

Zimbabwe Rule of Law Journal

Volume 1, Issue 1 February 2017

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FOREWORD

I am delighted to welcome the inaugural issue of the Zimbabwe Rule of Law Journal. The idea of establishing this Rule of Law Journal has largely been influenced by existing demand in the legal fraternity for a peer reviewed law journal with a national scope.

The aim of this Zimbabwe Rule of Law Journal is to make a significant contribution towards knowledge creation, raising general awareness on aspects of the law and instill informed scholarly debates. The journal is a joint endeavor between the International Commission of Jurists Africa Regional Programme and the Centre for Applied Legal Research (CALR). This journal is composed of articles and papers written by academics, legal practitioners and law students.

The rule of law is a foundational value and principle of our Constitution as set out in section 3. The Preamble of the Constitution recognises the need to entrench the rule of law because it underpins democratic governance. The rule of law is the means by which fundamental human rights are protected. It is therefore absolutely necessary that there be a way in which the legal profession is enabled to play its role in ensuring that the rule of law is maintained and promoted. This first issue contains articles on house demolitions in violation of s 74 of the Constitution, the right of access to the voters' roll, fair labour standards, the justice delivery mandate of the Judicial Service Commission, the right to life and applicable criminal defences, employment of persons with disabilities, accountability of persons in high offices and public statements prejudicial to the State.

It is my hope that this journal will play an important role in nation building. It will offer information on rule of law issues and disseminate the jurisprudence of our courts and international and regional courts on this very vital subject. It will hopefully introduce, through the contributions by lawyers and other practitioners of their professional expertise, to the comparative and international dimensions of the rule of law principle and the comprehensive developments in this area. In this way this journal will seek to protect and promote the rule of law through critical analysis of judgments of the courts.

The current Constitution of Zimbabwe was adopted in 2013. Many of its provisions require interpretation by the courts in order to build a body of jurisprudence for the future. It can be said that with the coming into force of the 2013 Constitution and establishment of the Constitutional Court, the process of balancing the Court's functional and institutional establishment has just begun. There is a need to strike a proper balance between constitutional functions and the concrete power of the Court and between the objects and subjects of constitutional control. This journal can, with the contribution of many professionals, become a permanent, continual and systemic source of assessment of the work of our courts and provide invaluable insights into the working of our system of governance.

I wish to thank the many individuals who have made it possible for this Journal to be produced and congratulate those who have prepared the articles that make up this first issue. I wish to apologize in advance for any inadequacies that may be picked up in this issue. It is the first and all efforts will not be spared to improve subsequent issues in all respects.

Harare, February 2017

Justice MH Chingengo, Chief Editor

CRIMINAL LAW DEFENCES AND THE RIGHT TO LIFE IN THE NEW CONSTITUTION

Geoffrey Feltoe

This article explores the status of defences to criminal liability for causing the death of another person in the light of the nature of the right to life guarantee in section 48 of the 2013 Constitution.¹

Defences in Criminal (Codification and Reform) Act [Chapter 9:13]

The Criminal Law (Codification and Reform) Act [Chapter 9:13] (“the Criminal Law Code”) provides that where stringent requirements are met a person has a defence to criminal liability where he or she causes the death of another—

acting in self-defence; [s 253] acting

in defence of a third party; acting in

defence of property; [s 258]

acting under necessity where he or she has been threatened that he or she will

be killed unless he or she kills the other person. [s 264]

acting under lawful superior orders [s 268].

Defence in the Criminal Procedure and Evidence Act [Chapter 9:07]

42 Resisting arrest

(1) If any person who is authorized or required under this Act or any other enactment to arrest or assist in arresting another person attempts to make the arrest and the person whose arrest is attempted—

(a) resists the attempt and cannot be arrested without the use of force; or

(b) flees when it is clear that an attempt to arrest him is being made or resists the attempt and flees;

the person attempting the arrest may, in order to effect the arrest, use such force as is reasonably

justifiable in the circumstances of the case to overcome the resistance or to prevent the person

¹ Constitution of Zimbabwe (Amendment Act 20) of 2013 (“2013 Constitution”)

concerned from escaping.

