

**UNIVERSITY OF ZIMBABWE
STUDENT JOURNAL**

LAW REVIEW

The new Declaration of Rights and its enforcement mechanisms

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FOREWORD

This journal comes at a historic time in Zimbabwe's legal field, over a year after the adoption of a new Constitution on 16th March 2013. The path to this historic occasion remains littered with political, legal, social pitfalls and counter narratives. Zimbabwe's constitution making history dates back to the pre-independence era but for purposes of celebrating this supposedly home-grown Constitution, lets confine our arguments to post-independence. An independent Zimbabwe was ushered through a protracted armed liberation struggle, sealed by a peace agreement in the form of the Lancaster House Constitution. The Lancaster House Constitution was more of a readily available constitution template for former British colonies, with modifications to suit the contextual nuances. For all intents and purposes, the Lancaster House Constitution was a ceasefire document whose values and ethos were meant to safeguard the interests of the erstwhile colonial masters while entrenching the incoming black majority government. A delicate balance signifying the complexities of political transitions.

The newly elected government within a few years of its reign had managed to bulldoze several amendments to the Lancaster House Constitution justified by varied legal and political interests. The amendments of interest focused on the executive presidency and the bill of rights. The judicial guarantees and enforcement of the rights were undermined as the Executive used its political party parliamentary majority to reverse judicial decisions enhancing the enjoyment of fundamental rights. Constitutional checks and balances were effectively overridden by excessive Executive and single party legislative dominance. By the time it was repealed, the Lancaster House Constitution had recorded 19 amendments, an average of one amendment every other 1, 7 years, possibly signifying the lack of acceptance and ownership of that constitution or mere political expediency.

Prior to the adoption of the 2013 Constitution, civil society and opposition political parties had successfully stalled the government lead Constitutional Commission exercise through a vote no campaign. Again, the merits and

demerits of that no vote are disputable. Fast forward to 2009, the Global Political Agreement between the major political parties spelt out the need to write a new constitution as part of ushering in a political dispensation whose electoral legitimacy was not to be contested. The interests for political parties were clear, power retention through acceptable legitimate means. The average person who participated in this process was probably uninterested in the political detail but inadvertently compelled to tow a particular line. The process was contested and the contents were equally left to the political parties to resolve through a technical drafting team.

Aside the shenanigans and political manoeuvring that ushered the 2013 Constitution, one should give due to the contents in particular the fairly expansive bill of rights, which introduced economic and cultural rights. Zimbabwe's legal field had for long been dominated by civil and political rights, with economic and cultural rights viewed as peripheral and approached from a developmental perspective, if at all. Local human rights advocates were trapped by the political environment to focus more on political rights, excuse being that no local law recognised such rights, despite the 1990 ratification of the International Covenant on Economic Social and Cultural Rights (ICESCR). Lawyers and political scientists who dominated the human rights discourse viewed rights as "normative, idealistic and individualists", while development practitioners, economists and social scientists viewed rights as "programmatic, empirical, consequentialist and aggregative". Over the years and in an effort to address the racial imbalances, Zimbabwe adopted several economic policies and blueprints, unfortunately some of those policies were inimical to the enjoyment of economic rights. The major disaster being the Bretton Woods influenced Economic Structural Adjustment Programme (ESAP) that contributed immensely to the decline of basic social indices. The ESAP was celebrated for achieving negative growth, "increased poverty from afflicting 40.4% of households in 1990/91 to 63.3% by 1995/96 and debt service ratio averaged 27.5% during the 1991-1995 period". The much taunted policies: Health for All, Education for All and Housing for All by 2000 were obliterated. Now that we have a Constitution that enshrines these rights, are we likely to see a deliberate approach in their realization and enforcement by the executive and the judiciary respectively? In the absence of a deliberate approach for national policies, budgets, economic blueprints and implementation frameworks to place these rights at the centre, I am afraid that these rights are in danger of neglect. The attention to the normative and idealist aspects of these rights that lawyers, law students and human rights advocates have to incorporate the pragmatic and empirical approaches of the economists and social scientists.

Regulation of human behaviour is the uppermost understanding of the role of law, but in our current context, the law yearns to be a tool for development and social transformation. For the Constitution to become a lived reality, a certain level of legal exploration, judicial activism and tolerance from the executive will be required. This will nurture and encourage constitutionalism. This journal offers a platform for us to stretch our imagination, stretch our legal theories, and create discomfort with the present conditions of adherence and recognition of economic rights. Let us celebrate these changes fully aware of the task ahead, as it will require perseverance and resoluteness of all concerned, including fusion of legal theory with pragmatism to create a potential for full human development. Let me encourage you to challenge oneself to locate your contribution and efforts towards the attainment and realization of a nation that respects the rule of law but more importantly recognizes and utilizes the potency of law as a tool for development, elimination of want and fear.

Otto Saki*

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EDITORIAL

So here we are. This is 2014 and clearly the world has been moving really fast. Internationally, this is a century begun with a sad preamble of terror and global disharmony. It is a century which saw the world breaching the very notions of peace and justice so vividly defined by a declaration agreed over five decades ago. Yet so young, this century has seen a tremendous increase in conflict, a phenomenon which too often undermines and erodes the rule of law and democracy. In 2015, the world will assess itself to measure its performance in achieving those goals set out in the Millennium Development Goals. New debates on how to eliminate poverty and to ensure the dignity of all of humanity will emerge and new technology will set the tone for a new future. Here in Zimbabwe, the start of the new century was marked by failed attempts to replace the Constitution which had been agreed at Lancaster in 1979. The start of the new century also saw great disharmony and conflict which invariably led to the disintegration of political institutions and the catastrophic collapse of an economy that had once been the envy of the world. Fourteen years after the start of an eventful century, and at the backdrop of an unprecedented economic crisis, Zimbabwe has a new Constitution. Declared as the supreme law of the land, it upholds the principles of fundamental human rights and the rule of law. Like the Universal Declaration of Human Rights, it recognises the inherent dignity and worth of each human being. It also embraces and acknowledges the equality of all peoples. Regardless of all these noble declarations, it remains to be seen whether this new law will deliver on health, on education and on food security for all.

Undoubtedly, as the young people of Zimbabwe and of the world we are truly blessed to be living in this historic epoch. As new challenges confront us, sometimes even challenging our faith in democracy and the rule of law, it is especially important for every young person to be prepared to tackle these challenges and to engage in the countless debates that will follow. The editors of the University of Zimbabwe Student Journal believe that this Student Law Review has a key role to play in this transition. As such, the editors present this Combined Volume of the Student Law Review to Zimbabwe and to the world. Through the articles and editorials that follow, the editors are confident that this journal will inspire new debates and increase the contribution of young people in the broader debate on human rights and the rule of law. As

former Judge Moses Chinhengo observed in the Foreword of our inaugural issue, we owe it to ourselves and to the next generation to uphold peace, justice and the rule of law.

Simbarashe Mubvuma

Editor-in-Chief 2014

ACKNOWLEDGEMENTS

Two years ago we had this audacious idea to start a student run law publication. This idea would not have been a success without the uncompromising support from the many who have contributed their time and resources to pull this journal together. When we were just about to lose any hope of finding the financial support needed to put together a publication during a time of general economic turmoil in the country, it was the International Commission of Jurists who so graciously came to our aid. The Editors continue to offer their deepest gratitude to the Commission. We remain confident that the journal continues to come forward representing the noble values which the Commission stands for. The Editors are also grateful to the counsel provided to us by Former Judge Moses Chinhengo and Professor G. Feltoe. Their professionalism and insight has been truly instrumental in the success of this publication.

Editors 2014

Harare, July 2014

To Nelson Mandela, a hero, a fine lawyer too.

VOLUME 2 No. 1 2014

Constitutional History of Zimbabwe

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A SUMMARY OF THE AMENDMENTS TO THE 1980 CONSTITUTION OF ZIMBABWE

EDITORIAL

ABSTRACT

On 22nd May 2013 the Government gazetted Constitution of Zimbabwe Amendment (No. 20) Act, 2013. In its Schedule, the Act contained the text of a new Constitution for Zimbabwe. The Constitution which was replaced by this new document had come into force on 18th April 1980. It had been agreed at Lancaster House in England in 1979. From 1980 to 2013, this document was amended nineteen times. The purpose of this piece is to outline and describe these amendments. It is hoped that this will serve as a memorial of the history of the Constitution now replaced. If anything, it might as well be the last time anyone bothers to write on the Lancaster House document and its nineteen patches.



INTRODUCTION

On 18th April 1980, Prince Charles formally conferred independence on Zimbabwe and on this day, a new Constitution agreed under the Lancaster House Agreement came into force. The Lancaster House Agreement was signed on 21st December 1979 after the conclusion of negotiations which had begun in September of the same year. The parties represented at the conference were the British Government, the Patriotic Front under the leadership of Robert Mugabe and the Zimbabwe African Peoples Union (ZAPU) led by Joshua Nkomo. Also represented was the Zimbabwe-Rhodesia government represented by Bishop Abel Muzorewa and Ian Smith. The 1980 Constitution was amended nineteen times before it was finally replaced in May 2013. The following is a descriptive summary of these amendments.

AMENDMENTS - 1980-1987

Constitution of Zimbabwe Amendment Act, No. 27 of 1981 was the first amendment to the Constitution agreed at Lancaster. The amendment reduced qualification period of lawyers to the judiciary and the Senate Legal Committee so as make these various offices accessible to black lawyers. This was followed by Constitution of Zimbabwe Amendment (No. 2) Act, 1981 which separated the Supreme Court and the High Court. This amendment also specified the qualification period for judges, reducing them and making them more attainable by blacks. Through Constitution of Zimbabwe Amendment (No. 3) Act, 1983 Parliament was afforded the power to abolish dual citizenship. The introduction of the Office of Ombudsman and the reconstitution of the Judicial Services Commission were effected through Constitution of Zimbabwe Amendment (No. 4) Act, 1984. Constitution of Zimbabwe Amendment (No. 5) Act, 1985 allowed for appointment of Provincial Governors by the President. The abolition of the separate roll for white voters was achieved through Constitution of Zimbabwe Amendment (No. 6) Act, 1987 (enacted through Act No. 15 of 1987).

CONSTITUTION OF ZIMBABWE AMENDMENT (NO. 7) ACT, 1987

Perhaps the most far reaching amendment to the 1980 document was Constitution of Zimbabwe Amendment (No. 7) Act, 1987 (Act No. 23 of 1987). The amendment created the Executive Presidency and abolished the office of the Prime Minister. The original Lancaster House Constitution provided for a largely ceremonial president, with most of the executive political powers concentrated in the office of the Prime Minister (Linington). The new executive President was to hold office for a period of six years with a provision for re-election with no term limits. This was distinct from the former

ceremonial president whose tenure was limited to a maximum of two six-year terms of office.¹

AMENDMENTS – 1987 - 1990

Act No. 4 of 1989 introduced Constitution of Zimbabwe Amendment (No. 8) Act, 1989. This provided for the Attorney General becoming a member of Cabinet. The Attorney General became a member of cabinet by virtue of office but did not have the right to vote on issues before it. The Attorney General was also responsible for prosecuting criminal matters in the courts and also represented the government in civil matters. 1989 also saw the abolition of the Senate making way for a one chamber Parliament. In 1990, Act No. 15 of 1990 amended the Constitution to create the position of a second Vice-President.² Constitution of Zimbabwe Amendment (No. 11) Act, 1990 terminated land provision for ‘willing buyer, willing seller’ in favour of ‘fair compensation’. Constitution of Zimbabwe Amendment (No. 12) Act, 1993 reorganised the prison services, the public services and the armed services.

AMENDMENTS – THE SUPREME COURT DECISIONS

In *S v A Juvenile*, the Supreme Court held that corporal punishment of minor boys convicted of criminal offences amounted to inhuman and degrading treatment not reasonably justifiable in a democratic society.³ Through Constitution Amendment (No. 11), provision was made for derogation to the right to protection from inhuman or degrading treatment or punishment. This derogation expressly allowed corporal punishment as a competent sentence which does not amount to inhuman or degrading treatment or punishment towards male minors. Constitution of Zimbabwe Amendment (No. 13) Act 1993 provided that delayed execution of the death sentence did not amount to inhuman and degrading punishment or treatment. This amendment had the effect of reversing the decision of the Supreme Court in *Catholic Commission for Justice and Peace in Zimbabwe v. Attorney-General & Ors* which had concluded that that the delay by the Executive in carrying out the sentences of

¹ Section 29 (1) of the Original Lancaster House Independence Constitution – The removal of term limits was described by one commentator as “... most unfortunate given the proclivity for African Heads of State to cling to power for long periods.” (John Hatchard – Cited by G Linington)

² As Linington writes, the allowance of up to two Vice Presidents has its origins in the merger of the ruling ZANU (PF) party with the opposition (PF) ZAPU party in 1987. The former leader of (PF) ZAPU, Mr Joshua Nkomo, was appointed a Vice President, while the other Vice President, Mr. Simon Muzenda, was a long-standing member of ZANU (PF).

³ *S v. A Juvenile* 1989 (2) ZLR 61 (S)



death imposed by the courts, together with the conditions under which the condemned prisoners were incarcerated and the anguish that they were then subjected to, rendered the proposed executions contrary to s 15(1) of the Constitution as being inhuman or degrading punishment or treatment.⁴ Constitution of Zimbabwe Amendment (No. 14) Act, 1996 also reversed the decisions of the Supreme Court in *Rattigan & Ors v. Chief Immigration Officer & Ors* and *Salem v. Chief Immigration Officer, Zimbabwe & Another*. The decisions were reversed in two material aspects. First, whilst the court in *Rattigan* had held that s 11 of the Constitution embodied substantive rights, and that it was not a mere preamble, the amendment clarified that s 11 was only a preamble which did not contain substantive rights. Second and whilst the court held that the rights of the applicant wives under s 22 (Freedom of Movement) of the former Constitution had been breached as they had a right to have their husbands reside with them in Zimbabwe, the amendment sought to escape this ruling. The explanatory note to the Amendment Bill stated that the judiciary had said that foreign husbands had a right to reside in Zimbabwe. The purpose of the amendment, continued the explanatory note, was to take away this right (Linington).⁵ Constitution of Zimbabwe Amendment (No. 15) Act, 1998 changed the start date of the government financial year from 1 July to 1 January.

CONSTITUTION OF ZIMBABWE AMENDMENT (NO. 16) ACT, 2000

Constitution of Zimbabwe Amendment (No. 16) Act, 2000 purported to transfer responsibility for compensation to disposed former white farmers from the Government of Zimbabwe to the British Government. The new provision, appearing as s 16A of the former Constitution, now read as follows:

(1) In regard to the compulsory acquisition of agricultural land for the resettlement of people in accordance with a programme of land reform, the following factors shall be regarded as of ultimate and overriding importance

(a) Under colonial domination the people of Zimbabwe were unjustifiably dispossessed of their land and other resources without compensation;

(b) The people consequently took up arms in order to regain their land and political sovereignty, and this ultimately resulted in the Independence of Zimbabwe in 1980;

(c) The people of Zimbabwe must be enabled to reassert their rights and regain ownership of their land; and accordingly—

(i) The former colonial power has an obligation to pay compensation for agricultural land compulsorily acquired for resettlement, through an adequate fund established for the purpose; and

⁴ *Catholic Commission for Justice and Peace in Zimbabwe v. Attorney- General & Ors* 1993 (1) ZLR 242 (S)

⁵ This argument was obviously faulty as it misinterpreted the judgement of the court. The judgement did not create new rights; it only upheld a violation of the rights of the applicants.

(ii) If the former colonial power fails to pay compensation through such a fund, the Government of Zimbabwe has no obligation to pay compensation for agricultural land compulsorily acquired for resettlement.

CONSTITUTION OF ZIMBABWE AMENDMENT NO. 17) ACT, 2005

Constitution of Zimbabwe Amendment (No. 17) Act, 2005 reintroduced Senate as the upper House of Parliament.⁶ This amendment also introduced a new section 16B to the Constitution titled “Agricultural land acquired for resettlement and other purposes”. The section sought to introduce a new provision to confirm the acquisition of land for resettlement purposes which took place pursuant to the Land Reform Programme beginning in 2000, and provide for the acquisition in the future of agricultural land for resettlement and other purposes.⁷ Specifically, the amendment ensured that the Constitution now provided that a person having any right or interest in the land so acquired could not apply to a court to challenge the acquisition of the land by the State, and no court could entertain any such challenge.⁸ This amendment was to be the subject of the long and fierce legal battle between Mike Campbell (Pvt) Ltd (a Zimbabwean farming company) and the Government of Zimbabwe.

Constitution Amendment (No. 17) Act, 2005 also amended section 22 of the Constitution by increasing the grounds upon which freedom of movement could be limited.⁹ Section 4 of the Amendment Act (No. 17) amended section 23 (Protection from discrimination) of the Constitution by the deletion of the word “gender” and its substitution with “sex, gender, marital status or physical disability.” A new paragraph was also introduced to widen the limitations to the discrimination clause. The new paragraph was to the effect that “the implementation of affirmative action programmes for the protection or advancement of persons or classes of persons who have been previously disadvantaged by unfair discrimination.” did not constitute discrimination. A further paragraph was inserted into section 23 which envisaged that in implementing any programme of land reform, the Government was to treat men and women on an equal basis. Section 17 of Constitution of Zimbabwe Amendment (No. 17) Act also established and outlined the functions of the Zimbabwe Electoral Commission. The new Commission was to be mentioned and provided for by the Constitution itself. The effect of the amendment was to abolish the Electoral Supervisory Commission.

⁶ Constitution of Zimbabwe Amendment (No. 17) Act, s 6, s 7

⁷ Constitution of Zimbabwe Amendment (No. 17) Bill, 2005, Memorandum

⁸ Constitution of Zimbabwe (1980), s 16B (3) (a)

⁹ Constitution of Zimbabwe Amendment (No. 17) Act, s 3



CONSTITUTION AMENDMENT OF ZIMBABWE (NO. 18) 2007

Constitution Amendment of Zimbabwe (No. 18) 2007 amended the Constitution in two material respects. First, it provided that the presidential, parliamentary and local authority elections were to be conducted concurrently.¹⁰ The ripple effect of this provision, also present in the new Constitution, has been seen in cases such as *Jameson Zvidzai Timba v. Chief Elections Officer and Ors* where the Electoral Court dismissed an application to open and inspect the election residue of a House of Assembly election on the basis that the “harmonised” nature of the elections would have the effect of granting the applicant access to materials which related to the presidential election (something that is now within the exclusive jurisdiction of the Constitutional Court).¹¹

Second, s 29 of the Amendment Act provided for the insertion of a new section in the Constitution titled “Zimbabwe Human Rights Commission”. The amendment laid out the composition and the functions of the new Commission. Essentially, the Commission was given functions to promote awareness and development of human rights, to monitor and assess the observance of human rights and to recommend to Parliament effective ways to promote human rights and freedoms. It was also charged with investigating the conduct of any authority or person where it is alleged that there has been a human rights violation. It would also assist Ministers in preparing any report required to be submitted to a regional or international body under any human rights treaty to which Zimbabwe is a party.

CONSTITUTION AMENDMENT (NO. 19), 2009

Constitution Amendment (No. 19), 2009 amended the Constitution in a number of ways. First, it repealed Chapter II (Citizenship) of the Constitution and replaced it with a new Chapter. The new Chapter provided for common citizenship on the grounds of birth, descent and registration. The new Chapter also imposed duties on every citizen to observe and respect the Constitution, to respect the national flag and the national anthem and to the best of his/her ability, to defend Zimbabwe in time of need. The provision further stated that every citizen was entitled to the protection of the State wherever he or she may be. More importantly, the Constitution now entitled a person married to a Zimbabwean citizen to Zimbabwean citizenship by registration.

Second, section 18 of the Constitution was amended to include a new subsection which imposed on every public officer a duty towards every Zimbabwean to exercise his or her functions in accordance with the law and to uphold the rule of law. A new section 23A was also inserted into the

¹⁰ Constitution of Zimbabwe Amendment (No. 17) Act, 2005, s 2 (3) (a)

¹¹ *Jameson Zvidzai Timba v. Chief Elections Officer and Others* EC 112/13, p 6

Constitution. This section, titled “Political Rights”, granted every Zimbabwean citizen the right to a free, fair and regular election for local and national political offices. It also guaranteed the right to free and fair referendums whenever they become necessary under law. It gave every adult Zimbabwean the right to vote secretly in elections and referendums and to stand for public office, and if elected, to hold such office.

Third, the amendment touched heavily on the issue of independent commissions. The Constitution now provided that the Commissions are independent and are not subject to the direction or control of anyone and that they must exercise their functions without fear, favour or prejudice. There were changes to the composition of ZEC as well as an introduction of the Zimbabwe Anti-Corruption Commission with the function of combating corruption, misappropriation, abuse of power and other improprieties in the conduct of public affairs in both the public and private sectors. It was to make recommendations to the Government and to organisations in the private sector on measures to enhance integrity and accountability. It was given the power to conduct investigations and inquiries on its own initiative upon receipt of complaints and to require assistance from the Police Force and other investigative agencies of the State. It was also given the power to secure the prosecution of persons guilty of corruption, theft, misappropriation and abuse of power through the Attorney General. A Media Commission was also established to uphold and develop freedom of the press as well as to promote and enforce good practice and ethics in the press. It had the power to conduct investigations into any conduct that appears to threaten freedom of the press and to institute disciplinary action against journalists and other persons employed in the press who are found to have breached any law or any code of conduct applicable to them.

