised as too subsidiary and deferent to the Contracting state.³⁸ Such deference reduces the level of protection of vulnerable groups in a state.

The preceding discussion of the ECHR highlights that the jurisprudence from the European Court and European Commission shows that human rights can be limited by a law of general application serving a legitimate aim taking into account the proportionality principle and the margin of appreciation given to states.

1.3 Limitation of minority language rights under the African human rights system

Under the African human rights system, human rights may be legitimately limited by states in three ways in terms of the African Charter on human and Peoples' Rights (ACHPR).³⁹

³¹ *Chassagnou v France* (1999) EHRR 112.

³² See *Handyside v UK*, ECHR (7 December 1976) Ser A 24 and *Silver and others v UK* ECHR (25 March 1983) Ser A 61.

³³ See *Marckx v Belgium*, ECHR (13 June 1979) Ser A 31 41.

³⁴ Like in *Campbell v UK*, ECHR (25 March 1992), Series A 233 46-47 and *Lingens v Australia*, ECHR (8 July 1986) Ser A 10342.

³⁵ *United Communist Party of Turkey & Ors v Turkey*, (1988) EHRR 57.

³⁶ *Sidiropoulos v Greece* [1997] ECHR 49.

³⁷ K Henrard Devising an adequate system of minority protection: Individual human rights, minority rights and the right to self-determination (2000) 75.

³⁸ K Henrard *supra*.

³⁹ This section has heavily relied on F Viljoen *International Human Rights Law in Africa* (2012) 329-333.

First, rights can be limited by 'claw back' clauses such as 'for reasons... previously laid down by law',⁴⁰ 'within the law',⁴¹ 'subject to law and order'⁴² and 'provided he abides by the law.'⁴³ The obvious concerns are that state parties could use 'claw back' clauses to unduly restrict the rights provided for in the ACHPR.⁴⁴ However, the African Commission has interpreted the term 'law' as international law or international human rights standards,⁴⁵ thus minimising the negative effects of these clauses.

Second, human rights in the ACHPR can be limited using right-specific-norm-based limitations⁴⁶ that requires the limiting law to serve some stipulated objective like national security, law and order, public health or morality,⁴⁷ health, ethics and rights and freedoms of others.⁴⁸ Interestingly, in *Amnesty International v Zambia*, the African Commission treated right-specific-norm-based limitations as 'claw back' clauses that can only be limited by international law or international human rights standards.⁴⁹

Third, minority language rights in the ACHPR can be limited using the general limitation clause in article 27(2) of the ACHPR which says '*[t]he rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest.*'⁵⁰ In practice, the African Commission applies the proportionality test to establish whether a limitation is legitimate and justifiable.⁵¹

The limitation should be by law of general application. The impact, nature and extent of the limitation is weighed against the legitimate state interest serving a particular goal. The limitation should not have the effect of obliterating and rendering the right concerned illusory.⁵² Whenever there is more than one way of achieving an objective, the less invasive route should be followed.⁵³

⁴⁰ Art 6 of the ACHPR.

⁴¹ Art 9 of the ACHPR.

⁴² Art 8 of the ACHPR.

⁴³ Art 10(1) and 12(1) of the ACHPR.

⁴⁴ See E Bondzie-Simpson, 'A critique of the African Charter on Human and Peoples' Rights' (1988) 31 *Howard Law Journal* 643, 661.

⁴⁵ See Communications 105/93, 128/94, 152/96 (joined), *Media Rights Agenda and others v Nigeria* (2000) AHRLR 200 (ACHPR 1998) (12th Annual Activity Report); Communication 101/93, Civil Liberties Organisation (in respect of Bar Association) v Nigeria (2000) AHRLR 186 (ACHPR 1995) (8th Annual Activity Report) para 15 and Communications 27/89, 46/90, 49/90, 99/93 (joined), *Organisation Mondiale Contre la Torture and others v Rwanda* (2000) AHRLR 282 (ACHPR 1996) (10th Annual Activity Report).

⁴⁶ F Viljoen *International Human Rights Law in Africa* (2012) 329.

⁴⁷ Art 12(2) of the ACHPR.

⁴⁸ Arts 8 and 11 of the ACHPR.