(2) Where a person whose arrest is attempted is killed as a result of the use of reasonably justifiable force in terms of subsection (1) the killing shall be lawful if the person was to have been arrested on the ground that he was committing or had committed, or was suspected on reasonable grounds of committing or having committed an offence referred to in the First Schedule.

Implied defence in the Prisons Act [Chapter 7:11]

30 Use of weapons by prison officers

(1) Subject to this section, a prison officer may use a weapon against—

(a) a prisoner who is—

(i) escaping or attempting to escape; or

(ii) engaged in a combined outbreak or in an attempt to force, break open or scale the outside door, gate, fence or enclosure wall of the prison; or

(iii) using violence to him or another prison officer or other person;

(b) a person who—

(i) whilst assisting a prisoner to escape, is using violence to him or another prison officer or other person; or

(ii) is engaged in a combined break-in or in an attempt to force, break open or scale the outside door, gate, fence or enclosure wall of the prison or an inside door, gate, fence or wall of the prison; or

(iii) whilst so engaged, is using violence to him or another prison officer or other person.

(2) Resort shall not be had to the use of a weapon—

(a) in terms of subparagraph (i) of paragraph (a) of subsection (1), unless—

(i) the prison officer has reasonable grounds to believe that he cannot otherwise prevent the escape; and

(ii) the prison officer gives a warning to the prisoner that he is about to use the weapon against him; and

(iii) the warning given by the prison officer is unheeded;

(b) in terms of subparagraph (iii) of paragraph (a) or subparagraph (i) or (iii) of paragraph (b) of subsection (1), unless the prison officer has reasonable grounds to believe that he or the other prison officer or other person, as the case may be, is in danger of suffering grievous bodily harm.

(3) No prison officer shall in the presence of a prison officer senior to himself make use of a weapon in terms of subsection (1), except on the orders of the senior prison officer.

(4) The use of weapons in terms of this section shall be, as far as possible, to disable and not to kill.

Constitutional provisions on the right to life in pre-2013 Constitution

Section 12 of the pre-2013 Constitution explicitly qualified the right to life guarantee by providing that various forms of killing would not be regarded as a violation of the right to life. The full provisions read as follows:

12 Protection of right to life

(1) No person shall be deprived of his life intentionally save in execution of the sentence of a court in respect of a criminal offence of which he has been convicted. (2) A person shall not be regarded as having been deprived of his life in contravention of subsection (1) if he dies as the result of the use, to such extent and in such circumstances as are permitted by law, of such force as is reasonably justifiable in the circumstances of the case—

(a) for the defence of any person from violence or for the defence of property;

(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

(c) for the purpose of suppressing a riot, insurrection or mutiny or of dispersing an unlawful gathering; or

(d) in order to prevent the commission by that person of a criminal offence;

or if he dies as the result of a lawful act of war.

(3) It shall be sufficient justification for the purposes of subsection (2) in any case to which that subsection applies if it is shown that the force used did not exceed that which might lawfully have been used in the circumstances of that case under the law in force immediately before the appointed day.

Provisions in the 2013 Constitution

By contrast the 2013 Constitution has no explicit provisions setting out the circumstances in which killing will be regarded as lawful and therefore not in violation of the right to life. This appears to be a serious oversight on the part of the drafters of the Constitution. Section 48 reads as follows—

48 Right to life

- (1) Every person has the right to life.
- (2) A law may permit the death penalty to be imposed only on a person convicted of murder committed in aggravating circumstances, and—
 - (a) the law must permit the court a discretion whether or not to impose the penalty;
 - (b) the penalty may be carried out only in accordance with a final judgment of a competent court;
 - (c) the penalty must not be imposed on a person—
 - (i) who was less than twenty-one years old when the offence was committed; or
 - (ii) who is more than seventy years old;
 - (d) the penalty must not be imposed or carried out on a woman; and
 - (e) the person sentenced must have a right to seek pardon or commutation of the penalty from the President.
- (3) ...