Amendment No. 19 was also used to lay out the legal framework to implement the power-sharing agreement which included the post of Prime Minister and Deputy Prime Ministers. This was achieved by the insertion of Schedule 8 to the Constitution. The preamble to the schedule acknowledged that there was an obligation to establish a framework for working together in an inclusive government and accepted the formation of such a government which would be “approached with great sensitivity, flexibility and willingness to compromise.” The preamble also recognised that the formation of such a Government would demonstrate the respect of the political parties for the deeply-felt and immediate hopes and aspirations of the millions of [our] people. The parties envisioned to carry out work to create the conditions for returning [our] country to stability and prosperity. The Amendment then provided for the sharing of Executive Authority among the President, the Prime Minister and the Cabinet. The Amendment was quite unusual in that it specifically mentioned that there was “to be a President, which Office was to continue to be occupied by President Robert Mugabe.” It further provided for



two Vice Presidents to “be nominated by the President and/or Zanu PF.” It also provided for a Prime Minister (which Office was expressly stated to be occupied by Mr Morgan Tsvangirai). There were to be two Deputy Prime Ministers, each one being nominated by the MDC-T and the MDC-M respectively. The amendment set the powers of the President and the Prime Minister. It made particular mention of senior government appointments such as Permanent Secretaries of Ministries and Ambassadors to foreign missions which had to be agreed by the President, the Vice Presidents, the Prime Minister and the Deputy Prime Ministers prior to appointment.

THE NEW CONSTITUTION

On 22nd May 2013, Constitution of Zimbabwe Amendment (No. 20) Act, 2013 was published in the Government Gazette. The Act enacted a new Constitution whose text is set out in the Schedule to the Act. The Constitution has a total of three hundred and forty-five (345) sections and six (6) Schedules. It is divided into eighteen (18) Chapters starting with the Founding Provisions in Chapter 1 and concluding with the General and Supplementary Provisions in Chapter 18. Chapter 2 articulates the National Objectives, Chapter 3 has provisions on Citizenship and Chapter 4 carries the Declaration of Rights. The Executive Branch follows in Chapter 5 with the Legislature being laid out in Chapter 6. Chapter 7 has provisions on Elections and Chapter 8 covers the Judiciary and the Courts. The rest of the Chapters deal with principles of public administration, the civil service, the security services, independent commissions, provincial and local government, traditional leaders, agricultural land and finance.

SUMMARY OF THE CONSTITUTIONAL COMMISSION DRAFT, THE NATIONAL CONSTITUTIONAL ASSEMBLY DRAFT AND THE KARIBA DRAFT

EDITORIAL

ABSTRACT

In 2013 Zimbabwe adopted a new Constitution which ousted the document which had come into force on 18th April 1980. Between the period of 1980 and 2013, there were attempts to replace the 1980 Constitution. These were reflected in the 1999 Constitutional Commission Draft, the National Constitutional Assembly Draft and the Kariba Draft of 2007. These documents are the subject of this account. Comments which relate to the Constitution now in force have been inserted to offer a comparative perspective.



INTRODUCTION

On 22nd May 2013 the Government Gazette carried Constitution Amendment (No. 20) Act, 2013 whose schedule contained the text of a new Constitution. This Constitution replaced the Constitution which had come into force on 18th April 1980. Prior to the draft that is now the supreme law of Zimbabwe, there were a number of attempts to replace the 1980 Constitution. These were reflected in the Constitutional Commission (CC) Draft of 2000, the National Constitutional Assembly (NCA) Draft of 2001 and the Kariba Draft (KD) of 2007. What follows is a descriptive account of the provisions of the CC Draft and the NCA Draft. A brief note on the Kariba Draft has also been included. Comments relating to the provisions of the constitution now in force appear below the various sections. As Zimbabwe is now past the constitutional making phase as a result of the adoption of a new Constitution in 2013, this could as well be the last account of these prior documents. Although aspiring to be a memorial of the three draft documents, this account is not exhaustive. It ideally seeks to achieve two things. First, it seeks to provide those researching constitutional history a basic summary of these documents. Second, it will offer comparative perspectives for countries such as Tanzania and Nepal which are presently going through their own constitutional reform processes.

CONSTITUTIONAL COMMISSION DRAFT, 2000

BACKGROUND

On the 12th and 13th of February 2000, a draft Constitution was put to a referendum. On 21st May 1999, President Robert Mugabe had convened a Constitutional Conference to draft a new Constitution for Zimbabwe. The President appointed Godfrey Chidyausiku, then a judge of the High Court, as the chairperson of the Constitutional Commission as the body was formally called. It was for this reason that the draft became popularly known as the “Chidyausiku Draft”. 396 people were also selected to be part of the Commission. These included all 150 members of the House of Assembly as well as present and erstwhile members of Government. In August and September 1999, the Commission held an estimated 5,000 public meetings across the country. On 29th November 1999, Judge Godfrey Chidyausiku announced the adoption of the draft by the commission. When the proposed law was put to a national referendum in February 2000, 54.7 % of the voters voted against the document. The proposed Constitution could not pass the referendum and was therefore abandoned. The following is a summary of the substantive provisions of the Constitutional Commission (CC) Draft.

FORM OF THE STATE

The proposed draft established Zimbabwe as one sovereign and democratic republic. With its preamble declaring commitment to the Constitution as the fundamental law of the land, its s 7 affirmed the Constitution as the supreme law of Zimbabwe, with any other law or conduct which is inconsistent with the Constitution being invalid to the extent of the inconsistency.¹ In its Chapter II on fundamental constitutional principles and national objectives, it asserted that the legal and political authority of the State derived from the people of Zimbabwe and had to be exercised in accordance with the Constitution solely to serve and protect the interests of the people. Clause 12 stated that all organs and agencies of the State and Government, including local government, and all persons were to observe and uphold the Constitution and the rule of law, with no institution or person standing above the law.²

Comment: The preamble of the Constitution now in force also declares a commitment to the Constitution as the fundamental law of Zimbabwe. Section 7 is similarly worded to the CC Draft and states that the Constitution is the supreme law of Zimbabwe and any law, practice, custom or conduct inconsistent with it is invalid to the extent of the inconsistency. The new Constitution also adds that the obligations imposed by the Constitution are binding on every person, natural or juristic, including the State and all executive, legislative and judicial institutions and agencies of government at every level. These organs or and persons must fulfil these obligations. This general provision imposing an obligation on all organs of the state, natural and juristic persons was not part of the CC Draft. The CC Draft only had a provision of similar effect in relation to its Declaration of Rights. Like the CC Draft, the new Constitution also includes a statement of Founding Principles as well as an enumeration of National Objectives.

EXECUTIVE AUTHORITY

THE PRESIDENT

The executive authority of Zimbabwe was to be vested in the President, the Prime Minister and the Cabinet.³ The President was the Head of State and the Commander-in-Chief of the Defence Forces and was charged with the duty to obey, uphold and defend the Constitution and to ensure that the provisions of the Constitution and of all other laws in force in Zimbabwe are faithfully observed. The term of office of the President would be a period of five years and no one could hold office as President for more than two terms.⁴ A term had to be construed to include any part of a term. The Senate, sitting as a court, at the request of at least two-thirds of the Members of the National Assembly, could impeach and remove the President for treason or wilful violation of the Constitution, failure to obey, uphold and defend the

¹ See Clause 7 Constitutional Commission (CC) Draft

² Clause 12 CC Draft

³ Clause 76 CC Draft

⁴ CC Draft, clause 82



Constitution, inability to exercise the functions of the office because of physical or mental incapacity or serious misconduct.⁵ The President, acting on the advice of the Prime Minister, was to appoint Ministers and assign functions to them. The President could appoint not more than twenty Ministers to hold office at any one time unless the National Assembly and the Senate, by resolutions passed by at least two-thirds of all their members, earlier resolves that the number of Ministers can be increased. Ministers were to be appointed from among Senators or Members of the National Assembly, with up to three being eligible for appointment from outside Parliament if their appointment is earlier approved by the Senate.⁶ The Cabinet consisted of the President, the Prime Minister and such Ministers as the President could determine with the approval of the Prime Minister. The President presided over Cabinet meetings.

Acting in consultation with the Prime Minister, the President was to, among other things, make appointments to public offices as required or permitted by the Constitution or any Act of Parliament, declare a state of emergency in the whole or in a part of Zimbabwe. This had to be by proclamation in the *Gazette*. The President could also deploy the Defence Forces outside Zimbabwe and declare war and make peace.⁷ A declaration of a state of public emergency would cease to have effect after seven days beginning with the day of publication of the proclamation in the *Government Gazette* unless, before the end of that period, the declaration is approved by at least two-thirds of all the Members of Parliament. A declaration of war or peace would also be rendered revoked unless it is earlier approved by a resolution passed within seven sittings of the declaration by at least two-thirds of all the Members of Parliament.⁸

The President was also responsible for assenting to bills sent from Parliament. If the President was to withhold his or her assent to a Bill, the Bill would be returned to the House from which it originated within fourteen days after the President withheld his assent, and it could not be presented to the President again unless, within six months, at least two-thirds of all the members of the Senate and the National Assembly, at a joint sitting, resolve that the Bill should be presented to the President for assent. The President in this case was then obliged to assent to such a bill within fourteen days.⁹

Comment: Section 89 of the new Constitution also establishes the office of the President who is the Head of State and Government and the Commander-in-Chief of the Defence Forces. As in the CC Draft, s 90 of the Constitution imposes a duty on the President to uphold, defend, obey and respect the Constitution as the supreme law of the nation and to ensure that the Constitution and all the other laws are faithfully observed. The Constitution,

⁵ *ibid*, clause 84

⁶ *ibid*, clause 95

⁷ *ibid*, clause 100

⁸ *ibid*, clause 102

⁹ *ibid*, clause 135

unlike the CC Draft, adds that the President has a duty to promote unity and peace in the nation for the benefit and well-being of all the people of Zimbabwe, to recognise and respect the ideals and values of the liberation struggle and to ensure protection of the fundamental human rights and freedoms and the rule of law. The Constitution, unlike the CC Draft, has the office of the two Vice Presidents. A candidate running for the Presidency must select two persons to run together with him/her in the election. These persons must be designated as First Vice-President and Second-Vice President. These provisions, however, did not apply in the first election and will not apply in any presidential election within ten years after the first election by virtue of s 14 (1) of the Sixth Schedule to the Constitution.

Section 91 (2) of the Constitution disqualifies a person from election to be President if that person has already held office as President under the Constitution for two terms, whether continuous or not. The Constitution deems three or more years' service as a full term. Under the CC Draft, however, any part of a term of office was to be construed as a full term of office. The new Constitution, by expressly stating that three or more years is to be considered a full term, appears to imply that a person who has served as President for less than three years, for one reason or another, is not considered to have served a "full term" as envisaged by the Constitution. Section 95 of the Constitution can add light on this area. Section 95 states that a presidential term extends until resignation or following an election. The effect of these provisions is unclear. Can a person who has served as President for less than three years be considered as having served a term, full or otherwise? The answer seems to be no. Curious and unclear as it may seem, it would appear that a term is only considered as such if it is for three years or more. Any other interpretation would render as redundant the words "three years or more". It is well accepted in the interpretation of statutes that a court must give effect to every word in the provision under consideration, save for instances where there is clear tautology.

THE PRIME MINISTER

The CC Draft also established the Prime Minister as the Head of Government. The President could appoint as Prime Minister a person who was a Member of the National Assembly and one who would be best able to command a majority in Parliament. The functions of the Prime Minister would be to direct the operations of Government, conduct Government business in Parliament and exercise any other function, including the administration of any Act of Parliament or of any Ministry or department, which the President could assign.¹⁰ Parliament could, by resolution passed by at least two-thirds of all its members at a joint sitting, pass a vote of no confidence in the Government. Where Parliament passes a vote of no confidence in the Government, the President had to remove the Prime Minister and every Minister from office within fourteen days and appoint a new Prime Minister. As an alternative, the President could dissolve Parliament.¹¹

¹⁰ *ibid*, clause 92

¹¹ *ibid*, clause 99



Comment: The Constitution, unlike the CC Draft, does not create the office of the Prime Minister. Under s 8, executive authority is vested in the President who exercises such authority through Cabinet and subject to the Constitution. Whilst the CC Draft made the Prime Minister the Head of Government, the Constitution establishes a President who is both the head of State and the head of Government. The difference between State and Government is that whilst the State is a broader entity with elements such as population, territory and majestas (sovereignty), a Government is a narrower concept. Government is responsible for enforcing the laws of a State and generally acts on behalf of the State.¹² A head of state will therefore invariably take the primary role of representing the state in international fora. Further, whilst Governments change or cease to be recognised at international law, States rarely alter.¹³ The difference between State and Government can most clearly be illustrated under international law discourse. Although the CC Draft distinguished the Head of State and the Head of Government, the distinction was rather unusual. Although the Prime Minister was stated as the Head of Government, it was the President who appointed Ministers, albeit on the advice of the Prime Minister. It was also the President who presided over cabinet meetings. The CC Draft Prime Minister seemed to be more of a glorified Minister under a system where the President would retain all the executive control over Government. Section 109 of the Constitution allows the Senate and the National Assembly, by a joint resolution passed by at least two-thirds of their total membership, to pass a vote of no confidence in the Government. Where Parliament passes a vote of no confidence in the Government, the President must, within fourteen days after the vote remove all Ministers and Deputy Ministers from office and dissolve Parliament and, within ninety days, call a general election.

PARLIAMENT

Parliament consisted of two Houses, the Senate and the National Assembly.¹⁴ Unless dissolved sooner by the President, Parliament would continue for five years from the date on which it first met after a general election, and would then stand dissolved.¹⁵ The legislative authority of Zimbabwe was to vest in the Legislature, which consisted of the President and Parliament. The Legislature had power to originate and pass legislation with regard to any matter. It could also confer legislative functions on any person or authority. The Senate was to consist of sixty Senators with five being elected in accordance with the Electoral Law, by secret ballot and under a system of proportional representation, from each of the ten provinces into which Zimbabwe was to be divided. Ten other senators were to be chiefs elected in

¹² See *S v. Banda 1989 (4) SA 519 (BG)* where the requirements of statehood were articulated.

¹³ E.Heath (2013)

¹⁴ *ibid*, clause 104

¹⁵ *ibid*, clause 142

accordance with the Electoral Law.¹⁶ The National Assembly consisted of one hundred and fifty members who were to be elected in accordance with the Electoral Law, by secret ballot, from the one hundred and fifty constituencies into which Zimbabwe was to be divided. A further fifty members would be elected in accordance with the Electoral Law under a system of proportional representation based on the votes cast at a general election for the members directly elected to Parliament. The Prime Minister, Ministers and the Attorney General could sit and speak in either House, but they did not have a right to vote in a House of which they were not members.¹⁷

Comment: Section 116 of the Constitution also creates a two chamber Parliament consisting of the Senate and the National Assembly. It is mandated to protect the Constitution and promote democratic governance in Zimbabwe. It has the power to ensure that the provisions of the Constitution are upheld and that the State and all institutions and agencies of government at every level act constitutionally and in the national interest. Similar to the CC Draft, the legislative authority under the Constitution vests in the Legislature which consists of the President and Parliament.¹⁸ The Senate consists of eighty Senators of which six are elected from each of the provinces into which Zimbabwe is divided by a system of proportional representation, sixteen are Chiefs, of whom two are elected by the provincial assembly of Chiefs from each of the provinces, other than the metropolitan provinces, into which Zimbabwe is divided, the President and Deputy President of the National Council of Chiefs and two other Senators elected in the manner prescribed in the Electoral Law to represent persons with disabilities.¹⁹ The National Assembly consists of two hundred and ten members elected by secret ballot from the two hundred and ten constituencies into which Zimbabwe is divided. Further, for the life of the first two Parliaments after the first election (2013), the National Assembly must have additional sixty women members, six from each of the provinces into which Zimbabwe is divided, elected under a party-list system of proportional representation.²⁰ Under s 114, the Attorney General may sit and speak in the Senate and the National Assembly, but has no vote.

THE JUDICIARY

The CC Draft vested judicial authority in the Constitutional Court, the Supreme Court, the High Court, the Magistrates Courts, Customary-law Courts and any other courts established by an Act of Parliament.²¹ Only the Constitutional Court, the Supreme Court, the High Court, the Magistrates Courts and Customary-law court could exercise or be given criminal

¹⁶ *ibid*, clause 106

¹⁷ *ibid*, clause 129

¹⁸ Section 103 of the Constitution

¹⁹ *ibid*, section 120

²⁰ *ibid*, section 124

²¹ CC Draft, clause 148



jurisdiction.²² Clause 150 of the proposed draft stated that when exercising their judicial authority, members of the judiciary were to be independent and subject only to the Constitution and the law, which they were to apply impartially and without fear, favour or prejudice. The head of the judiciary was to be the Chief Justice who was appointed by the President after consultation with the Judicial Service Commission.

The Constitutional Court was to be established as a superior court of record and as the highest court in all constitutional matters. It had the jurisdiction to determine the constitutionality of any Act of Parliament, to determine whether or not Parliament or the President, or any other person or authority, had fulfilled a constitutional obligation, to determine whether any question or issue arising before it is to be construed as a constitutional matter and if it is within its jurisdiction.²³ A Supreme Court was to be established as a superior court of record and the final court of appeal to exercise the jurisdiction and powers conferred on it by or under an Act of Parliament. A High Court was also established as a superior court of record with the jurisdiction and powers conferred on it by or under an Act of Parliament.

Judges other than the Chief Justice were appointed by the President from a list of names submitted by the Judicial Service Commission. The President was only required to consult the Judicial Service Commission before appointing the Chief Justice. A judge could be removed from office on the advice of the Judicial Service Commission only for misbehaviour or for mental or physical disability that incapacitates him or her from exercising the functions of a judge.²⁴ Unless an Act of Parliament was to specifically provide otherwise, members of the judiciary, including judges, could not enter into office until approval of such appointments by the Senate.²⁵ An Act of Parliament would provide for the appointment of members of the judiciary other than judges. Such an Act had to ensure that the appointments were made without favour or prejudice.

Comment: Section 162 of the Constitution includes all the courts enumerated in Clause 148 of the CC Draft. It adds the Administrative Court and the Labour Court. Section 164 of the Constitution is almost verbatim to Clause 150 of the CC Draft and provides that the courts are independent and are subject only to the Constitution and the law, which they must apply impartially, expeditiously and without fear, favour or prejudice. The new Constitution however adds that the independence, impartiality and effectiveness of the courts are central to the rule of law and democratic governance such that neither the State nor any institution or agency of the government at any level, and no other person, may interfere with the functioning of the courts. It also adds that the State, through legislative and other measures, must assist and protect the courts to ensure their independence, impartiality, dignity, accessibility and effectiveness and to

²² *ibid*, clause 157

²³ *ibid*, clause 151

²⁴ *ibid*, clause 162

²⁵ *ibid*, clause 163

ensure that they comply with the principles which guide the judiciary. Unlike the CC Draft, s 165 of the Constitution enumerates principles to guide the judiciary, viz, that justice must be done to all, irrespective of status and that justice must not be delayed such that the members of the judiciary must perform their judicial duties efficiently and with reasonable promptness. The Constitution also states that members of the judiciary must not engage in any political activities, hold office in or be members of any political organisation, solicit funds for or contribute towards any political organisation or attend political meetings. Further, members of the judiciary must not solicit or accept any gift, bequest, loan or favour that may influence their judicial conduct or give the appearance of judicial impropriety. All this reflects on the Bangalore Principles of Judicial Conduct.²⁶

Section 167 of the Constitution, similar to the CC Draft, establishes a Constitutional Court as the highest court in all constitutional matters whose decisions on constitutional matters are binding on all other courts. The Constitutional Court decides only constitutional matters and issues connected with decisions on constitutional matters and it also makes the final decision whether a matter is a constitutional matter or whether an issue is connected with a decision on a constitutional matter. Unlike the CC Draft, the Constitution gives the Constitutional Court the power to advise on the constitutionality of any proposed legislation where the legislation concerned has been referred to it in terms of the Constitution. The Constitutional Court is also the only court which can hear and determine disputes relating to election to the office of President and disputes relating to whether a person is qualified to hold the office of Vice-President. Similar to the CC Draft, it also has the power to determine whether Parliament or the President has failed to fulfil a constitutional obligation and makes the final decision on whether an Act of Parliament or conduct of the President or Parliament is constitutional, and must confirm any order of constitutional invalidity made by another court before that order has any force. Section 176 of the Constitution gives the Constitutional Court, the Supreme Court and the High Court inherent power to protect and regulate their own process and to develop the common law or the customary law, taking into account the interests of justice and the provisions of the Constitution.