⁴⁹ Communication 212/98, *Amnesty International v Zambia* (2000) AHRLR 325 (ACHPR 1999) (12th Annual Activity Report) para 50.

⁵⁰ Communications 105/93, 128/94, 152/96 (joined), *Media Rights Agenda and others v Nigeria* (2000) AHRLR 200 (ACHPR 1998) (12th Annual Activity Report) paras 68 and 77 established that the only legitimate limitation to rights in the ACHPR is article 27(2) of the ACHPR.

⁵¹ See F Viljoen *International Human Rights Law in Africa* (2012) 331.

⁵² Communications 105/93, 128/94, 152/96 (joined), *Media Rights Agenda and others v Nigeria* (2000) AHRLR 200 (ACHPR 1998) (12th Annual Activity Report) para 65.

⁵³ Communication 242/2001, *Interights and Ors v Mauritania* (2004) AHRLR 87 (ACHPR 2004) (17th Annual Activity Report) para 82.

It is interesting to note that in *Legal Resources Foundation v Zambia*,⁵⁴ the African Commission established that the limitation of rights cannot be solely based on popular will but the proportionality principle in article 27(2) of the ACHPR. This is crucial for the protection of vulnerable and non-dominant groups within a state.

One question that has arisen is whether and to what extent the European principle of margin of appreciation discussed above applies in the African human rights system. In *Prince v South Africa*, the African Commission acknowledged that the principle of subsidiarity and the doctrine of margin of appreciation apply to the ACHPR since states are primarily responsible for protecting rights in the ACHPR.⁵⁵ However, the African Commission did not allow a restrictive reading of the doctrines of deference and margin of appreciation which advocates for the hands-off approach by the African Commission on the mere assertion that its domestic procedures meet more than the minimum requirements of the African Charter. This would oust the African Commission's mandate to monitor and oversee the implementation of the African Charter. Put differently, the doctrine of margin of appreciation does not preclude an assessment by the African Commission of the reasonableness of the limitation of rights in terms of section 27(2) of the ACHPR.⁵⁶ This approach is similar to the European Court's approach that also indicates that the margin of appreciation goes hand in hand with European supervision (though the latter is inversely related to the width of the margin).

It is clear from the discussion in section 1 that human rights are not absolute but can be limited by claw-back clauses, norm-based limitations, the proportionality principle and the margin of appreciation given to states. However, the limitation should not have the effect of obliterating and rendering the right concerned illusory.

2. Limitation of rights in the Zimbabwean Constitution

Section 86 of the Zimbabwean Constitution is considered as the limitation clause. It has two interesting aspects. First, section 86(3) highlights rights that may be potentially absolute in the Zimbabwean Constitution namely the right to human dignity; the right not to be tortured or subjected to cruel, inhuman or degrading treatment or punishment; the right not to be placed in slavery or servitude; the right to fair trial; the right to obtain an order of habeas corpus and the right to life except to the extent specified in section 48 of the Constitution. Section 86(3) says 'No law may limit the following rights in this Chapter, and no person may violate them...' The use of may is not peremptory but discretionary in section 86(3). This potentially gives the Court the discretion to determine whether the mentioned rights are absolute or discretionary.

⁵⁴ Communication 211/98, *Legal Resources v Zambia* (2001) AHRLR 84 (ACHPR 2001) (14th Annual Activity Report) para 69.

⁵⁵ Communication 255/02, *Prince v South Africa* (2004) AHRLR 105 (ACHPR 2004) para 51 establishes that 'Similarly, the margin of appreciation doctrine informs the African Charter in that it recognises the respondent state in being better disposed in adopting national rules, policies and guidelines in promoting and protecting human and peoples' rights as it indeed has direct and continuous knowledge of its society, its needs, resources, economic and political situation, legal practices, and the fine balance that needs to be struck between the competing and sometimes conflicting forces that shape its society.'

⁵⁶ F Viljoen *International Human Rights Law in Africa* (2012) 333.

The second fundamental aspect of section 86 is that it provides the circumstances under which the rights enshrined in the Bill of rights may be limited. Currie and de Waal convincingly argue that the existence of a limitation clause does not mean that the rights in the Bill of rights can be limited for any reason but can only be limited for a justifiable reason.