Under the 2013 Constitution the permissible limitations on rights and freedoms in the Bill of rights are contained in section 86, the relevant portions of which are set out below -

86 Limitation of rights and freedoms (1)The fundamental rights and freedoms set out in this Chapter must be exercised reasonably and with due regard for the rights and freedoms of other persons.

...

- (3) No law may limit the following rights enshrined in this Chapter, and no person may violate them—
 - (a) the right to life, except to the extent specified in section 48;

...

The previous Constitution thus explicitly provided for the situations where causing of death will be lawful and will not violate the right to life. It laid down that without violating the right to life provision, the State may by law provide for defences to the causing of death in circumstances where the use of force was reasonably justifiable in the circumstances—

for the defence of any person from violence or for the defence of property;

in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

for the purpose of suppressing a riot, insurrection or mutiny or of dispersing an unlawful gathering; or

in order to prevent the commission by that person of a criminal offence; or the death results from a lawful act of war.

Section 48 of the 2013 Constitution has no such provisions. The only circumstance it provides in which the right to life does not apply is if the legislature provides for the imposition of the death penalty for the crime of murder committed in aggravating circumstances.

The limitation clause, section 86 provides that the right to life may not be limited by law except to the extent allowed for in section 48, that is, for murder in aggravating circumstances. It does, however, also provide that the fundamental rights in the Bill of Rights (which includes the right to life) must be exercised reasonably and with due regard for the rights and freedoms of other persons.

Implications of sections 48 and 86

Significant problems arise from the failure by the drafters of the 2013 Constitution explicitly to exempt from the right to life guarantee situations where the causing of death is reasonably justifiable under one of the defences contained in the Criminal Law Code. The best solution to overcome these problems would be to amend section 48 to incorporate these defences as exceptions to the right to life guarantee. Until this is done, the courts will have to try to find ways of dealing with cases in which the person causing death would otherwise have had a defence under the Criminal Law

Code. As will be seen below, it is difficult to see how the courts can find a satisfactory way of allowing these defences to operate in the absence of explicit incorporation of these defences into section 48.

Self-defence

Everyone should have the right to use force to defend himself or herself against an attacker who is intending to kill him or her or cause him or her serious injury. Section 52 of the Constitution provides that every person has the right to bodily integrity which includes the right to freedom from all forms of violence. As Burchell points out in *Principles of Criminal Law* 4th Ed p 117 where the State has failed to provide protection against such an attack "*it is the individual's inherent right accepted by all law, both natural as well as civil' to resort to private defence.*"

Under section 253 of the Criminal Law Code where X causes the death of Y who is murderously attacking him, X can rely on the defence of self-defence providing that the causing of death was reasonably necessary to defend himself or herself against such an attack. But section 48 of the 2013 Constitution provides that everyone has a right to life except a person convicted of murder in aggravating circumstances. Thus the person under attack has the right to life but, taken at face value, even a person who is unlawfully attacking another also has the right to life. This would mean that the person defending against a murderous assault would not be permitted to deprive the attacker of his constitutionally guaranteed right to life. This, of course, would lead to a completely ridiculous result that the person defending himself could be charged with murder or culpable homicide.

If, as is often the case, there is a dispute as to whether in fact the person who caused death did so in self-defence the prosecution can't simply decline to prosecute that person. Even where it is evident that the accused person caused death when he or she was under attack, there may still be doubt as to whether the causing of death was reasonably necessary to ward off the attack. If, however, the accused is charged with culpable homicide the court may be able to find that a reasonable person under attack would have acted no differently from the way in which the accused acted and thus the

accused has not negligently caused death.