Section 180 of the Constitution provides that the Chief Justice, the Deputy Chief Justice, the Judge President of the High Court are appointed by the President. Whenever it is necessary to appoint a judge, the Judicial Service Commission must advertise the position, invite the President and the public to make nominations, conduct public interviews of prospective candidates, prepare a list of three qualified persons as nominees for the office and submit the list to the President. The President must appoint one of the nominees to the office concerned. If the President considers that none of the persons on the list submitted is suitable for appointment to the office, he or she must require the Judicial Service Commission to submit a further list of three qualified persons. The President must appoint one of the nominees to the office concerned. The

²⁶ Bangalore Principles of Judicial Conduct



Judicial Services Commission sent out the first advertisement of this nature in March 2014 where it invited members of the public to nominate suitably qualified persons to fill three positions in the Supreme Court and three positions in the High Court.²⁷ The first public interviews for judges were held in Harare in July 2014. The striking difference between the CC Draft and the Constitution now in force is that under the CC Draft, the appointment of the Chief Justice and all judges had to be approved by Senate.

Section 183 provides that except as otherwise provided in the Constitution, a person must not be appointed as a judicial officer of more than one court. This has implications on the provisions of Electoral Law which allow the Judge President to designate High Court judges to act as judges of the Electoral Court. Since this court is in effect a separate court established as such, it can be argued that this falls foul of the Constitution. This is particularly so in light of the fact that s 10 of the Sixth Schedule of the Constitution provides that although all laws existing before the enactment of the new Constitution continue in force, they must be construed in conformity with the Constitution. An Act of Parliament will have to provide for the appointment of magistrates and other judicial officers other than judges.²⁸ Section 184 of the Constitution provides that appointments to the judiciary must reflect broadly the diversity and gender composition of Zimbabwe. This is particularly important in relation to the appointment of women to be judges. At the time of writing this comment, the Constitutional Court had five male judges and four female judges. Whilst the Constitution, like the CC Draft, provides that a Judge can be removed from office for inability to perform the functions of his or her office, due to mental or physical incapacity, it also adds that a judge can be removed for gross incompetence or gross misconduct. Both documents provide for the appointment of a tribunal by the President if it is considered that the question of removal of the Chief Justice or a judge from office ought to be investigated.

INDEPENDENT COMMISSIONS

The proposed draft introduced five independent commissions. The Independent Electoral Commission to organise, conduct and supervise Presidential, Parliamentary elections, elections to the governing bodies of provincial councils and local authorities and referendums.²⁹ It was mandated to ensure that those elections and referendums were conducted efficiently, freely, fairly, openly and in accordance with the law. Other functions of this commission were to register voters and to ensure the proper maintenance of voters' rolls, to determine the boundaries of constituencies, to consider and

²⁷ <http://www.jsc.org.zw> (accessed on 20 June 2014)

²⁸ Section 182 of the Constitution

²⁹ *ibid*, clause 201

advise on all proposals to alter the boundaries of wards or other electoral divisions of provincial council or local authority areas and to formulate and implement civic educational programmes relating to elections. The commission was appointed by the President for a term of six years renewable once. The appointments had to be approved by the Senate.³⁰

The draft also introduced a Human Rights and Social Justice Commission. It was to consist of a chairperson and at least two other members who have been qualified for at least five years to practise as legal practitioners and were to be appointed by the President on the advice of the Judicial Service Commission.³¹ The appointments had to be confirmed by the Senate. The functions of this commission included promoting awareness of and respect for human rights and freedoms at all levels of society, promoting the development of human rights and freedoms and social justice, monitoring and assessing the observance of human rights in Zimbabwe and recommending to Parliament effective measures to promote human rights and social justice and investigating the conduct of any authority or person, where it is alleged that any provision of Declaration of Rights has been violated by that authority or person. It could require any organs or agencies of the State or Government, including local government, to provide information on an annual basis stating the measures they would have taken towards the realisation of the rights under the Constitution. An Act of Parliament could confer power on the Human Rights and Social Justice Commission to conduct investigations on its own initiative or on receipt of complaints, to visit and inspect prisons, places of detention, refugee camps and related facilities and to secure or provide appropriate redress for violations of human rights and for injustice.³²

Comment: The Constitution introduces five independent commissions. These five commissions are termed “Independent Commissions Supporting Democracy”. These are the Zimbabwe Electoral Commission, the Zimbabwe Human Rights Commission, the Zimbabwe Gender Commission, Zimbabwe Media Commission and the National Peace and Reconciliation Commission.³³ Section 233 states that the general objectives of the independent commissions supporting democracy are to support and entrench human rights and democracy, to protect the sovereignty and interests of the people, to promote constitutionalism, to promote transparency and accountability in public institutions, to secure the observance of democratic values and principles by the State and all institutions and agencies of government, and government controlled entities and to ensure that injustices are remedied. The Constitution further provides that the commissions are independent and are not subject to the direction or control of anyone, that they must act in accordance with the

³⁰ *ibid*, clause 200

³¹ *ibid*, clause 208

³² *ibid*, clause 210

³³ See Chapter 12 of the Constitution of Zimbabwe



Constitution and that they must exercise their functions without fear, favour or prejudice. They are however accountable to Parliament for the efficient performance of their functions. The State and all other institutions of government have an obligation to assist the independent Commissions and to protect their independence, impartiality, integrity and effectiveness.

The Constitution further provides for two other independent institutions termed “institutions to combat corruption and crime.”³⁴ These are the Zimbabwe Anti-Corruption Commission and the National Prosecuting Authority. The Zimbabwe Anti-Corruption Commission is established to investigate and expose cases of corruption in the public and private sectors. Specifically, it is competent to receive and consider complaints from the public and to take such action in regard to the complaints as it considers appropriate. It may require assistance from members of the Police Service and other investigative agencies of the State as well as refer matters to the National Prosecuting Authority for prosecution. The National Prosecuting Authority is responsible for instituting and undertaking criminal prosecutions on behalf of the State. The power to prosecute under the CC Draft was vested in the Attorney General. The Constitution now in force also provides for the office of the Attorney General but this office is not responsible for criminal prosecutions. The AG acts as the principal legal advisor to government and represents the government in civil suits.

An Anti-Corruption Commission was also established under the proposed draft. It would consist of at least four and not more than nine members appointed by the President.³⁵ The appointments had to be confirmed by Senate. Its functions were to combat corruption, theft, misappropriation, abuse of power and other improprieties in the conduct of affairs in both the public and private sectors, to make recommendations to the Government and to organisations in the private sector on measures to enhance integrity and accountability and to prevent improprieties and to exercise any other functions conferred or imposed on the Commission by or under an Act of Parliament. It had powers to conduct investigations and inquiries on its own initiative or on receipt of complaints, to require assistance from members of the Police Service and other investigative agencies of the State and to secure the prosecution of persons guilty of corruption, theft, misappropriation, abuse of power and other improprieties through the Attorney-General.³⁶

Comment: The Constitution provides that the chairperson of the Anti-Corruption Commission is appointed by the President after consultation with the Committee on Standing Rules and Orders.³⁷ The powers of the

³⁴ See Chapter 13 of the Constitution of Zimbabwe

³⁵ *ibid*, clause 211

³⁶ *ibid*, clause 213

³⁷ See s 254 (1) of the Constitution

Commission under the CC Draft are almost similar to those under the Constitution now in force.

The Constitutional Assembly Draft provided that an Act of Parliament was to establish a Media Commission. This Commission had the function of upholding and developing freedom of the press, promoting and enforcing good practice and ethics in the press, news media and broadcasting, ensuring that the people of Zimbabwe have equitable and wide access to information and ensuring the equitable use and development of all indigenous languages spoken in Zimbabwe.³⁸ An Act of Parliament could confer the Media Commission with the power to conduct investigations and inquiries into conditions or conduct that appears to threaten freedom of the press or the conduct of the press, news media and broadcasting. An Act of Parliament could also confer the commission with the power to take disciplinary action against journalists and other persons employed in the press, news media or broadcasting who are found to have breached any law or any code of conduct applicable to them.

Comment: The Constitution also establishes a Zimbabwe Media Commission headed by a chairperson appointed by the President after consultation with the Committee on Standing Rules and Orders.³⁹ The competencies of the Media Commission under the CC Draft are almost similar to those under the Constitution now in force.

An Act of Parliament was required to establish a Land Commission. It was to be established for the purposes of monitoring the operations of Government in matters relating to land and to reporting on those operations to the Government and Parliament, making recommendations to the Government for a national policy on the tenure, acquisition, use and distribution of land, making recommendations to the Government for a policy for the beneficial exploitation of natural resources by local communities and advising the Government on measures to protect and preserve land and other natural resources from abuse, pollution and degradation.

Comment: Section 296 of the Constitution establishes a commission to be known as Zimbabwe Land Commission. It consists of a chairperson, deputy chairperson and a minimum of two and a maximum of seven other members appointed by the President. The Zimbabwe Land Commission has the functions of ensuring accountability, fairness and transparency in the administration of agricultural land that is vested in the State and conducting periodical audits of agricultural land. It also makes recommendations to the Government regarding the acquisition of private land for public purposes, equitable access to and holding and occupation of agricultural land and in particular, the elimination of all forms of unfair discrimination, particularly

³⁸ *ibid*, clause 214

³⁹ See s 249 (1) of the Constitution



gender discrimination and the enforcement of any law restricting the amount of agricultural land that may be held by any person or household.

OTHER OFFICES AND COMMISSIONS

The CC Draft established the office of the Public Protector, whose office was a public office but did not form part of the Public Service.⁴⁰ The Public Protector was to be appointed by the President on the advice of the Judicial Service Commission and with the approval of the Senate. The functions of the Public Protector were to investigate administrative action taken by a public officer or authority where it is alleged that anyone has suffered prejudice or injustice as a result of that action and appears to have no reasonably available remedy and to attempt to rectify such prejudice or injustice.

Comment: The Constitution does not provide for the office of the Public Protector. Section 16 (1) of the Sixth Schedule to the Constitution repeals the Public Protector Act [Chapter 10:18]. Section 16 (2) further provides that any matter that was being dealt with by the Public Protector immediately before the effective date must be transferred to the Zimbabwe Human Rights Commission for finalisation.

The draft also established the office of the Attorney-General, whose office was also a public office but did not form part of the Public Service.⁴¹ The Attorney-General was to be appointed by the President in consultation with the Prime Minister and the Judicial Service Commission and with the approval of the Senate. The draft provided that in the exercise of his or her powers regarding criminal prosecutions, the Attorney-General could not be subject to the direction or control of anyone else, and had to be guided by the public interest, the interests of the administration of justice and the need to prevent abuse of legal process.⁴² The Attorney General was to be the principal legal adviser to the Government, a member of the Cabinet, without the right to vote, a member of both Houses of Parliament, but without the right to vote in either House and could not be elected to any office, post or committee of either House. The Attorney General had power to undertake criminal prosecutions on behalf of the State in any court, to prosecute or defend appeals from decisions in criminal proceedings undertaken on behalf of the State, take over and continue criminal proceedings that have been instituted by other persons or authorities in courts and at any stage before judgment is delivered, to discontinue criminal proceedings or any appeal from a decision in criminal proceedings. The Attorney-General could require the Commissioner of Police to investigate and report on anything which, in the Attorney-General's opinion, relates to an offence or alleged or suspected offence. The Commissioner of Police was obliged to comply with the request. If the

⁴⁰ *ibid*, clause 217

⁴¹ *ibid*, clause 171

⁴² *ibid*, clause 173

Attorney-General considered it necessary to investigate the conduct of any public officer or to institute criminal proceedings against any public officer, the Attorney-General could appoint an independent prosecutor for the purpose. The appointment of an independent prosecutor was subject to approval by the Senate.

Comment: The Constitution now in force also establishes the office of the Attorney General.⁴³ The Attorney General is appointed by the President. The functions of the AG are to act as the principal legal adviser to the Government, to represent the Government in civil and constitutional proceedings, to draft legislation on behalf of the Government and to promote, protect and uphold the rule of law and to defend the public interest. The Attorney General is no longer responsible for instituting criminal proceedings on behalf of the State.

There was also to be a Public Service of Zimbabwe, responsible for the administration of the country.⁴⁴ The Public Service consists of persons employed by the State other than members of the Defence Forces, the Police Service or the Prison Service, judges and members of Commissions established by the Constitution. A chairperson was to be appointed by the President with the approval of the Senate. Its functions included appointing persons to hold posts or grades in the Public Service, fixing and regulating conditions of service of members of the Public Service, exercising disciplinary powers over members of the Public Service, ensuring the general well-being and administration of the Public Service and its maintenance in a high state of efficiency and making regulations for any of the purposes set out in the Constitution. A Defence Forces Service Commission was to be responsible for the administration of the defence forces.⁴⁵ Commissions were also established to administer the police service and the prison services.⁴⁶

Comment: The equivalent of the Public Service under the CC Draft in the Constitution is the Civil Service.⁴⁷ Similarly, Chapter 11 of the Constitution separately establishes the security services of Zimbabwe consisting of the Defence Forces, the Police Service, the Intelligence services and the Prisons and Correctional Service. The Constitution establishes a National Security Council consisting of the President as chairperson, the Vice-Presidents and such Ministers and members of the security services and other persons as may be determined in an Act of Parliament. The National Security Council is established to develop the national security policy for Zimbabwe, to inform and advise the President on matters relating to national security and to exercise any other functions that may be prescribed in an Act of Parliament.⁴⁸ The Constitution provides that the national security objectives of Zimbabwe must reflect the resolve of Zimbabweans to live as equals in liberty, peace and

⁴³ See s 114 of the Constitution

⁴⁴ *ibid*, clause 179

⁴⁵ *ibid*, clause 191

⁴⁶ *ibid*, clauses 195, 199

⁴⁷ Established under s 199 of the Constitution

⁴⁸ See s 209 of the Constitution



harmony, free from fear, and in prosperity.⁴⁹ The members of the security services must act in accordance with this Constitution and the law.⁵⁰ The Constitution also proscribes the security services and any of its members from acting in a partisan manner, furthering the interests of any political party or cause, prejudicing the lawful interests of any political party or cause or violating the fundamental rights or freedoms of any person.⁵¹ Members of the security services must not be active members or office bearers of any political party or organisation.⁵²

The CC draft proposed the office of the Auditor-General which office was a public office which did not however form part of the Public Service.⁵³ The Auditor-General was to be appointed by the President with the approval of the Senate. The Auditor General was mandated with auditing the accounts, financial statements and financial management all Ministries and departments of the State, organisations or persons that receive or hold public funds or property, the Reserve Bank of Zimbabwe and other statutory bodies and any other organisations that could be specified in an Act of Parliament. The Auditor General also had to report on the results of those audits to the National Assembly and the Minister responsible for finance and to direct the taking of measures to rectify any defects in the safeguarding of public funds or public property.

Comment: Section 309 of the Constitution also establishes the office of the Auditor General. The Auditor General is appointed by the President with the approval of Parliament (i.e. both houses and not only the Senate as under the CC Draft).

A Reserve Bank was also established under the draft. The primary object of the Reserve Bank of Zimbabwe was to protect the value of the currency in the interests of balanced and sustainable economic growth.⁵⁴ An Act of Parliament was to provide for the structure and organisation of the Reserve Bank of Zimbabwe. Its functions were broadly to regulate of the monetary system and to formulate and execute the monetary policy. In the exercise of its functions, the Reserve Bank could not be subject to the direction or control of anyone and had to exercise its functions independently and without fear, favour or prejudice.

Comment: Section 317 (1) of the Constitution states that there is a central bank, to be known as the Reserve Bank of Zimbabwe. The objects of the Reserve Bank are to regulate the monetary system, to protect the currency of Zimbabwe in the interest of balanced and sustainable economic growth and to formulate and implement monetary policy. Unlike the CC Draft, the Constitution does not go as far as providing for the independence of the

⁴⁹ *ibid*, s 206

⁵⁰ *ibid*, s 208 (1)

⁵¹ *ibid*, s 208 (2)

⁵² *ibid*, s 208 (3)

⁵³ CC Draft, clause 236

⁵⁴ *ibid*, clause 240

Reserve Bank of Zimbabwe. Section 317 (2) provides that an Act of Parliament may provide for the structure and organisation of the Reserve Bank of Zimbabwe and confer or impose additional functions on it.

PROVINCIAL AND LOCAL GOVERNMENT

The Constitutional Assembly draft divided the government into three tiers; namely the national Government, provincial councils and local authorities.⁵⁵ The draft recognised that provincial councils and local authorities had to be democratically elected and that provincial councils and local authorities had to be given as much autonomy as is compatible with good governance.⁵⁶ It stated that functions and responsibilities had to be decentralised and transferred from the central Government to provincial councils and local authorities in a co-ordinated manner. The draft divided Zimbabwe into a fixed ten provinces and an Act of Parliament could provide for the alteration of the boundaries of provinces. Such alteration could only be done after consultation with the Independent Electoral Commission. An Act of Parliament would establish a provincial council for every province consisting of such representatives of local authorities in the province and other persons as would be provided for in the Act of Parliament establishing the council. An Act of Parliament would also provide for the division of provinces into districts and for the establishment of councils to represent and manage the affairs of people in rural areas within those districts.

Comment: Chapter 14 of the Constitution provides for Provincial and Local Government. The Chapter, with a preamble of its own, provides that whenever appropriate, governmental powers and responsibilities must be devolved to provincial and metropolitan councils and local authorities which are competent to carry out those responsibilities efficiently and effectively.⁵⁷ The general principles of provincial and local government are to ensure good governance by being effective, transparent, accountable and institutionally coherent, to assume only those functions conferred on them by this Constitution or an Act of Parliament, to exercise their functions in a manner that does not encroach on the geographical, functional or institutional integrity of another tier of government, to co-operate with one another, to preserve the peace, national unity and indivisibility of Zimbabwe, to secure the public welfare and to ensure the fair and equitable representation of people within their areas of jurisdiction.⁵⁸ Zimbabwe is divided into ten provinces two of which are designated as Metropolitan Provinces (i.e. Bulawayo Metropolitan Province and Harare Metropolitan Province).⁵⁹ The boundaries of the provinces and districts are to be fixed in an Act of Parliament and they may be altered after consultation with the Zimbabwe Electoral Commission and the people in the provinces and districts concerned.⁶⁰

⁵⁵ *ibid*, clause 241

⁵⁶ *ibid*, clause 242

⁵⁷ See s 264 of the Constitution

⁵⁸ *ibid*, s 265 (1)

⁵⁹ *ibid*, s 267 (1)

⁶⁰ *ibid*, s 267 (2)



The Constitution establishes a provincial council for each province, except the metropolitan provinces.⁶¹ Section 269 establishes a metropolitan council for each of the two metropolitan provinces. The provincial or metropolitan councils are responsible for the social and economic development of provinces.⁶² They have the functions of planning and implementing social and economic development activities in the provinces, co-ordinating and implementing governmental programmes in provinces, planning and implementing measures for the conservation, improvement and management of natural resources in the provinces, promoting tourism in the provinces, and developing facilities for that purpose, monitoring and evaluating the use of resources in its province and exercising any other functions, including legislative functions, that may be conferred or imposed on it by or under an Act of Parliament.⁶³ The members of a provincial or metropolitan council are accountable, collectively and individually, to residents of their province and the national government for the exercise of their functions. Provincial or metropolitan councils have no legislative authority.

APPLICATION OF INTERNATIONAL LAW

The draft provided that customary international law was to be part of the law of Zimbabwe, unless it was inconsistent with the Constitution or an Act of Parliament or any statutory instrument.⁶⁴ It was also provided that when interpreting legislation, every court or tribunal was to adopt any reasonable interpretation of the legislation that is consistent with international law in preference to an alternative interpretation that is inconsistent with international law. In relation to international treaties or conventions, the draft provided that an international treaty which has been concluded or executed by the President did not bind Zimbabwe until approved by the Senate. It also provided that such treaty did not form part of the law of Zimbabwe unless it is incorporated into the law through an Act of Parliament.

Comment: The provisions of the Constitution are almost verbatim with those in the CC Draft. This is so in relation to customary international law and to international treaties, agreements or conventions. The only difference is that whilst the CC Draft provided for approval by the Senate, the Constitution provides for approval by Parliament.⁶⁵

THE NATIONAL CONSTITUTIONAL ASSEMBLY DRAFT, 2001

BACKGROUND

The National Constitutional Assembly was at the relevant time a civic organisation which was founded in 1997 and launched in 1998 at the University of Zimbabwe by individual citizens and civic organisation including trade unions, student groups and church groups.⁶⁶ In 2001 the

⁶¹ *ibid*, s 269 (1)

⁶² *ibid*, s 270 (1)

⁶³ *ibid*, s 270 (1)

⁶⁴ CC Draft, clause 259

⁶⁵ See s 326 and s 327 of the Constitution

⁶⁶ The NCA has since been turned into a political party

National Constitutional Assembly (NCA) presented a draft Constitution to the government of Zimbabwe with a demand that it be enacted into law.⁶⁷ It also enjoined the Government to facilitate the holding of a referendum on any future Constitution of Zimbabwe. According to the NCA, the Draft Constitution was put together after taking into account all the inputs which the NCA, working through its own structures and those of its member institutions, received between May 1997 and December 2001.⁶⁸ An All Stakeholders Conference facilitated by the NCA had taken place on 31 March 2001 with an objective to “agree on, and define a process of bringing about a new, democratic and genuinely people driven constitution.”