Woolman *et al*⁵⁷ argue that the limitation clause has a four-fold purpose. First, it functions as a reminder that the rights enshrined in the Bill of Rights are not absolute. Second, the limitation clause reveals that rights may only be limited where and when the stated objective behind the restriction is designed to reinforce the constitutional values. Third, the test set out in the limitation clause enjoins courts to engage in a balancing exercise in order to arrive at a global judgment on proportionality. Finally, the limitation clause serves as a reminder that the counter-majoritarian dilemma is neither a paradox nor a problem, but an ineluctable consequence of a country's commitment to living in a constitutional democracy.⁵⁸

The Zimbabwean Constitutional Court is yet to come up with the approach that a court should take when interpreting section 86 of the Constitution. In South Africa where section 36 of the Constitution has provisions almost similar to section 86 of the Zimbabwean Constitution, the courts usually ask two fundamental questions. First, whether a right in the Bill of Rights has been violated, impaired, limited or infringed by law or conduct?⁵⁹ Second, if the answer to the first question is in the affirmative, whether the infringement can be justified as a permissible limitation of the right?⁶⁰

A careful look at section 86 reveals that the limitation of rights is essentially two-fold. First, a right should be limited by a law of general application. It would be interesting for the Constitutional Court to define what a law of general application would entail. South African jurisprudence has defined the law of general application as the rule of law⁶¹ that includes legislation,⁶² common law⁶³ and customary law⁶⁴ that is impersonal,⁶⁵ applies equally to all and is not arbitrary in its application.

⁵⁷ S Woolman, T Roux & M Bishop *Constitutional law of South Africa: Student edition* (2007) 34-1 to 34-2.

⁵⁸ Put differently, powers of judicial review are best understood not as part of a battle for ascendancy between courts and legislatures or as a means of frustrating the will of the political majority, but rather as a commitment of South Africa's basic law to shared constitutional competence.

⁵⁹ In some cases, the Constitutional Court has dispensed with this first question and has proceeded on the basis of the second inquiry alone. Such cases include *Christian Education South Africa v Minister of Education* 2000 4 SA 757 (CC) and *S v Jordan* 2002 6 SA 642 (CC) [28] – [29]. A further analysis of this aspect is not useful to the subject under discussion in this thesis.

⁶⁰ Currie & de Waal op cit note 3 153. This approach is consistent with how Zimbabwean Court interpreted the Bill of rights before the new constitution came into effect. See *Bhatti & Anor v Chief Immigration Officer & Anor* 2001 (2) ZLR 114 (H)

⁶¹ *President of the Republic of South Africa v Hugo* 1997 4 SA 1 (CC).

⁶² It includes Acts of Parliament and delegated legislation. See *Larbi-Odam v MEC for Education (North West Province)* 1998 1 SA 745 (CC) 27.

⁶³ Policy, practice and contractual provisions do not qualify as law of general application. See *Hoffmann v South African Airways* 2001 1 SA (CC) 41 and *Barkhuizen v Napier* 2007 5 SA 323 (CC) 26.

⁶⁴ *Du Plessis v De Klerk* 1996 3 SA 850 (CC) 44 & 136.

⁶⁵ *Islamic Unity Convention v Independent Broadcasting Authority* 2002 4 SA 294 (CC).

Second, the law of general application should be fair, reasonable, necessary and justifiable⁶⁶ in an open and democratic society that is based on openness, justice, human dignity,⁶⁷ equality and freedom. Currie and de Waal convincingly contend that⁶⁸ '[it] must be shown that the law in question serves as a constitutionally acceptable purpose and that there is sufficient proportionality between the harm done by the law (the infringement of fundamental rights) and the benefits it is designed to achieve (the purpose of the law).' In the same vein, *S v Makwanyane* established that '[t]he limitation of constitutional rights for a purpose that is reasonable in a democratic society involves the weighing up of competing values, and ultimately an assessment based on proportionality.'⁶⁹ The proportionality principle (discussed above) is considered as central to a constitutional democracy.⁷⁰