In a case of self-defence the court could seek to rely upon section 86(1) of the 2013 Constitution which provides that the fundamental rights in Chapter 4, which includes the right to life, must be exercised reasonably and with due regard to the rights of other persons. The problem with this is that the murderous attacker is not exercising his right to life; he is in fact threatening the life to the person he is attacking so it is not a matter of the attacker being obliged to exercise his rights reasonably. Another approach might be for the court to interpret the right to life guarantee as impliedly being subject to a common law doctrine of necessity. Thus it could be ruled that where a person is under murderous attack and the only way that he can save his life is to kill the attacker, he was obliged to act out of necessity. The right to life of the person murderously attacking must surely be subordinate to the life of the attacker. Additionally, section 52 provides that every person has the right to bodily integrity which includes the right to freedom from all forms of violence from public or private sources. This right adheres to a person who is under a murderous attack. The courts would surely adopt a common sense interpretation of the right to life so as to provide that a person is entitled to defend his or her life against a person who is trying to kill him or her. In other words, there is a natural right to act for the purposes of self-preservation against an unlawful attacker.

The defence of self-defence can also apply where a person uses reasonable means to avert a violent attack which will cause serious injury but not death. Here it might be contended that the right to life of the unlawful attacker outweighs the threat of bodily injury to person attacked but, of course, there is often a thin dividing line between injury and death.

Killing in Defence of Property

The Criminal Law Code also provides in sections 257 and 258 that in extreme circumstances a person has a defence where he kills in defence of property. Some would argue that the law should not allow this defence on the basis that the right to life is more important than the protection of property. Be

that as it may, it is difficult to see how a court could use the doctrine of necessity to allow some sort of defence to the killing of a person as a last resort to defend property.

Killing under Compulsion

The problems with some of the other defences, such as compulsion, are even more acute. Under sections 243 and 244 of the Criminal Law Code where all the stringent requirements for the defence are satisfied, X has the defence of compulsion where he kills Z because Y has threatened to kill X unless he kills Z. Even though X was forced to kill the third person to save his own life, the fact remains that the person who dies is an innocent individual who has a constitutionally guaranteed right to life.

Killing to Arrest

The provision in section 42 of the Criminal Procedure and Evidence Act previously laid down that a person authorized to arrest a person may lawfully kill a person who is resisting arrest or is fleeing, provided that the person was being arrested on the ground that he was committing or had committed, or was suspected on reasonable grounds of committing or having committed a First Schedule offence. It was arguable that the use of lethal force to effect an arrest is not justifiable but even if lethal force is justifiable in extreme circumstances, that provision was surely too wide.

A First Schedule offence is any offence in terms of any enactment in respect of which a punishment of a period of imprisonment exceeding six months is provided and may be imposed without the option of a fine. This would cover relatively trivial offences and killing to prevent escape is not justifiable for such offences. Secondly, it covered killing where there is only a reasonable suspicion that such an offence has been committed. If we are going to have an exception to the right to life on this ground the ambit of lawful killing must be drastically narrowed down.

However, section 14 of Act 2 of 2016 has replaced this section with a new section 42 that substantially restricts the right to use lethal force to effect an arrest or prevent an escape. The force

used must be reasonably justifiable and proportionate in the circumstances to overcome the resistance to the arrest or to prevent the escape. The person attempting the arrest is only justified in using force if the person being arrested has committed, is committing or was suspected to have committed a First Schedule offence and the person attempting the offence believes on reasonable grounds that—

the force is immediately necessary to protect the person trying to arrest from
immediate death or grievous bodily harm; or

if the arrest is delayed there is a substantial risk that the suspect will cause imminent or future
death or grievous bodily; or

the offence for which the arrest is sought is in progress and is of a forcible and
serious nature and involves the use of life-threatening violence or a strong likelihood that it will
cause grievous bodily harm.