FORM OF GOVERNMENT

EXECUTIVE AUTHORITY - PRIME MINISTER

The NCA draft proposed a ceremonial President and an executive Prime Minister.⁶⁹ The Prime Minister was to be a member of the National Assembly (Parliament) and would be responsible and accountable to it.⁷⁰ He or she would be elected directly by voters in the same general election where other members of the National Assembly are elected. A person would be qualified for election as Prime Minister if he/she qualifies for election as a member of the National Assembly.⁷¹ The Prime Minister, as head of government, had to appoint not more than fifteen (15) ministers from Parliament with one of them being designated as Deputy Prime Minister.⁷² He or she was allowed to appoint as Cabinet Ministers persons who are not members of the National Assembly when it is “considered appropriate”. In such instances, the Prime Minister could appoint as Ministers up to three members of Senate and up to three persons who are neither Senators nor Members of the National Assembly.⁷³ The Prime Minister was not allowed to appoint Deputy Ministers. A National Assembly resolution supported by at least three-fifths of its total membership could pass a vote of no confidence and remove the Prime Minister.⁷⁴ The NCA argued that the people had reiterated that they did not want a President with executive authority. It was also argued that the people had rejected the idea of a Prime Minister who was elected solely by Parliament. They stated that the people had opted for an Executive Prime Minister who, although a member of the National Assembly, was to be elected separately in a Parliamentary election.

⁶⁷ NCA Draft Constitution (Statement by the NCA) page 2

⁶⁸ NCA Draft Constitution – page 2

⁶⁹ NCA Draft, clause 71

⁷⁰ *ibid*, clause 79

⁷¹ *ibid*, clause 80

⁷² *ibid*, clause 83

⁷³ *ibid*, clause 84

⁷⁴ *ibid*, clause 86



THE PRESIDENT

Chapter 5 of the Draft established the office of the President. The President was to be a non-executive and titular Head of State and Commander in Chief of the Defence Forces. Under this proposed law, the President would be the symbolic head of the Republic of Zimbabwe who was to uphold, defend and respect the Constitution and all other laws of Zimbabwe. The term of office of the President was to be five years and a person was only eligible for re-election to one further term. The President was responsible for summoning Parliament for its first sitting, dissolving Parliament pursuant to a resolution to dissolve by the National Assembly, assenting to, and signing Bills, referring a Bill back to Parliament for reconsideration of the Bill's constitutionality and making any appointments that he or she was required to make in terms of the Constitution. The National Assembly and Senate could through a resolution adopted with the support of not less than two thirds of their total membership remove the President from office. This was to be on the grounds of gross misconduct rendering the President unfit to continue in office or inability to perform the functions of his or her office by reason of infirmity of body or mind or a violation of the Constitution.

Comment: The Constitution does not create the office of the Prime Minister. It creates the office of the Executive President who is elected separately by the electorate. A person is disqualified for election as President or Vice-President if he or she has already held office as President under this Constitution for two terms, whether continuous. Three or more years' service is deemed to be a full term.⁷⁵ He/she is not a Member of Parliament.⁷⁶ The president is the Head of State and Government and Commander in Chief of the Defence Forces. The Senate and the National Assembly, by a joint resolution passed by at least two-thirds of their total membership, may pass a vote of no confidence in the Government.⁷⁷ Where Parliament passes a vote of no confidence in the Government, the President must, within fourteen days after the vote, remove all Ministers and Deputy Ministers from office, unless they have already resigned as a result of the resolution, and appoint persons in their place or dissolve Parliament and, within ninety days, call a general election. If the President does not act in accordance with subsection (4) within fourteen days after the passing of the vote of no confidence in the Government, Parliament stands dissolved. The Senate and the National Assembly, by a joint resolution passed by at least one-half of their total membership, may resolve that the question whether or not the President or a Vice-President should be removed from office for serious misconduct, failure to obey, uphold or defend the Constitution, wilful violation of the Constitution, inability to perform the functions of the office because of physical or mental incapacity.⁷⁸ Upon the passing of a resolution in terms of subsection (1), the Committee on Standing Rules and Orders must appoint a joint committee of the Senate and the National Assembly consisting of nine members reflecting the political composition of Parliament, to investigate the removal from office of the

⁷⁵ See s 91 (2) of the Constitution

⁷⁶ *ibid*, Chapter 5

⁷⁷ *ibid*, s 109

⁷⁸ *ibid*, s 97 (2)

President. If the joint committee recommends the removal from office of the President or Vice-President and the Senate and the National Assembly, by a joint resolution passed by at least two-thirds of their total membership, resolve that the President or Vice-President should be removed from office, the President or Vice-President thereupon ceases to hold office.

PARLIAMENT

The Draft provided a two chamber Parliament consisting of a National Assembly and a Senate.⁷⁹ Parliament was elected for term of five years and was vested with legislative authority. It could exercise its authority through the enactment of Acts of Parliament and could also delegate the power to make subsidiary legislation within the specifications and for the purposes laid out in an Act of Parliament.⁸⁰ Election to Parliament was through a mixed system of direct election and proportional representation. Seventy (70) members were to be directly elected to represent constituencies and a further seventy members were to be elected in terms of a system of proportional representation based on the votes cast in a general election for members voted directly by constituencies.⁸¹ The country had to be divided into seventy constituencies, each of which would freely elect a member of the National Assembly. The electorate of any constituency had the right to recall the Member elected before the expiry of the term of the National Assembly on the grounds of physical or mental incapacity, misconduct or misbehaviour and incompetence or persistent deserting of the electorate.⁸² The recall would be initiated by a petition in writing signed by at least sixty per cent (60%) of the persons who cast their votes in the election of the Member in question, and would be delivered to the Independent Electoral Commission. The Independent Commission would then conduct an enquiry and if satisfied with the genuineness of the petition, was to declare the seat vacant and conduct new elections for the constituency.⁸³

Comment: Section 124 of the Constitution establishes a National Assembly consisting of two hundred and ten members elected by secret ballot from the two hundred and ten constituencies into which Zimbabwe is divided and an additional sixty women members, six from each of the provinces into which Zimbabwe is divided, for the life of the first two Parliaments after the effective date. There is no right of recall under the Constitution.

The Senate would consist of fifty-eight members. Eight members were to be elected from provinces under proportional representation. Ten chiefs were to be elected in accordance with the provisions of an Act of Parliament. A further eight would be elected by the National Assembly at its first sitting. These would be elected from interest groups including women, the disabled, the youth, and combatants of the armed struggle, trade unions, religious groups, business and farmers. The election had to be in such a way that each interest group must would have at least one representative. An Act of Parliament would provide for the presentation of nominations to Parliament

⁷⁹ Clause 46 NCA Draft

⁸⁰ *ibid*, clause 49

⁸¹ *ibid*, clause 60

⁸² *ibid*, clause 62

⁸³ *ibid*, clause 62



by interest groups.⁸⁴ In relation to assent to Bills by the President, the draft provided that the President was to either assent to or sign a Bill or withhold his or her assent if he or she had reservations about its constitutionality. If assent was withheld, the President was enjoined to refer the Bill, together with the detailed reasons for withholding assent, to a joint sitting of the National Assembly and Senate which would reconsider the Bill and fully accommodate the President's reservations; or pass the bill, with or without amendments. This had to be through an affirmative vote supported by at least two-thirds of the total membership of the two Chambers.⁸⁵ The President was then required to assent to such a Bill.

Comment: The Constitution provides for the establishment of the Senate consisting of eighty Senators.⁸⁶ Six are elected from each of the provinces into which Zimbabwe is divided, by a system of proportional representation, sixteen are Chiefs, of whom two are elected by the provincial assembly of Chiefs from each of the provinces, other than the metropolitan provinces into which Zimbabwe is divided, two are the President and Deputy President of the National Council of Chiefs and a further two are elected in the manner prescribed in the Electoral Law to represent persons with disabilities.

Section 131 provides for issues relating to the presidential assent to bills sent from Parliament. When a Bill is presented to the President for assent and signature, he or she must, within twenty-one days either assent to it and sign it, and then cause it to be published in the Gazette without delay or, if he or she considers it to be unconstitutional or has any other reservations about it, refer the Bill back to Parliament through the Clerk of Parliament, together with detailed written reasons for those reservations and a request that the Bill be reconsidered.⁸⁷ Where a Bill has been referred back to Parliament, the Speaker must without delay convene a sitting of the National Assembly which must reconsider the Bill and fully accommodate the President's reservations or pass the Bill, with or without amendments, by a two-thirds majority of the total membership of the National Assembly.⁸⁸ In each case, the Speaker must then cause the Bill to be presented to the President without delay for assent and signature and must give public notice of the date on which the Bill was sent to the President. If a Bill that has been presented to the President fully accommodates the President's reservations, the President must assent to the Bill and sign it within twenty-one days and then cause it to be published in the Gazette without delay.⁸⁹ Should the President still holds reservations about the Bill, he or she must within twenty-one days either assent to the Bill and sign it, despite those reservations or refer the Bill to the Constitutional Court for advice on its constitutionality. If the Constitutional Court advises that the Bill is constitutional, the President must assent to it and sign it immediately and cause it to be published in the Gazette without delay.

⁸⁴ *ibid*, clause 65

⁸⁵ *ibid*, clause 70

⁸⁶ See s 120 (1) of the Constitution

⁸⁷ See s 131 (6) of the Constitution

⁸⁸ *ibid*, s 131 (7)

⁸⁹ *ibid*, s 131 (8)

THE BILL OF RIGHTS

The Bill of Rights proposed in the NCA Draft contained civil and political rights such as the right to life, personal liberty and to free and fair regular elections. It also contained justiciable socio-economic rights such as the right to education, right to health, right to a clean environment, right to strike and the rights of disabled persons. Further, it included minority rights with minority groups having a right to participate in decision-making processes at all levels of State organs. In labour matters, every worker was granted the right to fair and safe labour practices and standards and to be paid and at least a living wage consistent with the poverty datum line. Every person also had the right to form and join trade unions or employers' associations of their choice as well as the right to strike, sit-in or stay-away, or such other concerted action. Men and women were to be entitled to equal remuneration for work of equal value with women being entitled to fully-paid maternity leave.

LAND ISSUE

On the issue of land, the statement to the Draft declared that it recognised the importance of land. It therefore allowed the government to compulsorily acquire land for equitable redistribution albeit with a requirement that fair compensation be paid.

Comment: Chapter 16 of the Constitution is devoted to "Agricultural Land". Agricultural land is defined as land used or suitable for agriculture, that is to say for horticulture, viticulture, forestry or aquaculture or for any purpose of husbandry, including the keeping or breeding of livestock, game, poultry, animals or bees or the grazing of livestock or game. Communal Land or land within the boundaries of an urban local authority or within a township established under a law relating to town and country planning is excluded from the definition of agricultural land.⁹⁰ The Constitution provides that policies regarding agricultural land must be guided by a set of principles enumerated in s 289 of the Constitution. These include the principle that land is a finite natural resource that forms part of Zimbabweans' common heritage, that every Zimbabwean citizen has a right to acquire, hold, occupy, use, transfer, hypothecate, lease or dispose of agricultural land regardless of his or her race or colour, that the allocation and distribution of agricultural land must be fair and equitable, having regard to gender balance and diverse community interests and that the land tenure system must promote increased productivity and investment by Zimbabweans in agricultural land. It is also provided that the use of agricultural land should promote food security, good health and nutrition and generate employment, while protecting and conserving the environment for future generations and that no person may be deprived arbitrarily of their right to use and occupy agricultural land. The Constitution provides that any person who, immediately before the effective date, was using or occupying, or was entitled to use or occupy, any agricultural land by virtue of a lease or other agreement with the State continues to be entitled to use or occupy that land on or after the effective date, in accordance with that lease or other agreement.⁹¹

⁹⁰ *ibid*, s 72 (1)

⁹¹ *ibid*, s 291



In relation to compensation for acquisition of previously-acquired agricultural land, s 295 (1) of the Constitution provides that any indigenous Zimbabwean whose agricultural land was acquired by the State before the effective date is entitled to compensation from the State for the land and any improvements that were on the land when it was acquired. The Constitution does not, however, define an “indigenous Zimbabwean”. The Constitution further provides that any person, other than an “indigenous Zimbabwean” whose agricultural land was acquired by the State before the effective date is entitled to compensation from the State only for improvements that were on the land when it was acquired.⁹²

THE JUDICIARY

Judicial authority was to be vested in the Constitutional Court, the Supreme Court, the High Court, the Labour Appeal Court, the Administrative Court, the Labour Court, the Family Court, Magistrates Courts, Customary Law Courts and such other courts subordinate to the Supreme Court and High Court as could be established by, or under, an Act of Parliament.⁹³ A Chief Justice was to be the head of the judiciary and also President of the Constitutional Court. The Chief Justice was to be appointed by the President on the advice of the Prime Minister and with the approval of Senate from a list of three nominees submitted by the Judicial Services Commission. The draft stated that the courts were to be independent and subject only to the Constitution and the law, which they were to apply impartially and without fear, favour or prejudice. The courts were mandated with protecting and upholding the Constitution.

The Constitutional Court was to be the highest court in all constitutional matters and could decide only constitutional matters, and issues connected with decisions on constitutional matters. It would also make the final decision whether a matter is a constitutional matter or whether an issue is connected with a decision on a constitutional matter. It would also make the final decision whether an Act of Parliament, a Provincial Act, or conduct of the President was constitutional, and was to confirm any order of invalidity made by the Supreme Court of Appeal, a High Court, or a court of similar status, before that order could have any force. National legislation or the rules of the Constitutional Court had to allow a person, when it is in the interests of justice and with leave of the Constitutional Court to bring a matter directly to the Constitutional Court or to appeal directly to the Constitutional Court.

The Supreme Court was to be a superior court of record and the final court of appeal for Zimbabwe save for constitutional matters. The Supreme Court consisted of the Chief Justice and four other judges of the Supreme Court. The High Court was to be a superior court of record exercising the jurisdiction and powers conferred on it by the Constitution or any Act of Parliament. The Constitutional Court, the Supreme Court and High Court had the inherent power to protect and regulate their own process, and to develop the common law taking into account the interest of justice and the provisions of the Constitution. Acts of Parliament would provide for the establishment of all the other courts below the High Court.

⁹² *ibid*, s 295 (3)

⁹³ See Clause 95 NCA Draft

Comment: Under the new Constitution, the appointment of the Chief Justice does not need the approval of Senate as was the case under the NCA Draft. The appointment of judges under the new Constitution is in the fashion envisaged in s 180 of the Constitution.

The NCA draft also provided for an Attorney- General appointed by the President on the advice of the Judicial Services Commission and with the approval of the Senate.⁹⁴ The functions of the Attorney General were to act as the principal legal adviser to the government, to be in charge of all criminal prosecutions including prosecuting and defending appeals from decisions in criminal proceedings and, in appropriate cases, requiring the Commissioner of Police to investigate and report on an alleged criminal offence. The Attorney General had to be “absolutely” independent when exercising his or her powers and duties in relation to criminal prosecutions.

Comment: The Attorney General under the Constitution is appointed by the President to serve as the principal legal advisor for the government, to represent the government in civil suits and to draft legislation on behalf of the government. The Attorney General is not responsible for instituting criminal prosecutions.

INDEPENDENT COMMISSIONS

Chapter 9 of the Draft established twelve independent commissions. These were the Independent Electoral Commission, the Human Rights Commission, the Gender and Anti-Discrimination Commission, the Public Protector Commission, the Truth, Justice, Reconciliation and Conflict Prevention Commission, the Labour Commission, the Media Commission, the Youth and Children Commission, the Culture and Arts Commission, the Land Commission, the Health and Education Services Commission and the Anti-Corruption Commission. The functions of the Commissions were to first, support and entrench human rights, democracy, ensure that injustices are remedied and address past historical, economic and human rights injustices; second, ensure the efficient provision of social services and third, ensure financial discipline and financial transparency. The Commissions were to be accountable to Parliament for the efficient performance of their functions. As such, each Commission had to submit a full annual report to Parliament and was to also provide Parliament with six monthly reports.

Comment: The Constitution establishes all the commission under the NCA save for the Health and Education Services Commission, the Culture and Arts Commission, the Youth and Children Commission and the Public Protector Commission. The Anti-Discrimination Commission under NCA also had a wider mandate than the Gender Commission under the Constitution now in force. Similarly to NCA, the independent commissions under the Constitution are accountable to Parliament.

Separate from the independent commission was the Auditor - General who would be appointed by the President on the recommendations of the National Assembly by a resolution supported by a majority of its members. The Auditor General mandated with auditing the accounts, financial systems and financial management, of all government departments and institutions which receive public funds, ordering the taking of measures to rectify any defects in

⁹⁴ *ibid*, clause 116



the management and safeguarding of public funds and reporting on any other function which may be imposed by an Act of Parliament.⁹⁵ There was also to be established a central bank of Zimbabwe to be known as the Reserve Bank of Zimbabwe. The Reserve Bank of Zimbabwe was to be independent and subject only to the law. The primary object of the Reserve Bank of Zimbabwe was to protect the currency of Zimbabwe in the interest of balanced and sustainable economic growth. An Act of Parliament would provide for the functions of the Reserve Bank of Zimbabwe.⁹⁶

OTHER COMMISSIONS

The Draft established three other commissions. First, there was to be established a Public Service Commission to appoint competent and qualified persons for employment in the public service, to promote a high standard of professional ethics in the public service and ensure that services are provided impartially, fairly and without bias, to recommend to Government, the remuneration and other benefits of persons employed in the public service and to exercise disciplinary control over persons employed in the public service. This commission was to be accountable to the National Assembly and had to report annually to the National Assembly on its activities for the year.⁹⁷ Second, there was to be established a Security Services Commission to exercise functions in relation to the Defence Force, Police Force, Prison Service and the Intelligence Service. Its broad functions, although they were to be enumerated in an Act of Parliament, were to recommend to the National Assembly persons to be appointed to head the various components of the Security Services, to advise the Government on the remuneration and other benefits and conditions of service of persons employed in the Security Services, to exercise disciplinary control over persons employed in the Security Services, to ensure that Security Services are impartial and operate in compliance with the law and to make recommendations to the National Assembly to ensure that military spending is not excessive. Third, a Judicial Services Commission was also established to play a central role in the appointment and removal of judges and fixing judicial conditions of service. It could also advise the national government on any matter relating to the judiciary or the administration of justice.

PROVINCIAL GOVERNMENT

The draft sought to divide Zimbabwe into five provinces. These were to be Manicaland, Mashonaland, Masvingo, Matabeleland and Midlands. There was to be, in each province, a provincial legislature, to be called a Provincial Assembly consisting of not less than thirty members and not more than fifty members elected on an electoral system based on proportional

⁹⁵ *ibid*, clause 149

⁹⁶ *ibid*, clause 151

⁹⁷ *ibid*, clause 156

representation.⁹⁸ The Provincial Assembly was vested with the legislative authority of the Province and had power to initiate and pass legislation dealing with specific provincial planning, provincial tourism, public transport, soil conservation, housing, provincial tax, education, health, rural development and roads.⁹⁹ Parliament could, at a joint sitting and by a vote supported by at least two-thirds of its total membership, nullify a piece of provincial legislation on the grounds that such legislation is prejudicial to the economic or security interests of another province or the country as a whole or is grossly unreasonable.¹⁰⁰ The Executive authority of a Province was vested in a Provincial Governor and an Executive Council. The Governor would be elected by the Provincial Assembly from among its members at its first sitting and was charged with appointing not more than ten members from the Provincial Assembly to constitute an Executive Council, which would then act as a Cabinet for the Province. The President could dissolve the Provincial Assembly at any time if three-quarters of its total membership voted in favour of dissolution.¹⁰¹

Comment: The Constitution divides Zimbabwe into ten provinces. There is no provision for provincial governors under the Constitution. Provincial or Metropolitan Councils are headed by a chairperson for the provincial council and in the case of the metropolitan provinces, the mayor of the city of Bulawayo and the mayor of the city of Harare respectively.¹⁰² The provincial or metropolitan councils do not have any legislative authority.