Section 86(2) lists six factors that a court should take into account when it determines whether or not a limitation is reasonable and justifiable in a democratic society. Five of these factors are substantially similar to the factors that constituted proportionality in the *Makwanyane* case are used to determine proportionality. The following are the factors:

a. The nature of the right or freedom

A court is usually enjoined to assess what the importance of a particular right is in the overall constitutional scheme vis a vis the justification of its infringement. It would therefore follow that a right that is important to the Constitutional ambition to create democratic society based on values embodied in section 3 of the Constitution will carry a lot of weight in the exercise of balancing the right against the justification for its infringement.

b. The purpose of the limitation

Reasonableness usually demands that the limitation of a right must serve some worthwhile and important purpose in a constitutional democracy. Unlike the SA Constitution that does not list acceptable purposes of the limitation, section 86(2)(b) indicates that the limitation should be '...necessary in the interests of defence, public safety, public order, public morality, public health, regional or town planning or the general public interest.' It will be very interesting to see how the Zimbabwean Constitutional Court will interpret this provision.

c. The nature and extent of the limitation

This factor requires the court to assess the way in which the limitation of a right affects the right concerned. South African Courts have established that this factor looks at the effects of the limitation on the right concerned and not on the right holder.⁷¹ Essentially, the law that limits the right should not do more damage to the right than is reasonable for achieving its purpose.⁷²

⁶⁶ Devenish GE (2005) *The South African Constitution* (LexisNexis Butterworths: Durban) 181 says the limitation should be reasonable and proportional.

⁶⁷ Section 86(3)(b) of the Constitution makes it clear that human dignity is one of the rights that cannot be limited.

⁶⁸ Currie & de Waal op cit note 3 163.

⁶⁹ *S v Makwanyane* 1995 (3) SA 391 (CC) [102].

⁷⁰ DM Beatty *Ultimate rule of law* (2005) 163 argues that '[t]he fact is that proportionality is an integral, indispensable part of every constitution that subordinates the system of government it creates to the rule of law. It is constitutive of their structure, an integral part of every constitution by virtue of their status as the supreme law within the nation state.'

⁷¹ *S v Meaker* 1998 8 BCLR 1038 (W).

⁷² *S v Manamela* 2000 3 SA 1 (CC) 34.

d. The need to ensure that the enjoyment of rights and freedoms by any person does not prejudice the rights and freedoms of others

This requirement awakens to the reality that rights are not exercised in isolation but should take into account the rights of others.

e. The relationship between the limitation and its purpose.

This factor requires that there be a good reason for the infringement of a right. The court should make a factual inquiry on whether or not there is proportionality between the harm done by a limitation of right and the benefits that the limiting law seeks to achieve. If the limiting law does not or barely contributes to achieving the purpose of limitation, such law will not be regarded as a reasonable and justifiable limitation of a right. Interestingly, section 86(2)(b) of the ZIM Constitution qualifies this factor by requiring the court to specifically assess whether the limitation ‘... imposes greater restrictions on the right or freedom concerned than are necessary to achieve its purpose.’

f. Whether there are less restrictive means of achieving the purpose of the limitation

This requires courts to assess whether the means used to restrict a right is the best possible means to achieve the purpose of a limitation or there are other means that can be used to achieve the purpose that a limitation of rights seeks to achieve without restricting the limited right at all or restricting the limited right to a smaller extent. Currie and de Waal⁷³ argue that to be legitimate, a limitation of a fundamental right must achieve benefits that are in proportion to the costs of limitation. It follows therefore that a limitation of a right can be deemed not proportionate if the state could employ other means to achieve the same ends that will not restrict the limited right at all or will restrict the limited right to a small extent. South African Courts have established that the limitation is not be proportional if there are less restrictive (but equally effective) means that can be employed to achieve the same purpose of the limitation.⁷⁴

It is therefore clear from the above discourse that constitutional rights are not absolute but qualified. Constitutional rights can be legitimately limited by a law of general application that is fair, reasonable, necessary and justifiable in an open and democratic society that is based on openness, justice, human dignity, equality and freedom

⁷³ Currie and de Waal op cit note 3 170.

⁷⁴ *S v Makwanyane* 1995 3 SA 391 [123] and [128].