Commendable though this provision is restricting the use of lethal force, the problem still exists that section 48 of the Constitution does not explicitly provide for this exception to the right to life.

Other Constitutional Provision

Until there is a constitutional amendment to provide explicitly for these defences the courts could possibly have resort to section 327(6) of the 2013 Constitution which provides as follows:

(6) When interpreting legislation, every court and tribunal must adopt any reasonable interpretation of the legislation that is consistent with any international convention, treaty or agreement which is binding on Zimbabwe, in preference to an alternative interpretation inconsistent with that convention, treaty or agreement.

It is, however, questionable whether this provision can be used to read into the section 48 provisions

that are absent from that section.

Offences Attracting the Death Penalty

Finally it should be noted that there are various offences that previously attracted the death penalty that are now inconsistent with section 48 which only allows the imposition of the death penalty for murder committed in aggravating circumstances.

- Criminal Law Code Treason (Section 20)
- Insurgency, banditry, sabotage or terrorism which results in death (Section 23) (but this could be charged as murder)
- Defence Act [*Chapter 11:02*] Mutiny in terms Section 8 First Schedule.

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the person attempting the arrest may, in order to effect the arrest, use such force as is reasonably

justifiable in the circumstances of the case to overcome the resistance or to prevent the person

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concerned from escaping.

(2) Where a person whose arrest is attempted is killed as a result of the use of reasonably justifiable force in terms of subsection (1) the killing shall be lawful if the person was to have been arrested on the ground that he was committing or had committed, or was suspected on reasonable grounds of committing or having committed an offence referred to in the First Schedule.

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(iii) whilst so engaged, is using violence to him or another prison officer or other person.

(2) Resort shall not be had to the use of a weapon—

(a) in terms of subparagraph (i) of paragraph (a) of subsection (1), unless—

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(ii) the prison officer gives a warning to the prisoner that he is about to use the weapon against him; and

(iii) the warning given by the prison officer is unheeded;

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(a) for the defence of any person from violence or for the defence of property;

(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

(c) for the purpose of suppressing a riot, insurrection or mutiny or of dispersing an unlawful gathering; or

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or if he dies as the result of a lawful act of war.

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The previous Constitution thus explicitly provided for the situations where causing of death will be lawful and will not violate the right to life. It laid down that without violating the right to life provision, the State may by law provide for defences to the causing of death in circumstances where the use of force was reasonably justifiable in the circumstances—

for the defence of any person from violence or for the defence of property;

in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

for the purpose of suppressing a riot, insurrection or mutiny or of dispersing an unlawful gathering; or

in order to prevent the commission by that person of a criminal offence; or the death results from a lawful act of war.

Section 48 of the 2013 Constitution has no such provisions. The only circumstance it provides in which the right to life does not apply is if the legislature provides for the imposition of the death penalty for the crime of murder committed in aggravating circumstances.

The limitation clause, section 86 provides that the right to life may not be limited by law except to the extent allowed for in section 48, that is, for murder in aggravating circumstances. It does, however, also provide that the fundamental rights in the Bill of Rights (which includes the right to life) must be exercised reasonably and with due regard for the rights and freedoms of other persons.

Implications of sections 48 and 86

Significant problems arise from the failure by the drafters of the 2013 Constitution explicitly to exempt from the right to life guarantee situations where the causing of death is reasonably justifiable under one of the defences contained in the Criminal Law Code. The best solution to overcome these problems would be to amend section 48 to incorporate these defences as exceptions to the right to life guarantee. Until this is done, the courts will have to try to find ways of dealing with cases in which the person causing death would otherwise have had a defence under the Criminal Law

Code. As will be seen below, it is difficult to see how the courts can find a satisfactory way of allowing these defences to operate in the absence of explicit incorporation of these defences into section 48.

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accused has not negligently caused death.