APPLICATION OF INTERNATIONAL LAW

The NCA Draft provided that in interpreting its Bill of Rights, a court, tribunal, forum or body had to take into account international law, treaties and conventions and consider relevant foreign law interpreting international law, treaties and conventions.¹⁰³ It also provided that the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable, is recognised by international human rights standards and is necessary and justifiable in an open and democratic society.¹⁰⁴

Comment: The NCA Draft did not have elaborate provisions on the status of customary international law and international treaties and conventions in Zimbabwe. The Constitution now in force has elaborate provision in s 326 and s 327. Customary international law is part of the law of Zimbabwe, unless it is inconsistent with the Constitution or an Act of Parliament. For treaties to be binding on Zimbabwe, they not only need to be concluded by the President, they should be approved by Parliament. Treaties do not become part of the law of Zimbabwe unless they are incorporated into the law of Zimbabwe through an Act of Parliament.¹⁰⁵ However, when interpreting legislation, every court and tribunal must adopt any reasonable interpretation of the

⁹⁸ *ibid*, clause 164

⁹⁹ *ibid*, clause 171

¹⁰⁰ *ibid*, clause 168

¹⁰¹ *ibid*, clause 170

¹⁰² See s 268, 269 of the Constitution

¹⁰³ *ibid*, clause 9 (d)

¹⁰⁴ *ibid*, clause 13 (2)

¹⁰⁵ See s 327 (2) (b) of the Constitution



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.¹⁰⁶

NOTE ON THE KARIBA DRAFT

In 2007 representatives of a three political parties met in the town of Kariba. The represented parties were the Zimbabwe African National Union (Patriotic Front), the Movement for Democratic Change (MDC) led by Morgan Tsvangirai and the Movement for Democratic Change then led by Arthur Mutambara. There the parties came up with a draft Constitution. The draft agreed at Kariba was unofficially known as the Kariba Draft Constitution. Although the draft was not presented to a referendum, an agreement signed by the three parties in September 2008, the Global Political Agreement (GPA), referred to the Kariba Draft Constitution. Article 6 of the GPA acknowledged the draft Constitution that the Parties signed and agreed to in Kariba on the 30th of September 2007. The Kariba Draft was included as an annexure to the GPA. Its formal name was therefore Annexure B to the Global Political Agreement of 15 September 2008. It appeared the intention of the three parties was to use the Kariba draft as a starting point in the constitution making envisaged under the GPA. A review of the Kariba Draft shows that it might have been used extensively in drafting the Constitution now in force.

¹⁰⁶ *ibid*, s 327 (6)

THE PEOPLES' CHARTER OF 2008

EDITORIAL



ABSTRACT

In 2008 a conglomeration of Non-Governmental Organisations converged in Harare to deliberate on the state of Zimbabwe in the context of human rights, the rule of law and democracy. At the conclusion of the conference, a document known as the Zimbabwe Peoples' Charter was adopted. It set out values which those gathered believed are to guide the State in all its dealings with the citizens. Proclaiming to be speaking on behalf of the people, the charter touched on issues of gender, youth, elections and the constitutional making process among other issues. The following is a preview of the Peoples' Charter of 2008. Comments referencing the new Constitution of Zimbabwe have been inserted to offer a comparative overview of how the Charter might have had an impact on the negotiation of the Constitution that is now in force.



INTRODUCTION

The Zimbabwe Peoples' Charter is a statement of principles which should guide Zimbabwe in all spheres of government. The Zimbabwe People's Charter was first established at the People's Convention on February 9 2008 in Harare. The Convention was attended by over 3000 delegates from civil society and non-governmental organisations. The Charter has since been adopted by organizations such as Zimbabwe Lawyers for Human Rights, the Zimbabwe Human Rights NGO Forum, Transparency International Zimbabwe, the National Association of Non-Governmental organisations among others.¹ The Charter is not a legal instrument; it is a declaration of what those who have adopted believe should be the principles underlying governance in Zimbabwe. It is particularly important in that it represents what coalitions of civic-society and non-governmental organisations view as the principles which should guide Zimbabwe. It is even more important when compared with the values now enshrined in the Constitution. Does the Constitution embrace the values stated in the Peoples' Charter? The following is a summary of the substantive elements of the Charter. Comments have been inserted cross-referencing the Charter to the Constitution.

POLITICAL ENVIRONMENT

The Peoples' Charter starts by declaring that the political environment of Zimbabwe since colonialism and after our national independence in 1980 has remained characterised by a lack of respect for the rule of law, political violence and the lack of fundamental rights and freedoms, including freedom of expression and information, association and assembly.² It implores the following principles; that the People must have a political environment in which all people in Zimbabwe, including children, are guaranteed without discrimination the rights to freedom of expression and information, association and assembly, and all other fundamental rights and freedoms as provided under international law to which the state has bound itself voluntarily, that all People in Zimbabwe must live in a society characterised by tolerance of divergent views, cultures or religions, honesty, integrity and common concern for the welfare of all and that all people in Zimbabwe are guaranteed safety and security, and a lawful environment free from human rights violations and impunity.³ It also adds that all national institutions including the judiciary, law enforcement agencies, state security agencies, electoral, media and human rights commissions, are independent and impartial and serve all the people of Zimbabwe without fear or favour. The Charter also declares that there must be a free and vibrant media, which places emphasis on freedom of expression and information and a government, which guarantees independent public media as well as a vibrant and independent

¹ See The Zimbabwe Peoples' Charter (9th February 2008)

² See Article 1 of the Peoples' Charter

³ *ibid*, Article 1

private media.⁴ It further calls for the embodiment of transparency, with an efficient public service and a belief in a legitimate, people-centred state.

Comment: The founding provisions of the Constitution state that Zimbabwe is founded on respect the supremacy of the Constitution, the rule of law, fundamental human rights and freedoms, the nation's diverse cultural, religious and traditional values, recognition of the inherent dignity and worth of each human being, recognition of the equality of all human beings, gender equality, good governance and recognition of and respect for the liberation struggle.⁵ The Constitution also provides for freedom of thought, opinion, religion or belief and freedom to practise and propagate and give expression to their thought, opinion, religion or belief, whether in public or in private.⁶ Section 58 of the Constitution gives every person has the right to freedom of assembly and association, and the right not to assemble or associate with others. Chapter 2 of the Constitution contains the objectives which must guide the State and all institutions and agencies of government at every level in formulating and implementing laws and policy decisions that will lead to the establishment, enhancement and promotion of a sustainable, just, free and democratic society in which people enjoy prosperous, happy and fulfilling lives.⁷ These include good governance, fostering of fundamental rights and freedoms, national development, food security and gender balance.⁸ Section 88 states that Executive authority derives from the people of Zimbabwe and must be exercised in accordance with the Constitution.⁹ Section 117 (1), for its part, declares that the legislative authority of Zimbabwe is derived from the people and is vested in and exercised in accordance with the Constitution by the Legislature.¹⁰ The Constitution also declares that the courts are independent and are subject only to the Constitution and the law, which they must apply impartially, expeditiously and without fear, favour or prejudice.¹¹ In relation to the media, section 248 establishes the Zimbabwe Media Commission mandated to uphold, promote and develop freedom of the media and to ensure that the people of Zimbabwe have fair and wide access to information.¹²

ELECTIONS

The Charter declared that all elections were to be rendered illegitimate unless they were conducted under a new democratic and people-driven constitution.¹³ The Charter declared that the people must have all elections under a new people-driven constitutional dispensation characterised by several principles and conditions. These included equal access to the media, one independent,

⁴ *ibid*, Article 1

⁵ See s 3 (1) of the Constitution

⁶ *ibid*, s 60

⁷ *ibid*, s 8 (1)

⁸ *ibid*, Chapter 2

⁹ *ibid*, s 88

¹⁰ *ibid*, s 117

¹¹ *ibid*, s 164

¹² *ibid*, s 249 (f)

¹³ See Article 2 of the Peoples' Charter



impartial, accountable and well-resourced electoral management body, transparent and neutral location of polling stations, agreed to through a national consultative process, voter education with the full participation of civic society that is both expansive and well-timed in order to allow citizens to exercise their democratic right to choose leaders of their choice to the full, International, Regional and Local Observers and Monitors being permitted access to everyone involved in the electoral process and an Electoral Court, which is independent and impartial, well-staffed and well-resourced to address all issues relating to electoral processes, conduct, conflicts and results in a timely manner.¹⁴

Comment: Chapter 7 of the Constitution has extensive provisions on elections. It provides that elections, which must be held regularly, and referendums, to which the Constitution applies must be peaceful, free and fair, conducted by secret ballot, based on universal adult suffrage and equality of votes and free from violence and other electoral malpractices.¹⁵ The Constitution further provides that the State must take all appropriate measures, including legislative measures, to ensure that effect is given to the principles in the Constitution.¹⁶ Section 156 (a) provides that the Zimbabwe Electoral Commission must ensure that whatever voting method is used, it is simple, accurate, verifiable, secure and transparent and that the results of the election or referendum are announced as soon as possible after the close of the polls. Appropriate systems and mechanisms must be put in place to eliminate electoral violence and other electoral malpractices and to ensure the safekeeping of electoral materials.¹⁷ Section 238 establishes a commission to be known as Zimbabwe Electoral Commission which, like all other independent commissions in the Constitution, should be independent and are not subject to the direction or control of anyone and must exercise their functions without fear, favour or prejudice.¹⁸ Members of the Zimbabwe Electoral Commission must not exercise of their functions in a partisan manner and they must not further the interests of any political party or cause or prejudice the lawful interests of any political party or cause.¹⁹

CONSTITUTIONAL REFORM

PROCESS

The Charter declared that the Constitution reform process had to be characterised by comprehensive consultation with the people of Zimbabwe where participants are guaranteed freedom of expression and information, freedom of association and freedom of assembly. There had to be collection of the views of the people and their compilation into a draft constitution that would be undertaken by an All-Stakeholders' Commission composed of representatives of government, parliament, political parties, civil society,

¹⁴ *ibid*, Article 2

¹⁵ See s 155 of the Constitution

¹⁶ *ibid*, s 155 (2)

¹⁷ *ibid*, s 156 (c)

¹⁸ *ibid*, s 235 (1)

¹⁹ *ibid*, s 236 (1)

labour, business and the church with a gender and minority balance. It also stated the need for a transparent process of the appointment of the All-Stakeholders' Commission members as well as their terms of reference and the holding of a national referendum on any draft constitution.

Comment: In 2009, the three primary political parties signed an understanding that was known as the Global Political Agreement (GPA). Article 6.1 of the GPA provided for the establishment of Select Committee of Parliament composed of representatives of the Parties to spearhead the task of preparing a new Constitution.²⁰ The Committee also had to set up such subcommittees chaired by a Member of Parliament and composed of members of Parliament and representatives of Civil Society as would be necessary to assist the Select Committee in performing its mandate. The Select Committee was established in April 2009 consisting of 25 parliamentarians selected to reflect parliament's gender balance and the relative strengths of the different parties in both the senate and the house of assembly.²¹ The Select Committee was tasked with holding such public hearings and such consultations as it may deem necessary in the process of public consultation over the making of a new constitution for Zimbabwe, convening an All Stakeholders Conference to consult stakeholders on their representation on such matters as may assist the committee in its work. It also had to table its draft Constitution to a 2nd All Stakeholders Conference and to report to Parliament on its recommendations over the content of a New Constitution for Zimbabwe. The draft recommended by the Select Committee was to be submitted to a referendum. The Select Committee held its first All-Stakeholders Conference in July 2009 which was attended by 4000 delegates, including all parliamentarians as well as nominees from political parties and civil society, and delegates chosen to represent special-interest groups such as war veterans.²² From June to October 2010, the Select Committee undertook public consultations.²³ The constitution draft committee was headed by three principal drafters (one selected by each party to the GPA). These were Mr. Brian Crozier, Former Judge Moses Chhengo and Mrs Priscilla Madzonga. The draft was based on a list of agreed constitutional issues drawn from a national report of people's submissions.²⁴ The draft was accepted by over 94% of voters in a referendum conducted on 16 and 17 March 2013.²⁵

²⁰ See Article 6.1 of the Global Political Agreement (GPA)

²¹ It had 17 men and 8 women, 11 members of MDC-T, 10 ZANU-PF members, 3 MDC-N members and 1 representative of the traditional chiefs

²² Dzinesa (2012) : 4

²³ See Dzinesa (2012) : 5 – These were described in some quarters as acrimonious, under-funded and devoid of any freedom of speech as required by the Peoples' Charter (Human Rights Watch 2011)

²⁴ See COPAC Draft Constitution of 29 February 2013

²⁵ ZEC announced a "YES VOTE" of 3,079,966 and a "NO VOTE" of 179,000. There were 56,627 spoilt papers



CONTENT

The Peoples Charter was adopted in 2008 before the new Constitution came into force. It therefore contained statements on how the constitutional reform process had to be undertaken. It concluded that a new constitution of Zimbabwe must be produced by a people-driven and participatory process.²⁶ The Charter declared that any Constitution for Zimbabwe must guarantee that the Republic of Zimbabwe is a democracy, with separation of powers, a justiciable Bill of Rights that recognises civil, political, social, economic, cultural and environmental rights. It further declared that the Constitution must provide for devolution of government authority to provinces and to local government level, provide for a multi-party system of democratic government based on universal suffrage and regular free and fair elections and the right to recall public officials, the right to citizenship for any person born in Zimbabwe and that birth certificates, national identity documents and passports shall be easily available for all citizens. It also stated that there must be a provision for a credible and fair election management body and process, an independent, impartial and competent judiciary, protection of labour rights and the right to informal trade and the protection and promotion of the rights of people living with disabilities. It advocated for the Independent and impartial commissions which deal with gender equality, land, elections, human rights and social justice as well as guarantees for an impartial state security apparatus.²⁷

Comment: Section 1 of the Constitution provides that Zimbabwe is a unitary, democratic and sovereign republic. The Constitution also provides that Zimbabwe is founded on the observance of the principle of separation of powers.²⁸ Chapter 4 of the Constitution has justiciable Declaration of Rights. The Declaration provides for civil, political, social, economic, cultural and environmental rights. Chapter 14 of the Constitution provides for devolution of government. It declares that whenever appropriate, governmental powers and responsibilities must be devolved to provincial and metropolitan councils and local authorities who are competent to carry out those responsibilities efficiently and effectively.²⁹ In relation to elections, s 155 of the Constitution provides that elections must be peaceful, free and fair, conducted by secret ballot, based on universal adult suffrage and equality of votes and must be free from violence and other electoral malpractices. There is no right of recall of the Members of Parliament or any other public officials under the Constitution. In terms of citizenship, Chapter 3 of the Constitution gives all citizens the right to the protection of the State wherever they may be, the right to passports and other travel documents and the right to birth certificates and other identity documents issued by the State. Section 65 provides for labour rights and provides that every person has the right to fair and safe labour practices and standards and to be paid a fair and reasonable wage. It also states that women and men have a right to equal remuneration for similar work and

²⁶ See Article 3 of the Peoples' Charter

²⁷ *ibid*, Article 3

²⁸ See s 3 (2) (e) of the Constitution

²⁹ *ibid*, s 264 (1)

that women employees have a right to fully paid maternity leave for a period of at least three months.

In relation to the protection of rights of persons with disabilities, s 83 is dedicated to rights of persons with disabilities. It provides that the State must take appropriate measures, within the limits of the resources available to it, to ensure that persons with disabilities realise their full mental and physical potential. Section 120 (1) (d) also reserves two Senatorial seats for the representation of persons with disabilities. In terms of independent commissions, Chapter 12 of the Constitution establishes a number of commissions to support democracy and to combat crime and corruption. As to the impartiality of the state security service, s 208 provides that members of the security services must act in accordance with the Constitution and the law. They also duty bound not to act in a partisan manner or to further the interests of any political party or cause, to prejudice the lawful interests of any political party or cause or to violate the fundamental rights or freedoms of any person.

NATIONAL ECONOMY AND SOCIAL WELFARE

The Charter declared that the colonial and post-colonial periods resulted in massive growth in social inequality and marginalisation of women, youths, peasants, informal traders, workers, the disabled, professionals and the ordinary people. It therefore implored the state to be guided by certain enumerated principles. These included people-centred economic planning and budgets at national and local government levels that guarantee social and economic rights, an obligation on the state, provincial and local authorities to initiate public programmes to build schools, hospitals, houses, dams and roads and create jobs, equitable access to and distribution of national resources for the benefit of all people of Zimbabwe and a transparent process of ownership and equitable, open and fair redistribution of land.³⁰ The Charter also declared that the national economy must ensure that the people of Zimbabwe have free quality public health care including free drugs, treatment, care and support for those living with HIV and AIDS, a living pension and social security allowances for all retirees, elderly, disabled, orphans, unemployed and ex-combatants and ex-detainees, affordable, and decent and affordable public funded housing. It called for a tax-free minimum wage linked to inflation and the poverty datum line and pay equity for women, youth and casual workers.

Comment: A number of provisions in the new Constitution make reference to the national economy and social welfare. Section 13 of the Constitution makes reference to principles which should guide the State and all institutions and agencies of government at every level in endeavouring to facilitate rapid and equitable development. The State must promote private initiative and self-reliance, foster agricultural, commercial, industrial, technological and scientific development; foster the development of industrial and commercial enterprises in order to empower Zimbabwean citizens and to bring about balanced development of the different areas of Zimbabwe, in particular a proper balance in the development of rural and urban areas.³¹ The Constitution

³⁰See Article 4 of the Peoples' Charter

³¹ See Article 13 of the Constitution



further states that these measures must protect and enhance the right of the people, particularly women, to equal opportunities in development. Section 77 of the Constitution provides that every person has the right to safe, clean and potable water and to sufficient food. The State must take reasonable legislative and other measures, within the limits of the resources available to it, to achieve the progressive realisation of this right. The Constitution also guarantees every citizen and permanent resident of Zimbabwe the right to have access to basic health-care services, including reproductive health-care services.³²

NATIONAL VALUE SYSTEM

The Charter stated that the people must commit themselves to a national value system that recognises the humanity of every single individual in the society which is to be called Ubuntu or Hunhu.³³ It stated a commitment to provide solidarity wherever needed to those that are less privileged in the society as individuals or in any other capacity, to equally respect people of all ages, to challenge intolerance by learning and respecting all languages and cultures, to embrace an inclusive national process of truth, justice, reconciliation and healing and to recognise all people involved in the liberation struggle. It stated that there should be an emphasis that Ubuntu/Hunhu is passed on from one generation to the next at national and community level.

Comment: A number of provisions in the Constitution relate to this part of the Charter. Section 3 of the Constitution states that Zimbabwe is founded on respect for the values and principles which include the nation's diverse cultural, religious and traditional values, recognition of the equality of all human beings and recognition of and respect for the liberation struggle. Section 6 of the Constitution lists Chewa, Chibarwe, English, Kalanga, Koisian, Nambya, Ndau, Ndebele, Shangani, Shona, sign language, Sotho, Tonga, Tswana, Venda and Xhosa as the officially recognised languages of Zimbabwe. It is further provided that an Act of Parliament may prescribe other languages as officially recognised languages and may prescribe languages of record. The State and all institutions and agencies of government at every level must ensure that all officially recognised languages are treated equitably and must take into account the language preferences of people affected by governmental measures or communications.³⁴ Section 21 provides that the State and all institutions and agencies of government at every level must take reasonable measures, including legislative measures, to secure respect, support and protection for elderly persons and to enable them to participate in the life of their communities. Section 251 establishes a National Peace and Reconciliation Commission to ensure post-conflict justice, healing and reconciliation and to bring about national reconciliation by encouraging people to tell the truth about the past and facilitating the making of amends and the provision of justice.

³² See s 76 of the Constitution

³³ See Article 5 of the Peoples' Charter

³⁴ See s 6 (3) of the Constitution

GENDER

The Charter declares that in relation to gender that all human beings are created equal, and that all people must live and be respected equally with equitable access to all resources that our society offers regardless of their gender, and that gender equality is the responsibility of women and men equally.³⁵ It also recognises the role that our mothers and sisters played in the liberation of our country from colonialism and their subsequent leading role in all struggles for democracy and social justice. The Charter states that these principles of equality must be observed both on paper and in practice where decisions are made about the national budget and economy, the legislative and government processes, through the provision by the state of all health care and all sanitary requirements of women and through understanding and acknowledging that women bear the brunt of any decline in social welfare security, economic and political systems.

Comment: Section 3 (1) (g) states that Zimbabwe is founded on respect for gender equality and the recognition of the inherent dignity and worth of each human being.³⁶ Section 17, for its part, provides that the State must promote full gender balance in Zimbabwean society through, among other things, promoting the full participation of women in all spheres of Zimbabwean society on the basis of equality with men and taking all measures, including legislative measures to ensure that both genders are equally represented in all institutions and agencies of government at every level and that women constitute at least half the membership of all Commissions and other elective and appointed governmental bodies established by or under the Constitution or any Act of Parliament. The Constitution further provides that the State and all institutions and agencies of government at every level must take practical measures to ensure that women have access to resources, including land, on the basis of equality with men.³⁷ The State must also take positive measures to rectify gender discrimination and imbalances resulting from past practices and policies. In the recent case of *Jennifer Williams and Ors v. The Co-Ministers of Home Affairs*, the Constitutional Court held that “the blanket application of the requirement that each detainee is allowed one layer of clothing and one undergarment ignores the fact that the applicants being women, have, by reason of their sex, personal needs which differ from that of men and has resulted in discrimination against the applicants, who by virtue of their biological make-up, have need of two undergarments.” The court however stated that “while the idea would appear to be abhorrent that sanitary provisions are not afforded to women in custody, the applicants do not allege that they were menstruating and were refused sanitary provisions by the Police.” The court therefore held that s 24 of the former Constitution did not allow the applicants to be torchbearers for women in general.³⁸

The declaration of rights under the Constitution in its s 56 provides that all persons are equal before the law and have the right to equal protection and benefit of the law. Women and men have the right to equal treatment,

³⁵ See Article 6 of the Peoples' Charter

³⁶ See also s 3 (1) (e) of the Constitution

³⁷ *ibid*, s 17 (1) (c)

³⁸ *Jennifer Williams and Ors v. The Co-Ministers of Home Affairs* CCZ 4/14



including the right to equal opportunities in political, economic, cultural and social spheres. A person is treated in a discriminatory manner for the purpose of this provision if they are subjected directly or indirectly to a condition, restriction or disability to which other people are not subjected or other people are accorded directly or indirectly a privilege or advantage which they are not accorded.³⁹ Section 124 (1) (b) provides that for the life of the first two Parliaments after 22 August 2013 (the effective date), the National Assembly shall have an additional sixty women members, six from each of the provinces into which Zimbabwe is divided, elected under a party-list system of proportional representation based on the votes cast for candidates representing political parties in a general election for constituency members in the provinces. Section 245 of the Constitution establishes the Zimbabwe Gender Commission whose function is to monitor issues concerning gender equality to ensure gender equality as provided in the Constitution. The commission also receives and considers complaints from the public and to may take such action in regard to the complaints as it considers appropriate.

YOUTH

The Charter recognises that at all given times the youth, both female and male, represent the present and the future of our country and that all those in positions of leadership nationally and locally must remain true to the fact that our country shall be passed on from one generation to the next. The Charter declares that the youth must be guaranteed the right to education at all levels until they acquire their first tertiary qualification, an equal voice in decision-making processes that not only affect them but the country as a whole in all spheres of politics, the national economy and social welfare.⁴⁰ The youth must also be guaranteed access to the right to health. Further, the Charter declares that the youth shall not be subject to political abuse through training regimes that connote political violence or any semblance of propaganda that will compromise their right to determine their future as both individuals and as a collective. The youth must also have the right to associate and assemble and express themselves freely.

Comment: Several provisions of the Constitution relate to the youth. Section 14 states that at all times the State and all institutions and agencies of government at every level must ensure that appropriate and adequate measures are undertaken to create employment for all Zimbabweans, especially women and youths. Section 20, for its part, provides that the State and all institutions and agencies of government at every level must take reasonable measures, including affirmative action programmes, to ensure that youths, that is to say people between the ages of fifteen and thirty-five years have access to appropriate education and training. It also provides that the State and all institutions and agencies of government at every level must ensure that youths are afforded opportunities for employment and other avenues to economic empowerment, have opportunities for recreational activities and access to recreational facilities and that they protected from harmful cultural practices,

³⁹ See s 56 (4) of the Constitution

⁴⁰ See Article 7 of the Peoples' Charter

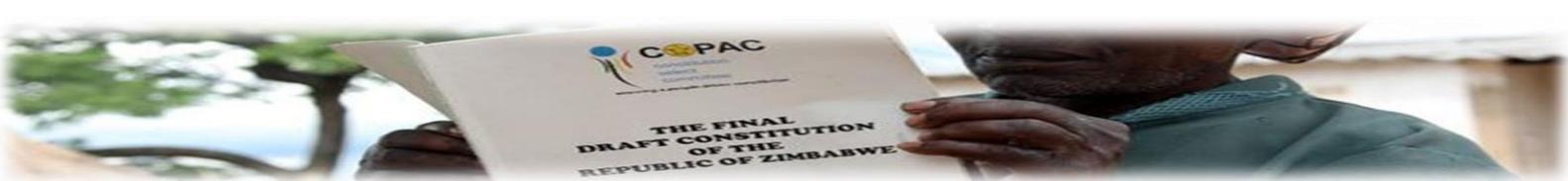
exploitation and all forms of abuse.⁴¹ The Constitution further provides that an Act of Parliament may provide for one or more national youth programmes which must be inclusive, nonpartisan and national in character.

⁴¹ See s 20 of the Constitution



THE TRANSITIONAL PROVISIONS OF THE NEW CONSTITUTION

EDITORIAL



ABSTRACT

On 22nd May 2013 a new Constitution came into force in Zimbabwe. The Sixth Schedule of this Constitution carries important provisions which deal with the transition from the former Constitution to the new Constitution. These provisions relate to the repeal of the former Constitution, the conduct of the first elections after 22nd May 2013 among other issues. Besides the Sixth Schedule, various other provisions in the Constitution also relate to the transition from the old Constitution to the new Constitution. The following is an overview of the transitional provisions of the Constitution.

INTRODUCTION

The new Constitution was published in the Government Gazette of 22 May 2013. Constitution of Zimbabwe Amendment (No. 20) Act 2013 carried in its Schedule the text of a new Constitution for Zimbabwe. The phrases “publication day” and “effective date” as referred to in the Constitution are important in understanding the transitional provisions of the Constitution. The publication day means the day on which the Constitution, or the statute by which it is enacted, is published in the *Gazette* in accordance with section 51(5) of the former Constitution.¹ Constitution of Zimbabwe Amendment (No. 20) Act, 2013 was published in the Government Gazette on 22 May 2013. This, therefore, made 22 May 2013 the publication day as referred to in the Constitution. The effective date as referred to in the Constitution means the day on which this Constitution was to wholly come into operation.² This was the date when the first President-elect after the enactment of the new Constitution was to assume office.³ Section 94 elected as President and Vice-Presidents assume office when they take, before the Chief Justice or the next most senior judge available, the oaths of President and Vice-President respectively. provides that persons Robert Mugabe of the ZANU PF party was sworn in as President on the 22nd of August 2013, making this day the effective date as referred to in the Constitution. These dates are important because certain parts of the Constitution came into force on the publication day and other on the effective date. The effective date is also important in as much as determining the law applicable in Zimbabwe is concerned. The transitional provisions of the Constitution can be found in the Sixth Schedule to the Constitution as well as in some of the substantive sections of the Constitution.⁴ The following is a summary of the transitional provisions.

THE PUBLICATION DAY

Section 3 of the Sixth Schedule outlines a number of provisions which came into operation (and therefore immediately replaced similar provisions of the former Constitution) on 22 May 2013, i.e. the publication day. These were the Schedule itself and the provisions outlined below.

1. Chapter 3 : Citizenship

The provisions on citizenship under Chapter 3 replaced the provisions on citizenship which were set out in Chapter II of the Constitution of

¹ See s 1 of the Sixth Schedule to the Constitution

² *ibid*, s 1

³ *ibid*, s 3 (2)

⁴ Section 2 of the Sixth Schedule provides that the Schedule prevails, to the extent of any inconsistency, over all other provisions of this Constitution.



Zimbabwe.⁵ This explains why on 27 June 2013, in the case of *Mutumwa Mawere v. The Registrar General and Ors*, the Constitutional Court applied the provisions of the new Constitution to declare that the applicant is a citizen of Zimbabwe.⁶

2. Chapter 4 : Declaration of Rights

The provisions on the Declaration of Rights in Chapter 4 of the Constitution replaced the provisions in Chapter III of the former Constitution on 22 May 2013.

3. Chapter 5 : Election and assumption of office of the President

The provisions on the qualifications for election as President and Vice-President, Election of President and Vice-Presidents (save for the provision on selecting Vice Presidents before an election), challenge to presidential election and assumption of office by President and Vice-Presidents in Chapter 5 of the new Constitution of Zimbabwe replaced the provisions on the same subjects in Chapter IV of the former Constitution on 22 May 2013.

4. Chapter 6 : Election of Members of Parliament and the summoning of Parliament after a general election and to the assent to Acts of Parliament by the President

The provisions in Chapter 6 of the Constitution on the election to Parliament (i.e. The National Assembly and Senate) replaced the provisions on the same subject in Chapter V of the former Constitution on 22 May 2013. The first election was to be held under the provisions of the new Constitution.

5. Chapter 7: Elections⁷

The provisions on elections replaced similar provisions in the former Constitution on 22 May 2013. An exception was made for s 158, s 160 and s 161 of the new Constitution. These were explicitly stated as inapplicable for the purposes of the first election. Section 158 relates to the timing of a general election which must be held so that polling takes place not more than thirty days before the expiry of the five-year presidential term, ninety days after Parliament passes resolutions to

⁵ Constitution of Zimbabwe Amendment (No.19) had repealed and replaced Chapter II of the former Constitution.

⁶ *Mutumwa Mawere v. The Registrar General and Ors* CCZ30/2013

⁷ An exception was made for provisions relating to the Timing of elections and when they must take place, the division of constituencies by the Zimbabwe Electoral Commission and the Delimitation of electoral boundaries (i.e sections 158, 160 and 161 did not come into effect on 22 May 2013). Section 8 of the Sixth Schedule however provided that the first elections must be conducted in terms of an Electoral Law in conformity with this Constitution.

dissolve in terms of section 143(2) or ninety days after the dissolution following a vote of no confidence under s 109(4) or (5).

6. Chapter 8: Jurisdiction and Powers of the Constitutional Court

A new Constitutional Court was established as the highest court in all constitutional matters whose decisions on those matters bind all other courts on 22 May 2013. All constitutional cases before the Supreme Court (The Supreme Court was the highest court in constitutional matters under the former Constitution) on 22 May 2013 in which argument from the parties had not been heard before the publication date had to be transferred to the Constitutional Court.⁸ All cases in which the argument from the parties had been heard as at 22 May 2013 had to be completed by the Supreme Court unless all the parties to the case agree to it being referred to the Constitutional Court.⁹

All cases, other than pending constitutional cases, that were pending before any court before the 22 August 2013 (effective date) could be continued before that court or the equivalent court established by the Constitution as if the Constitution had been in force when the cases were commenced. However, the procedure to be followed in those cases was to be the procedure that was applicable to them immediately before the effective date even if such procedure was contrary to any provisions of the Declaration of Rights under the new Constitution.¹⁰

The Sixth Schedule also provides that notwithstanding s 166 of the Constitution¹¹, for seven years after the publication date, the Constitutional Court consists of the Chief Justice and the Deputy Chief Justice and seven other judges of the Supreme Court who must sit together as a bench to hear any constitutional case.¹² By virtue of the provision in s 2 of the Sixth Schedule that the Schedule prevails, to the extent of any inconsistency, over all other provisions of the Constitution, this provision overrides the provision in s 183 of the Constitution which bars the appointment of a judicial officer to more than one court.¹³

7. Chapter 9: Principles of public administration and leadership

Chapter 9 of the Constitution came into operation on 22 May 2013. Chapter 9 enumerates basic values and principles governing public administration. These include a high standard of professional ethics which must be promoted and maintained, efficient and economical use of resources which must be promoted, the need for public administration to be development-oriented, the impartiality, fairness

⁸ See s 8 (a) of the Sixth Schedule to the Constitution

⁹ *ibid*, s 8 (b)

¹⁰ *ibid*, s 9

¹¹ section 166 of the Constitution

¹² See s 18 (2) of the Sixth Schedule

¹³ *ibid*, s 183



and equitability in service provision, the promptness required in meeting the needs of the people and the accountability required in public administration.¹⁴

8. Section 208: Conduct of members of the security services

The provisions of s 208 also came into force on 22 May 2013. These provisions require members of the security services, consisting of the Defence Forces, the Police Service, the intelligence services and the Prisons and Correctional Service, not to act in a partisan manner, further the interests of any political party or cause, prejudice the lawful interests of any political party or cause or violate the fundamental rights or freedoms of any person. This transitional provision was clearly aimed at seeking to provide a fair playing field in the impending general election.

9. Chapter 12: Provisions relevant to the Zimbabwe Electoral Commission

Part 2 of Chapter 12 of the Constitution came into force on the 22nd of May 2013. This part provides for the establishment and the functions of the Zimbabwe Electoral Commission. Section 241 of the Constitution provides that ZEC must without delay, and through the appropriate Minister, submit a report to Parliament on the conduct of every election and every referendum.

10. Chapter 14: Provincial and local government

Chapter 14 establishes a completely different format of provincial and local government. It establishes provincial and metropolitan councils with a rather complex formula for composition. The members of provincial councils (comprising Senators elected for that province, Senator Chiefs, members of the National Assembly elected for the province concerned and mayors) have to elect a chairperson at their first meeting. It is not clear how this Chapter was expected to apply as of 22 May 2013. The difficulties of convening a provincial council meeting to elect a chairperson or even to carry out its mandate when an election was impending (which would likely alter the membership of all the councils) were quite clear.

EFFECTIVE DATE

All provisions except those outlined in s 3 of the Sixth Schedule came into operation on 22 August 2013.¹⁵ The following issues relating to the effective date are important:

¹⁴ See s 194 of the Constitution

¹⁵ There are a few exceptions laid out below

The law to be administered

The “effective date” is important with regards to the law to be applied by the courts. Section 192 of the Constitution provides that the law to be administered by the courts of Zimbabwe is the law that was in force on the effective date, as subsequently modified.¹⁶ As such, the law applicable in Zimbabwe is the law that was in force in Zimbabwe on 22 August 2013 as subsequently modified. A court will have to ascertain if a certain rule was in force on 22 August 2013 and whether it has been subsequently modified, either by legislation, the common law or even custom, before it can apply such a rule. In relation to Roman Dutch Law, a rule under Roman Dutch Law will be applicable in Zimbabwe if a court is satisfied that it would have applied on 22 August 2013 and that it has not been subsequently modified by the common law itself (through the decisions of the superior courts) or through legislative instruments validly enacted after the 22nd of August 2013.

Agricultural land identified in terms of section 16B (2) (a) (ii) or (iii) of the former Constitution before the effective date

Section 72 (3) and section 290 (b) of the Constitution provides that all agricultural land which was identified in terms of section 16B(2)(a)(ii) or (iii) of the former Constitution continues to be vested in the State, **and no compensation is payable in respect of its acquisition except for improvements effected on it before its acquisition.** Section 16B (2) (a) (ii) of the former Constitution referred to agricultural land that was identified after the 8th July, 2005 the *Gazette* or *Gazette Extraordinary* under section 5(1) of the Land Acquisition Act [*Chapter 20:10*], being agricultural land required for resettlement purposes. Section 16B (2) (a) (iii) referred to agricultural land that would be identified in terms of section 16B of the former Constitution by the acquiring authority after the commencement of Constitution of Zimbabwe Amendment No. 17 in the *Gazette* or *Gazette Extraordinary* for whatever purpose, including, but not limited to settlement for agricultural or other purposes, the purposes of land reorganization, forestry, environmental conservation or the utilization of wild life or other natural resources or the relocation of persons dispossessed in consequence of the utilization of land for any purpose recognized by the Constitution. Section 295 (1), on the other hand, provides that any indigenous Zimbabwean whose agricultural land was acquired by the State before the effective date is entitled to compensation from the State for the land and any improvements that were on the land when it was acquired. The Constitution does not define an indigenous Zimbabwean.¹⁷ Further, the Constitution provides that any person who,

¹⁶ See s 192 of the Constitution

¹⁷ The Legislature has defined an indigenous Zimbabwean as “any person who, before the 18th April, 1980, was disadvantaged by unfair discrimination on the grounds of his or her race, and any descendant of such person, and includes any company, association, syndicate or partnership of which indigenous Zimbabweans form the majority of the members or hold the controlling interest” under the Indigenisation and Economic Empowerment Act [*Chapter 14:33*]. This is of course within the context of



immediately before the effective date, was using or occupying, or was entitled to use or occupy, any agricultural land by virtue of a lease or other agreement with the State continues to be entitled to use or occupy that land on or after the effective date, in accordance with that lease or other agreement.¹⁸

Composition of the National Assembly

In addition to the two hundred and ten members elected to the National Assembly by secret ballot from the two hundred and ten constituencies into which Zimbabwe is divided, s 124 (b) of the Constitution provides that there shall for the life of the first two Parliaments after the effective date, an additional sixty women members, six from each of the provinces into which Zimbabwe is divided, elected under a party-list system of proportional representation based on the votes cast for candidates representing political parties in a general election for constituency members in the provinces.

National Peace and Reconciliation Commission

Section 251 of the Constitution provides that for a period of ten years after the effective date, there is to be a commission to be known as the National Peace and Reconciliation Commission. This commission has the functions of ensuring post-conflict justice, healing and reconciliation, developing and implementing programmes to promote national healing, unity and cohesion in Zimbabwe and the peaceful resolution of disputes, bringing about national reconciliation by encouraging people to tell the truth about the past and facilitating the making of amends and the provision of justice as well as developing procedures and institutions at a national level to facilitate dialogue among political parties, communities, organisations and other groups, in order to prevent conflicts and disputes arising in the future.¹⁹ It also has the functions of developing programmes to ensure that persons subjected to persecution, torture and other forms of abuse receive rehabilitative treatment and support, receiving and considering complaints from the public and to take such action in regard to the complaints as it considers appropriate, developing mechanisms for early detection of areas of potential conflicts and disputes, and to take appropriate preventive measures, conciliating and mediating disputes among communities, organisations, groups and individuals as well as recommending legislation to ensure that assistance, including documentation, is rendered to persons affected by conflicts, pandemics or other circumstances. The mandate of the Commission will terminate on 22 August 2023.

Continuation and interpretation of existing laws

Section 10 of the Sixth Schedule to the Constitution provides that all existing laws continue in force but must be construed in conformity with this

that Act and cannot be reasonably imported into the Constitution. It, however, hints on the perception of the law makers on what constitutes an “indigenous Zimbabwean”

¹⁸ See s 291 of the Constitution

¹⁹ *ibid*, s 252

Constitution. In matters of interpretation, where the Constitution vests power in a particular person or authority to enact legislation on any matter, and that matter is provided for in an existing enactment made by some other person or authority, the existing enactment has effect as if it had been made by the person or authority with the power to make it under the Constitution.²⁰

Miscellaneous: The Prosecutor General, Public Protector Consolidated Revenue Fund, etc.

Section 19 (1) of the Sixth Schedule provides that the person who held office as Attorney-General immediately before the effective date continues in office as Prosecutor-General on and after that day. Mr. J Tomana who was the Attorney General on 22 August 2013 assumed office as the Prosecutor General on that date. The office of the Attorney General also became vacant on the same date. Section 16 of the Sixth Schedule provides that any matter that was being dealt with by the Public Protector immediately before the effective date must be transferred to the Zimbabwe Human Rights Commission for finalisation. Section 17 of the Sixth Schedule, for its part, provides that the funds which, immediately before the effective date, stood to the credit of the Consolidated Revenue Fund established by the former Constitution become the Consolidated Revenue Fund established by the new Constitution. Section 19 (2) provides that a vested or contingent right in regard to a pension benefit which existed immediately before the effective date and was protected by the former Constitution continues to exist and enjoy the same protection under the Constitution.

²⁰ See s 11 (2) of the Sixth Schedule to the Constitution



THE CURIOUS ASPECTS OF THE “FIRST ELECTIONS” UNDER THE NEW CONSTITUTION OF ZIMBABWE

Gavin Gomwe*



ABSTRACT

The Sixth Schedule of the new Constitution carries transitional provisions which relate to the conduct of the first elections under the new Constitution of Zimbabwe. On 31st July 2013, an election was conducted under the new Constitution. The author argues that the conduct of the election was rather curious as it seemed to neglect the framework defined under the new Constitution. He argues that the first decision of the Constitutional Court was incorrect in that it failed to consider the provisions of the new Constitution when it made a determination of the election date. He recalls the sentiments of the Deputy Chief Justice in his dissent in this historic judgement. In hindsight, he reckons that the advice of the Deputy Chief Justice was worth following. He regrets that this was not the case.

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INTRODUCTION

On 31 July 2013 Zimbabwe held its first harmonized general elections under a new Constitutional dispensation. For the purposes of this piece, a detailed commentary of the conduct of the poll will not be pursued. The point that will be made and one which will be progressively developed in this piece relates to the failure to give the electoral provisions of our new Constitution the efficacy they so desperately required. As the oft quoted nomenclature goes, the first election, it will be argued, was a classic case of a ‘false start’ in the new Constitutional dispensation of our proud nation.

The New Constitution of Zimbabwe came into force on 22nd May 2013. The Sixth Schedule to the Constitution is the transitional section that stipulates which provisions of the Constitution come into force and when. This was in order to ensure a seamless transition from the Lancaster House Constitution (‘Old Constitution’) to the new Constitution. Section 158, governing the timing of elections and sections 160 and 161 are the main electoral provisions which did not come into effect on the publication day (22 May 2013). Under the Sixth Schedule, these three important provisions would only come into operation after the ‘first elections’ (22 August 2013).

THE ‘FIRST ELECTIONS’

Section 1 of Part 1 of the Sixth Schedule provided that the ‘first elections’ were to be held in conformity with the New Constitution. Section 8 of Part 3 of same alludes to the fact that the ‘first elections’ must be conducted in terms of an Electoral Law that was in conformity with the new Constitution.

The ‘first elections’ are defined as:

- (a) The first election of the President under the new Constitution
- (b) The first election of Members of Parliament under the new Constitution
- (c) The first elections of governing bodies of provincial and metropolitan councils and local authorities, all of which were to be held after the publication day.

What is clear any subsequent poll to be held after the coming into operation of the New Constitution had to be in terms of the new supreme law of the land, which made special provision for the ‘first elections’.



THE MAWARIRE JUDGMENT

Mawarire v Robert Mugabe N.O. & Ors¹ was the first case decided by the newly formed Constitutional Court ('ConCourt'). This case was of immense national significance in that the court was seized with determining when elections fell due under section 58(1) of the former Constitution. To arrive at a correct interpretation, it was required of the Court to not only enunciate the import of section 58(1) as read with sections 63(4) and 63(7) ['the election provisions'] but also, given the fact that between the filing of the case on 15 May 2013 and judgment on 30 May 2013 the new Constitution had come into force. It was therefore imperative for the court to sufficiently engage the provisions of the New Constitution particularly where the issue of the 'first elections' mentioned in the Sixth Schedule was concerned.