In a case of self-defence the court could seek to rely upon section 86(1) of the 2013 Constitution which provides that the fundamental rights in Chapter 4, which includes the right to life, must be exercised reasonably and with due regard to the rights of other persons. The problem with this is that the murderous attacker is not exercising his right to life; he is in fact threatening the life to the person he is attacking so it is not a matter of the attacker being obliged to exercise his rights reasonably. Another approach might be for the court to interpret the right to life guarantee as impliedly being subject to a common law doctrine of necessity. Thus it could be ruled that where a person is under murderous attack and the only way that he can save his life is to kill the attacker, he was obliged to act out of necessity. The right to life of the person murderously attacking must surely be subordinate to the life of the attacker. Additionally, section 52 provides that every person has the right to bodily integrity which includes the right to freedom from all forms of violence from public or private sources. This right adheres to a person who is under a murderous attack. The courts would surely adopt a common sense interpretation of the right to life so as to provide that a person is entitled to defend his or her life against a person who is trying to kill him or her. In other words, there is a natural right to act for the purposes of self-preservation against an unlawful attacker.

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Killing to Arrest

The provision in section 42 of the Criminal Procedure and Evidence Act previously laid down that a person authorized to arrest a person may lawfully kill a person who is resisting arrest or is fleeing, provided that the person was being arrested on the ground that he was committing or had committed, or was suspected on reasonable grounds of committing or having committed a First Schedule offence. It was arguable that the use of lethal force to effect an arrest is not justifiable but even if lethal force is justifiable in extreme circumstances, that provision was surely too wide.

A First Schedule offence is any offence in terms of any enactment in respect of which a punishment of a period of imprisonment exceeding six months is provided and may be imposed without the option of a fine. This would cover relatively trivial offences and killing to prevent escape is not justifiable for such offences. Secondly, it covered killing where there is only a reasonable suspicion that such an offence has been committed. If we are going to have an exception to the right to life on this ground the ambit of lawful killing must be drastically narrowed down.

However, section 14 of Act 2 of 2016 has replaced this section with a new section 42 that substantially restricts the right to use lethal force to effect an arrest or prevent an escape. The force

used must be reasonably justifiable and proportionate in the circumstances to overcome the resistance to the arrest or to prevent the escape. The person attempting the arrest is only justified in using force if the person being arrested has committed, is committing or was suspected to have committed a First Schedule offence and the person attempting the offence believes on reasonable grounds that—
the force is immediately necessary to protect the person trying to arrest from
immediate death or grievous bodily harm; or

if the arrest is delayed there is a substantial risk that the suspect will cause imminent or future death
or grievous bodily; or

the offence for which the arrest is sought is in progress and is of a forcible and
serious nature and involves the use of life-threatening violence or a strong likelihood that it will cause
grievous bodily harm.

Commendable though this provision is restricting the use of lethal force, the problem still exists that
section 48 of the Constitution does not explicitly provide for this exception to the right to life.

Other Constitutional Provision

Until there is a constitutional amendment to provide explicitly for these defences the courts could
possibly have resort to section 327(6) of the 2013 Constitution which provides as follows:

(6) When interpreting legislation, every court and tribunal must adopt any reasonable interpretation of
the legislation that is consistent with any international convention, treaty or agreement which is binding
on Zimbabwe, in preference to an alternative interpretation inconsistent with that convention, treaty or
agreement.

It is, however, questionable whether this provision can be used to read into the section 48 provisions

that are absent from that section.

Offences Attracting the Death Penalty

Finally it should be noted that there are various offences that previously attracted the death penalty that are now inconsistent with section 48 which only allows the imposition of the death penalty for murder committed in aggravating circumstances.

- Criminal Law Code Treason (Section 20)
- Insurgency, banditry, sabotage or terrorism which results in death (Section 23) (but this could be charged as murder)
- Defence Act [*Chapter 11:02*] Mutiny in terms Section 8 First Schedule.