In one's submission, the court such an opportunity was missed by the court as the majority based its decision almost entirely on the provisions of the old Constitution. The provision on which the decision was premised was section 58(1), which the court construed as placing an obligation on the President to set dates for the polls four months before the dissolution of Parliament. This was despite the fact that a plain reading of the said section pointed to polls being set four months after the dissolution of Parliament, a standpoint also supported by the new Constitution. The Court accordingly ordered elections to be held on July 31 based on what it deemed as the 'exigencies of the matter'.

The point to be underscored is that the date arrived at by the majority of the court as the date for harmonized general elections was a terminal blow to the possibility of there being practical efficacy to the first elections provisions of the new Constitution. As Malaba DCJ noted in a forceful dissent to the majority decision, by including the 'first elections' provisions in the Sixth Schedule of the New Constitution, the Legislature placed an obligation on the Court and the Executive to ensure the 'democratic quality of the First Elections'.

Such quality would be significantly watered down by an overly strict deadline such as the one ordered by the court (July 31). Despite the fact that the Sixth Schedule did not specifically include a date for the 'first elections', (this being the reason the majority arrived at a decision based on an interpretation of section 58(1) of the Old Constitution), it was necessary, having taken the stance to set an election date as a Court, to arrive at a computation of the ideal date having read section 58(1) of the former Constitution as juxtaposed with the Sixth Schedule of the new Constitution. This is so simply because the Sixth Schedule conditioned 'first elections' on the completion of clearly

¹ CCZ 1/13

identified processes that included, *inter alia*, amendments to the Electoral Act², a clean-up of the voters roll etc.

THE WAY FORWARD

As underscored from the onset, it is beyond the scope of this piece to pass judgment on the conduct of the July 31 polls. What is not in dispute, however, is that conducting the polls on July 31 was unfortunate from a legal standpoint. This is so because it frustrated the application of the electoral framework in the Sixth Schedule which had been tailor-made for the ‘first elections’. Malaba DCJ had made the timely warning that:

*‘In determining the question raised by the application I bear in mind the fact that elections are crucial to democracy. This is particularly so at this stage of the history of our country. The first elections which are due to be held under the new Constitution are bound to test the readiness of Zimbabweans to embrace the change embodied in the new Constitution. The leadership that is going to emerge elected will have to embrace the new values prescribed by the new Constitution. **Choosing the precise date to hold the first elections is therefore a matter of utmost importance to be handled with the greatest care.**’³ (My emphasis)*

It is unfortunate that both the Courts and the Executive would willingly spurn an opportunity to test and abide by the provisions of the New Constitution at the first time of asking. This should not be encouraged. Any future election, as a first step, should exude the spirit imbued in the pool of persuasion as encapsulated in the remarks by learned Deputy Chief Justice.

² Chapter [2:13]

³ At p 31 of the cyclostyled judgment



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To Nelson Mandela, a hero, a fine lawyer too.

IMPLICATIONS OF THE NEW CONSTITUTION ON CRIMINAL PROCEDURE

Brian Crozier*



ABSTRACT

The following is a presentation by Brian D Crozier which was delivered at a Constitutional Symposium held at the University of Zimbabwe on 23 April 2014. The presentation explores the impact of the new Constitution on the law of Criminal Procedure. It focuses on the following topics:

1. The structure of the Declaration of Rights
2. The right to life
3. The right to personal liberty and the rights of arrested and detained persons
4. Freedom from torture or cruel, inhuman or degrading treatment or punishment
5. Right to privacy
6. Right to a fair hearing and rights of arrested persons
7. Implementation of the Declaration of Rights

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INTRODUCTION

The rules of criminal procedure are the mechanisms by which the criminal law is put into practice. The rules cover the structure and powers of the courts, the powers of the police and prosecution, the rights and disabilities of suspects and accused persons, pre-trial procedures, detention, bail, the conduct of trials, verdicts, sentencing, appeals and reviews, and the exercise of the prerogatives of pardon and mercy.

The extensive scope of the rules indicates their importance. Probably no other branch of the law affects the lives of ordinary people so frequently and so closely. Almost everyone has had some contact with the police during their lives, even if it involved nothing more than being stopped at a roadblock. Some of us have had much more contact than that. But however fleeting, however trivial the contact may have been, the rules of criminal procedure governed the relationship between ourselves and the police officers.

Most contacts between citizens on the one hand and the police and other law enforcement agents on the other are inherently unequal. However pleasant, polite and reasonable the police may be, they represent the State and all its power; the citizen is on his own. This inequality can easily be abused, and often has been: police officers, being human, are tempted to abuse their powers and all too often they fall for temptation. Perhaps the most frequently abused power is the power of arrest. Police officers often forget that arrest is a drastic curtailment of a suspect's freedom and should be resorted to only if it is necessary to bring the suspect to trial or to present the suspect from committing an offence; the power of arrest must be exercised reasonably and only in cases of real necessity.¹

Because of the importance of the rules of criminal procedure, and their potentially devastating effect on peoples' lives, the Declaration of Rights in both the current Constitution and its predecessor, the Lancaster House Constitution, contained many provisions designed to curtail the powers of law enforcement authorities.

¹ Muzonda v Minister of Home Affairs & Anor 1993 (1) ZLR 92 (S) and Allan v Minister of Home Affairs 1985 (3) ZLR 339 (H) at 346A.



STRUCTURE OF THE DECLARATION OF RIGHTS

In the Lancaster House Constitution the Declaration of Rights set out the fundamental rights which it protected in 15 sections (sections 12 to 23A). There was no general limitation provision, except section 25 which allowed rights to be limited in times of public emergency, but each section which set out a right specified one or more exceptions to that right. So for example, section 12 set out the right to life (“No person shall be deprived of his life intentionally”) and then listed the exceptions: a person could be killed in execution of a sentence of a court, or through the use or reasonable force in an attempt to arrest him, or in wartime.

The present constitution, in contrast, generally sets out fundamental rights (rather more of them than in the Lancaster House Constitution — there are 31 sections) and does not specify exceptions to the individual rights. Instead, there is a general limitation section, section 86, which allows most of the rights to be limited “in terms of a law of general application” and only if the limitation is “fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom.” Some rights cannot be limited at all, for example the right to life (except in regard to the death penalty, the right to human dignity, and the right to a fair trial.

This difference between the two constitutions has consequences for the law of criminal procedure, as I shall point out when dealing with the death penalty and corporal punishment.

PROVISIONS OF THE DECLARATION OF RIGHTS RELATING TO CRIMINAL PROCEDURE

In so far as they relate to criminal procedure, the principal rights and freedoms set out in the Declaration of Rights, and the limitations on them, are as follows:

THE RIGHT TO LIFE (SECTION 48)

THE DEATH PENALTY

Section 48 states baldly that “every person has the right to life.” It goes on to say that a law may permit the death penalty to be imposed, but only in the following circumstances:

- The law may permit it to be imposed only on persons convicted of “murder committed in aggravating circumstances. The term “aggravating circumstances” is not defined and its meaning will presumably have to be worked out by the High Court and the Supreme Court on a case-by-case basis, in much the same way that the term “extenuating circumstances” under the previous law was developed.
- The law must permit the court to have discretion to impose the death penalty, so a law cannot make it a mandatory penalty.
- It may be carried only in accordance with a final judgment of a competent court. Hence it cannot be carried out until the sentenced person has exercised his right to appeal against the conviction and sentence under section 70(5) of the Constitution.
- It may be imposed only on men who are between the ages of 21 and 70
- A person who is sentenced to death must have a right to ask the President for a pardon or commutation (i.e. alteration) of the penalty.

It is arguable that as a result of the restrictive nature of these provisions, we no longer have a death penalty in Zimbabwe. Note that section 48 says that a law can permit the death penalty only in certain circumstances. We do have a law that purports to permit the death penalty; it is section 337 of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. It does not, however, comply with the restrictions laid down by section 48:

- It says the death penalty must be imposed in all cases of murder, not just murder committed in “aggravating circumstances”.
- The death penalty is mandatory unless the court finds extenuating circumstances.
- The penalty can be imposed on women, unless they are pregnant (section 338).
- It can be imposed on young people between the ages of 18 and 20.

In other words, the law as enunciated in section 337 is not a law which is envisaged in section 48 of the Constitution. Hence it is void, because there is no way that it can be “read down” by the courts so as to comply with section 48; its wording is too clear and intractable. We do not therefore have a law which allows the death penalty to be imposed.



Even if section 337 can be regarded as constitutional, there are further grounds for believing that the death penalty in its current form is unconstitutional. This arises from another provision of the Declaration of Rights, section 53, which prohibits torture or cruel, inhuman or degrading punishment.

The Lancaster House Constitution contained a provision (section 15(4)) to the effect that execution by hanging did not amount to inhuman or degrading punishment, but there is no such provision in the present Constitution. Hence a court could decide that hanging is unconstitutional on the ground that it amounts to torture or to cruel, inhuman or degrading punishment.²

An excessive delay between the imposition of the death sentence and its execution may amount to inhuman or degrading treatment. In two judgments of our Supreme Court, decided in 1993,³ the court held that undue delay could amount to such treatment, and if it did would preclude the execution of the death sentence. The Government promptly amended the Lancaster House Constitution in order to nullify those judgments, by inserting a provision⁴ which stated that delay in the execution of a sentence could not be regarded as inhuman or degrading treatment. There is no equivalent provision in the present Constitution, so the two judgments are once again persuasive, indeed authoritative.

KILLING IN ORDER TO EFFECT AN ARREST

Section 86 of the Constitution, which allows limits to be imposed on the rights contained in the Declaration of Rights, does not allow any limitation to be placed on the right to life: no law can authorise killing under any circumstances. The Lancaster House constitution contained a specific provision, section 12(2) (b), which allowed suspects to be killed in order to stop them escaping arrest. There is nothing equivalent in the present Constitution. Hence the police have no power to use deadly force in order to effect an arrest; that is to say, they cannot shoot and kill suspects in order to stop them escaping. Section 42(2) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] is therefore unconstitutional and void.

² In *S v Makwanyane & Anor* 1995 (3) SA 391 (CC), the South African Constitutional Court concluded that the death penalty *per se* amounted to such punishment.

³ *Catholic Commission for Justice & Peace in Zimbabwe v Attorney-General, Zimbabwe, & Ors* 1993 (1) ZLR 242 (S) and *Woods & Ors v Minister of Justice, Legal and Parliamentary Affairs & Ors* 1993 (2) ZLR 443 (S).

⁴ Section 15(5).

THE RIGHT TO PERSONAL LIBERTY AND THE RIGHTS OF ARRESTED AND DETAINED PERSONS (SECTIONS 49 AND 50)

Under section 49 of the Constitution everyone has a right to personal liberty, including the rights not to be detained without trial and not to be deprived of liberty arbitrarily⁵ or without just cause. This right is amplified, in relation to persons who have been arrested and detained, by section 50. The more important of these rights are as follows:

REASONS FOR ARREST

The arrest must not be arbitrary, and the arrested person must be told why he or she is being arrested at the time of the arrest, not afterwards.⁶

ACCESS TO RELATIVES, LAWYERS, ETC.

An arrested person must be allowed, without delay and at State expense, to contact anyone of their choice, including a lawyer or relative. He or she must also be allowed, without delay but at their own expense, to consult their lawyer or medical practitioner. And, most important, they must be told promptly of these rights.

Detained people must be allowed, at their own expense, to consult their lawyer, and must be allowed to contact and be visited by their lawyer, doctor, priest, relatives and (subject to reasonable security conditions) by anyone else of their choice.

RIGHT TO BE BROUGHT TO COURT

Anyone who is arrested or detained on a criminal charge must be brought before a court as soon as possible and in any event within 48 hours, and must be released after 48 hours unless their detention has been extended by a competent court.⁷ The 48-hour period cannot be extended, so the old practice of arresting suspects on Thursday evening and holding them in custody over the weekend until late on Monday has become illegal.

At their first court appearance, a person who has been arrested or detained on a criminal charge must be charged or released or, if the court decides they must continue in detention, must be told why they are to be detained.

⁵ Arbitrary is defined in the Concise Oxford Dictionary as “1 based on or derived from uninformed opinion or random choice; capricious. 2 despotic.” In *Pharmaceutical Manufacturers Association of S.A.: in re ex parte the President of R.S.A.* 2000 (2) SA 674 (CC) at para 85, the South African Constitutional Court held: “It is a requirement of the rule of law that the exercise of public power ... should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement.”

⁶ Section 50(1)(a) of the constitution.

⁷ Section 50(2) of the constitution.



RIGHT TO BAIL

Arrested persons must be released pending a charge or trial — i.e. they must be granted bail — unless there are compelling reasons justifying their continued detention. In the absence of compelling reasons, they must be released. This requirement is more stringent than the South African Constitution, which allows bail to be refused “if the interests of justice permit”. The whole of section 117 of the Criminal Procedure and Evidence Act [*Chapter 9:07*], which is based to some extent on equivalent South African legislation, is therefore unconstitutional in that it unduly restricts the grant of bail.

RIGHT TO SILENCE

Anyone arrested or detained for an alleged crime has the right to remain silent and to be told that they have this right and of the consequences of remaining silent or of speaking.⁸

What this means is that a suspect cannot be compelled to make a statement to the Police, and the fact that he or she has remained silent when questioned by the Police cannot be held against him, because silence is a constitutional right. No adverse inference, therefore, can be drawn against him or her because of such silence.⁹ Under the Lancaster House Constitution, this right (which was enshrined in the common law) was eroded: while a suspect could not legally be compelled to answer questions, if he or she refused to answer then a court could “draw such inferences from that refusal as are proper and ... treat that refusal, on the basis of such inferences, as evidence corroborating any other evidence given against that person.”¹⁰

I should point out that even giving full allowance to the accused’s right of silence, if the State has established a *prima facie* case against him at his trial and he nevertheless elects to remain silent, the *prima facie* case may harden into sufficient evidence for a conviction.¹¹ This is not because of his silence but because he has failed to disturb or rebut the case the State has made against him. That case, being uncontroverted, is regarded as proved beyond reasonable doubt.

Several provisions of the Criminal Procedure and Evidence Act, following the Lancaster House Constitution, have substantially eroded the right to silence:

- Adverse inferences are allowed be drawn from an accused person’s silence: see sections 67, 115, 189, 199 and 257 of the Criminal

⁸ Section 50(4)(a) & (b) of the constitution. The right is also enshrined in various human-rights conventions.

⁹ *S v Thebus & Anor* 2003 (6) SA 505 (CC) at 543C-E.

¹⁰ Section 18(13)(e) of the Lancaster House constitution.

¹¹ *R v Stidolph* 1965 RLR 552 (A) at 555B, cited in *S v Mukungatu* 1998 (2) ZLR 244 (S) at 247E-F.

Procedure and Evidence Act. In particular, section 257 states that if a person who is being questioned by the police fails to mention a fact which is relevant to his defence and which he could reasonably be expected to mention in the circumstances, a court may draw adverse inferences from his failure and treat the failure as evidence corroborating any other evidence given against him.

- If an accused person applies for bail, he must disclose whether or not other charges are pending against him, whether or not he has been granted or refused bail on those charges, and whether or not he has previous convictions (section 117A(5) of the Criminal Procedure and Evidence Act).
- Before evidence is led in a criminal trial, the accused must outline his defence:
 - An accused who is indicted for trial in a the High Court is obliged by section 66(6) of the Criminal Procedure and Evidence Act to provide a written outline of his defence, and if he fails to disclose a relevant and material fact adverse inferences may be drawn (section 67(2) of the Act).
 - An accused who pleads not guilty in a trial in a magistrates court is obliged by section 188 of the Criminal Procedure and Evidence Act to give an outline of his defence, and if he fails to disclose a relevant and material fact adverse inferences may be drawn (section 189(2) of the Act).
- If an accused declines to give evidence in a trial, he may nevertheless be questioned by the prosecutor and the court in terms of section 198(9) of the Criminal Procedure and Evidence Act, and again, if he fails to disclose a relevant and material fact the court may draw adverse inferences from his failure (section 199(1) of the Act).
- Facts discovered through an inadmissible confession made by the accused are admissible in evidence at his trial, and the prosecution can disclose in evidence that the facts were discovered as a result of information given by the accused (section 258 of the Act).

These provisions erode the right of silence significantly¹² and, to the extent they do so they are unconstitutional.

CHALLENGE TO ILLEGAL ARREST AND DETENTION

An arrest or detention is illegal if the conditions set out in section 50 are not complied with, and the arrested or detained person is entitled to compensation.¹³ Arrested and detained persons must be allowed to challenge

¹² MacFarlane v Sengweni NO & Anor 1995 (1) ZLR 385 (S) at 389E-G.

¹³ Section 50(8) & (9) of the constitution.



the lawfulness of their arrest or detention in court¹⁴, so they must be given reasonable facilities to enable them to do so.

And, it should be noted, anyone else is entitled to challenge the lawfulness of their detention by applying to the High Court for an order of *habeas corpus*.¹⁵ The courts have never insisted that applicants for such an order should establish their *locus standi* through a close relationship with the detained person but now anyone at all can apply for such an order.

FREEDOM FROM TORTURE OR CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT (SECTION 53)

No one may be subjected to physical or psychological torture or to cruel, inhuman or degrading treatment or punishment. No limits may be placed on this freedom.¹⁶ I have already mentioned the death penalty in relation to this section, but the section is relevant in regard to corporal punishment (i.e. whipping) as well.

In the case of *S v A Juvenile* 1989 (2) ZLR 61 (S), our Supreme Court held by a majority that the judicial corporal punishment of boys constituted inhuman and degrading punishment prohibited by section 15 of the Lancaster House Constitution, which was then in force. The government responded by amending section 15 to say that juvenile corporal punishment was not to be regarded as inhuman or degrading for the purposes of the section. The amendment therefore nullified the Supreme Court's judgment.

Section 53 of the present constitution contains no exemption for corporal punishment and, in section 81(1) (e), states that juveniles must be protected from "any form of abuse". Hence the Supreme Court's judgment in *S v A Juvenile* has arguably become authoritative again.¹⁷

RIGHT TO PRIVACY (SECTION 57)

The right to privacy includes the right not to have one's home, premises or property entered without one's permission and not to have one's person, home, premises or property searched. This right is subject to the general limitations contained in section 86 of the constitution.

¹⁴ Section 50(1)(e) and (5)(e) of the constitution.

¹⁵ Section 50(7) of the constitution.

¹⁶ Section 86(3) of the constitution.

¹⁷ The South African Constitutional Court has taken the same view on corporal punishment: see *S v Williams* 1995 (3) SA 632 (CC).

RIGHT TO A FAIR HEARING AND RIGHTS OF ACCUSED PERSONS (SECTIONS 69 & 70)

Section 18 of the Lancaster House Constitution protected many rights that are important to a fair trial, but sections 69 and 70 of the new Constitution extend and elaborate those rights. Under section 69, anyone accused of a crime has the right to a fair and public trial within a reasonable time before an independent and impartial court. Section 70 then goes on to specify some of those rights.

Clearly the right to a fair trial embraces more than the specific rights set out in section 70. What does it include? South African courts have been reluctant to specify precisely what it means, but they have laid down some of its elements:

- Justice must not only be done but must be seen to be done.¹⁸
- The concept embraces fairness not only to the accused, but to society as a whole.¹⁹
- An important aim of the right is to ensure that innocent people are not wrongly convicted.²⁰
- It includes the right to have a prosecutor who acts, and is perceived to act, without fear, favour or prejudice.²¹
- It entails informed participation by the accused, where he is unrepresented. A court must therefore explain all procedural rights and options to an unrepresented accused, and must do so at every critical stage.²²
- In regard to sentencing, the procedures must not prevent any factor which is relevant to the sentencing process and which is mitigating from being considered by the sentencing court.²³

Some of the specific rights which section 70 of the Constitution confers on accused persons are the following:

PRESUMPTION OF INNOCENCE

Accused persons must be presumed innocent until proved guilty. Although the degree of proof required to prove guilt is not specified, the South African

¹⁸ S v Dzukuda & Ors; S v Tshilo 2000 (4) SA 1078 (CC).

¹⁹ S v Sunday & Anor 1995 (1) SA 497 (C) at 507C

²⁰ S v Dzukuda & Ors; S v Tshilo 2000 (4) SA 1078 (CC).

²¹ Bonugli & Anor v Deputy National DPP & Ors 2010 (2) SACR 134 (T) at 143; [2008] ZAGPHC 28. See also Smyth v Ushekowunze Anor 1997 (2) ZLR 544 (S).

²² Geldenhuys & Joubert Criminal Procedure Handbook 10th ed page 283.

²³ Ibid.



Constitutional Court has held that a similarly-worded provision (sec 35(3)(h)) of that country's Constitution requires proof beyond reasonable doubt.²⁴

LEGAL REPRESENTATION

Accused persons have a right to be represented at their own expense by a lawyer of their choice; they cannot have a State lawyer foisted upon them.²⁵ They also have a right to a lawyer paid for by the State if substantial injustice would result from their being unrepresented.²⁶ They must be told of these rights.²⁷

The right to legal aid is obviously problematic in a country such as Zimbabwe, with inadequate resources even to keep the court system operating efficiently. Nonetheless it is a constitutional right and, if legal aid is not given in appropriate cases, the trials will have to be set aside on the grounds of unfairness.

INFORMATION REGARDING THE CHARGE

Accused persons must be told promptly what the charge is against them, in sufficient detail to enable them to prepare their defence, and they must be given adequate time and facilities to prepare their defence.²⁸ Accused persons cannot simply be dumped in remand prison to await their trial, therefore, without being given reasonable facilities to prepare their defence.

RIGHT TO SILENCE

Accused persons have a right to remain silent and cannot be compelled to give self-incriminating evidence.²⁹

I have dealt with the right to silence earlier, but here it should be noted that the provisions³⁰ of the Criminal Procedure and Evidence Act [*Chapter 9:07*] which require accused persons to outline their defences and allow them to be questioned by the prosecutor and the court even if they have declined to give evidence, are almost certainly unconstitutional — at least in so far as the provisions do not oblige the court to inform accused persons of their right to silence and allow the court to draw adverse inferences from an accused person's exercise of that right.

EXCLUSION OF ILLEGAL EVIDENCE

Evidence that has been obtained illegally, i.e. in a way that violates any provision of the Declaration of Rights, must be excluded (i.e. is inadmissible) in any criminal trial if its admission as evidence would render the trial unfair

²⁴ See *S v Boesak* 2001 (1) SA 912 (CC) at 920D-E and the cases there cited.

²⁵ Section 69(4) of the constitution.

²⁶ Section 70(1)(e) of the constitution.

²⁷ Section 70(1)(f) of the constitution.

²⁸ Section 70(1)(b) of the constitution.

²⁹ Section 70(1)(i) of the constitution.

³⁰ Sections 66, 67, 115, 188, 189, 198, 199 and 257 of the Act.

or would otherwise be detrimental to the administration of justice or the public interest.³¹ This reverses the common-law position, under which all relevant evidence was admissible no matter how it was obtained.

RIGHT OF APPEAL OR TO REVIEW

If accused persons are convicted of a crime, they have the right to have the case reviewed by a higher court or to appeal to a higher court.³² This right casts some doubt on the provisions³³ of the High Court Act [*Chapter 7:06*] which require convicted persons to get leave to appeal from the trial judge.

LIMITATION OF RIGHTS

The rights given by section 70 of the constitution can be limited under section 86 but the limitations must not go so far as to render the trial unfair, because the right to a fair trial cannot be limited (section 86(3)(e)).

IMPLEMENTATION OF THE DECLARATION OF RIGHTS

The rights laid down in the Declaration of Rights are extensive and, if implemented, will go a long way towards ensuring that accused persons are treated fairly at all stages of the criminal justice process.

The important words, though, are “if implemented”. The Declaration of Rights has been in operation for nearly a year (it came into effect on the 22nd May, 2013) and so far our laws on criminal procedure — primarily the Criminal Procedure and Evidence Act [*Chapter 9:07*] — have not been amended to give effect to its provisions.

This means that, in accordance with the Criminal Procedure and Evidence Act:

- Prosecutions continue to be conducted by prosecutors who are under the charge of a person who combines the functions of Attorney-General and Prosecutor-General, in violation of the Part 2 of Chapter 13 of the new constitution.
- Accused persons continue to be invited to outline their defences at the beginning of their trials, without being informed that they have a right to silence.
- They continue to be questioned at the end of their trials even if they have declined to give evidence, again without being informed of their right to silence.
- Boys convicted of crimes continue to be whipped.

³¹ Section 70(3) of the constitution.

³² Section 70(5) of the constitution.

³³ Section 44 of the High Court Act.



- Convicted murderers continue to be sentenced to death if there are no extenuating circumstances.
- Convicted murderers continue to languish on death row, many years after they were convicted and sentenced.

And so on.

The Government has shown little interest in implementing the provisions of the new Constitution, and this has led to serious injustice. Trials that violate the rights conferred by the constitution are, almost axiomatically, unfair.

So I have to conclude by saying that the new constitution's implications on criminal procedure are far-reaching. Its impact so far, however, has been minimal.

FROM ORGANISED ROBBERY TO UNIVERSALLY ACCEPTED NOTIONS OF HUMAN DIGNITY

THE CHANGING FACE OF INTERNATIONAL LAW IN ZIMBABWE

Simbarashe Mubvuma^{*}



ABSTRACT

The role of international human rights law in the modern day context is immense. International human rights law is rich in its substance in matters affecting the peoples of the world on a day to day basis. Clearly, the nature of human rights in general is to cut across the old notion of sovereignty. Today, certain issues cannot be shoved under the carpet as entirely domestic affairs. This is so because human rights violations take a unique character. Violations of human worth have generally become the concern of all such that sovereignty as a concept has generally lost steam. With the growth of international bodies to monitor and implement human rights norms as well as the birth of world courts to enforce international law, it is undoubted that there is a general trend towards greater penetration of international law into domestic law. As St Augustine tells us, in the absence of justice, sovereignty is nothing but organised robbery. This very notion expresses itself in the notion of international human rights law. This paper argues that by opening up its legal system to greater penetration of international law, Zimbabwe has shunned the route of organised robbery of human worth towards the path of universally acknowledged notions of human dignity. It is an optimistic view of the role international law will play in the new constitutional framework of Zimbabwe.

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INTRODUCTION

St Augustine tells us that in the absence of justice, sovereignty is nothing but organised robbery. These words are particularly significant when juxtaposed with notions of human dignity and the realities of mass human rights violations which are often perpetrated under the thin guise of a fluid concept called sovereignty. In recent times, international human rights law has brought a new twist to international relations. It has pierced the traditional notions of sovereignty. It has also charted a new course in the regime for protecting the rights of individuals who for too long have been neglected by the international legal order. Indeed, international human rights law has weakened the state to state nature of public international law. Although this might appear a rather exaggerated view of international law, the increasing role of international law in issues traditionally regarded as “domestic” is undoubted. There is obviously a pattern towards the increased penetration of international legal rules within domestic systems (Shaw). The reason for this has largely been the realisation and the acceptance of the very concept that was articulated by St Augustine. That sovereignty as a concept is meaningless if a state fails the test of justice towards its own citizens. This paper is neither an exposition of international human rights law nor a general overview of its structure, substance and scope. It is also not an attempt to define justice. Rather, it is a brief comment on the provisions relating to the applicability of international law under the new Constitution of Zimbabwe within the context of human rights protection. One will argue that by opening its legal system to international law, Zimbabwe has not only embraced universally accepted notions of justice, it has also ended the organised robbery of human worth and human dignity. One will therefore posit an optimistic view of the role international human rights law will play in the new constitutional framework of Zimbabwe.

INTERNATIONAL HUMAN RIGHTS LAW

For many people, the story of human rights starts in 1948 with the adoption of the Universal Declaration of Human Rights. In fact, however, the idea of human rights can be seen from as early as 269-231 BCE when *Ashoka The Great* establishes a series of Edicts to protect the rights of the poor and the vulnerable in ancient India. Legend would tell us that through these Edicts, *Ashoka* emphasised goodness, kindness and generosity.¹ Further and even closer to home, the African idea of “Ubuntu” speaks to the broader spirit of human rights. *Ubuntu* is an idea in Southern Africa which in its narrow philosophical sense defines an African way of seeing self-identity formed

¹ See “A Timeline of Human Rights” – Compiled by Diana Camacho, 2013 CISV Year Human Rights Background Reading

through community.² It is this idea that can broadly explain the concept of peoples’ rights within the African Human Rights System. Even with all these varying conceptions of human rights, the notion of human rights articulated in the UDHR is by far the most widely accepted conception of human rights. The preamble of the UDHR emphasises that “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world”.³

Whilst the sources of international human rights law indicate a departure from the traditional sources envisaged under Article 38 (1) of the Statute of the International Court of Justice, international treaties and conventions, customary international law, general principles of law recognised by civilised nations and judicial decisions and writings of eminent publicists of the various nations remain important sources of international human rights discourse.⁴ Indeed, the increase in charter and treaty mechanisms for the implementation of human rights has brought up new potential sources of international human rights law.⁵ In considering the role international human rights law can play in the new constitutional order of Zimbabwe, one will specifically limit the discussion to international treaties/conventions and customary international law.

INTERNATIONAL LAW IN THE COURTS OF ZIMBABWE

TREATIES – SECTION 327 OF THE CONSTITUTION

As mentioned in the introductory remarks to this discussion, there is a clear pattern towards the increased penetration of international legal rules within domestic systems (Shaw). Despite this development, the traditional theories on the relationship between international law and domestic law remain relevant. These theories are the monist theory and the dualist theory. Dualism is expressed in the modern positivist–dualist position through the doctrine of transformation (Shaw). This maintains that international law and domestic law are distinct and autonomous systems of law. As such, the rules of international law can only apply domestically if they have been “transformed” into rules of municipal law. It is this approach that finds expression in section 327 of the Constitution of Zimbabwe.

² Michael Battle (2009)

³ see paragraph 1 to the Preamble of the Universal Declaration of Human Rights

⁴ Article 38 (1) of the Statute of the ICJ has been accepted as the most articulate enumeration of the sources of human rights law – See M. Shaw (2009)

⁵ The General Comments of the Human Rights Committee and the Recommendations of the African Commission on Human and Peoples’ Rights are examples.



Section 327 relates to this position in two important ways. First, s 327 (2) provides that an international treaty⁶ that has been concluded or executed by the President does not bind Zimbabwe unless it has been approved by Parliament. Second, s 327 (2) (b) provides that a treaty concluded or executed by the President does not form part of the law of Zimbabwe unless it has been incorporated into the law of Zimbabwe through an Act of Parliament.⁷ The provision in s327 (2) (b) relates to ratification or accession to treaties whilst the provision in s 327 (2) (b) refers to the positivist-dualist position under the doctrine of transformation (referred to as domestication).⁸

Ratification or accession refers to the international act whereby a State establishes on the international plane its consent to be bound by a treaty.⁹ A state becomes a party to a treaty when it has ratified or acceded to such a treaty and it is bound to perform the obligations imposed by the treaty in good faith. Ratification does not normally entail that the provisions of the treaty can be applied directly under municipal law. In Zimbabwe, when then can an international treaty that has been ratified by Zimbabwe be applicable or even relevant in a case before the municipal courts? The answer to this question can be found in the Constitution.

The first way in which a treaty ratified by Zimbabwe can apply directly is, as already partly explained above, when such a treaty has been transformed into municipal law by an Act of Parliament. The usual form of such legislation is to include the complete text of the treaty into a Schedule to the Act. The Genocide Act [*Chapter 9:20*] is an example of such an Act. When such transformation has taken place, the court will not apply the treaty in a strict sense; it will merely apply the municipal legislation whose effect is to transform the international rule into a municipal rule. It is obvious that the court can make use of the decisions of international bodies or even foreign courts which might have interpreted the provisions of such a treaty before.

The second way in which a treaty ratified by Zimbabwe can apply in our courts is one envisaged under s 327 (6) of the Constitution. Under this section, in interpreting legislation, every court and tribunal must adopt any reasonable

⁶ Article 2 (1) (a) of the Vienna Convention on the Law of Treaties defines a treaty as international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation – Section 327 (1) of the Constitution defines an international treaty as “a convention, treaty, protocol or agreement between one or more foreign States or governments or international organisations.

⁷ Section 327 (2) (a) of the Constitution of Zimbabwe

⁸ Section 34 (titled **Domestication of international instruments**) of the Constitution states that the State must ensure that all international conventions, treaties and agreements to which Zimbabwe is a party are incorporated into domestic law

⁹ Article 2 (1) (b) Vienna Convention on the Law of Treaties (VCLT)

interpretation of the legislation that is consistent with any convention or treaty which is binding on Zimbabwe.¹⁰ Section 46 (1) (c) of the Constitution also enjoins every court, tribunal, forum or body to take into account international law and all treaties and conventions to which Zimbabwe is a party when interpreting the Declaration of Rights in Chapter 4 of the Constitution. As such, whilst section 46 (1) (c) relates specifically to the interpretation of the Declaration of Rights, the court must also refer to international law in interpreting any other legislative instruments as required by section 327 (6). This approach is in line with the Bangalore Principles which also go further in stating that a judge shall keep himself or herself informed about relevant developments of international law, including international conventions and other instruments establishing human rights norms.¹¹

An encouraging trend has emerged from the courts in 2014. The Constitutional Court and other courts have in a number of decisions referred to international law. For instance, in the case of *Nezandonyi v. Nezandonyi HH115-14*, Tsanga J referred to the *Convention on The Elimination of All Forms of Discrimination against Women (CEDAW)* and the *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*. In interpreting s 7 of the **Matrimonial Causes Act [Chapter 5:13]**, the learned judge stated that s 327 (6) of the Constitution clearly imposes a duty on the courts to be guided by international instruments to which Zimbabwe is a party in interpreting legislation. Again, in the case of *Madanhire and Another v. The Attorney General CCZ 2/2014*, the Constitutional Court made extensive reference to international law. In passing judgement in a case where the applicants had challenged the constitutionality of the offence of criminal defamation under s 96 of the **Criminal Law (Codification and Reform) Act [Chapter 9:23]**, the court specifically included a section of the judgement to address the international dimension of "freedom of expression". The court referred to the *United Nations General Assembly Resolution No. 59 (1) of 14 December 1946*, *Human Rights Committee General Comment No. 34 – 2011*, Article 19 of the *International Covenant on Civil and Political Rights*, *Alexander Adonis v. The Philippines, Communication No. 1815/2008 (Complaint to the HRC)* and *African Commission of Human and Peoples' Rights Resolution 169/2010*. This extensive reference and affirmation of international human rights norms from the highest courts in Zimbabwe is commendable. It is obviously important in expounding our own legislation as well as in possibly filling gaps in our own domestic system of human rights protection.

¹⁰ Section 327 (6)

¹¹ The Bangalore Principles of Judicial Conduct 2002, Value 6.4



SECTION 326 – CUSTOMARY INTERNATIONAL LAW

If John Pym was to utter the famous maxim “actions are more powerful than words” today as he did in 1628, he could as well be providing a succinct description of customary international law.¹² Whilst the identification and ascertainment of customary international is not as pedestrian as this old maxim might suggest, it remains true that customary international law is embedded in the concept of the practice of states. As Shaw writes, it is how states behave in practice that forms the basis of customary international law. The Statute of the ICJ describes customary international law as general practices accepted as law by States. In *S v. Petane*, a South African court had this to say about customary international law;

*“All that theory can say is this: Whenever and as soon as a line of international law conduct frequently adopted by States is considered legally obligatory or legally right, the rule which may be abstracted from such conduct is a rule of customary international law...”*¹³

The twin requirements for the formation of customary international law are general practice (*usus*) and acceptance as legally binding (*opinio juris*). These requirements are based on the simple idea that international law, in general, is based on the will and consent of states. *Usus* was described by the ICJ in the *Asylum Case* as “constant and uniform usage”.¹⁴ In the **Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. USA)**, the ICJ confirmed that for the requirement of uniformity to be fulfilled, usage does not need to be followed in exactly the same way by every state. The court concluded that “substantial compliance” was enough to establish uniformity.¹⁵ Although there is no straight jacket approach to what number of states are required to set in motion a rule of customary international law, it has been accepted that the practice has to be widespread and general as opposed to being universal. The requirements of the generality of practice bring into paly an interesting exception to the general rule which dictates that once there is sufficient state practice backed by *opinio juris*, a rule of customary international law is binding on the general body of states. This is the principle of persistent objectors. Under the principle of persistent objectors, international law holds that a state cannot be bound by a rule of customary international law if it objected to such rule as being applicable in the early stages of its formation and did so consistently thereafter. As to the

¹² John Pym was an English parliamentarian, leader of the Long Parliament and a prominent critic of Kings James I and then Charles I. (Wikipedia)

¹³ *S v. Petane* 1988 (3) SA 51 at p.57

¹⁴ *Asylum Case* 1950 ICJ Reports. 266

¹⁵ *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua V USA 1986 ICJ Reports*

requirements for the applicability of the principle, it has been accepted that the objection needs to be “timely”, “active”, “unambiguous” and “consistent”.¹⁶

The second requirement for a rule to be classified as a rule of customary international law is that it should not only be embedded in state practice, but that it must be “accepted as law” as opposed to courtesy or good neighbourliness.¹⁷ This requirement therefore sifts away other practices which although general, are not treated as creating legally binding obligations. Should the requirements of *usus* and *opinio juris* be fulfilled, a rule will be said to have crystallised into a rule of customary international law. A study of whether a certain norm constitutes customary international law, wherever taken, should therefore enquire into whether these two requirements have been satisfied before concluding that a certain norm is a rule of customary international law.

In Zimbabwe, customary international law is relevant on two levels. First, it applies directly just as an Act of Parliament or a rule of the common law would unless it is found to be inconsistent with the Constitution or with an Act of Parliament.¹⁸ Second, customary international law must guide every court when interpreting legislation. In an instance where a piece of legislation is subject to diverging constructions, the court must adopt that interpretation which best reflects the position of customary international law on the subject.¹⁹ An obvious question that would arise relates to the test to be applied in deciding when a rule of customary law would be inconsistent with the Constitution or with an Act of Parliament. The Oxford dictionary defines “inconsistent” to mean incompatible with, conflicting with, in conflict with, at odds with, at variance with, differing from, different to, in disagreement with, disagreeing with, not in accord with, contrary to, in opposition to, opposed to, **irreconcilable** with, not in keeping with, out of keeping with, out of place with, out of step with, not in harmony with, incongruous with, discordant with, discrepant with; antithetical to or diametrically opposed to.” (My emphasis).²⁰ Where it is possible to **reconcile** a rule of customary international law with the Constitution or an Act of Parliament, the court should generally hold that such rule is part of the law of

¹⁶ See DA Colson, „How Persistent Must the Persistent Objector be?“ (1986) 61 Washington LR 965–969; Steinfeld (n 2) 1651–1653

¹⁷ The ICJ in the North Sea Continental Shelf Case ruled that for the requirement of *opinio juris* to be fulfilled, the state must comply with the practice because it feels legally obliged to do so, that it must feel that it commits an international wrong should it not comply with that norm.

¹⁸ Section 326 (1) of the Constitution

¹⁹ Section 326 (2) of the Constitution

²⁰ see <http://www.oxforddictionaries.com/definition/english-thesaurus/inconsistent>



Zimbabwe.²¹ Reconciling the apparent conflict will obviously be guided by the underlying object and intention of both the legislative provisions as well as the rule of customary international law in question.²² As such, one would argue that this is a broad test which would seem to suggest that a court should be generally inclined to reconciling the apparent conflict rather than emphasising or exaggerating it. If such interpretation of s 326 (1) is adopted, the impact of customary international law on our law will be far reaching. This is so because customary international law is a rich body of law which unlike treaties is more universal. As such, this provision is significant in as much as it imports customary international law as the law of Zimbabwe.

CONCLUSION

In the end, one would argue that the courts now have greater autonomy to apply international law in the domestic courts. This is obviously welcome in as much as international law is rich in its jurisprudence on fundamental human rights. As such, one would encourage practitioners to make greater use of international law in seeking to protect the rights of their clients. There is scope for the application of international law under the new Constitution which if exploited can enrich our human rights jurisprudence and supplement and expound on the Declaration of Rights in the Constitution. By making use of international law, one is confident that Zimbabwe will move from an epoch characterised by the robbery of human dignity towards an era of greater respect for human rights.

²¹ The concept of reconciling conflicting legislative provisions is not alien to the judiciary. The courts often have to reconcile conflicting legislative provisions.

²² In the case of *Sawyer v. Law Society of S Rhodesia* 1948 (2) SA 956 (SR) the court attempted to reconcile an apparent inconsistency between the provisions of certain Regulations. The court held that the inconsistency could be reconciled if subjected to the test of the underlying object and intention of the regulations.

TRAFFICKING IN PERSONS ACT [CHAPTER 9:25]: A LEGAL FRAMEWORK

Tendai Dube*



ABSTRACT

The fight against Trafficking in Persons is now a top priority for the global community. Zimbabwe is a source, transit and destination country for victims of trafficking. The problem of trafficking can be addressed from a range of different perspectives including crime control, migration as well as human rights. A human rights based approach entails —the human rights of trafficked persons shall be at the centre of all efforts to prevent and combat trafficking and to protect, assist and provide redress to victims. The Trafficking in Persons Act, 2014 domesticates the UN Trafficking into Zimbabwean law. This review highlights three main aspects of the Act i.e., the prosecution of traffickers and other role-players, and the protection of victims of trafficking as they are contained in the act and evaluates whether or not the Act fulfils the obligations of the Government of Zimbabwe (GoZ) obligations under the UN Trafficking Protocol.

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INTRODUCTION

THE PROBLEM

The fight against Trafficking in Persons is now a top priority for the global community. Trafficking in persons is a crime that is relentless in its exploitation of women, children and men for many purposes including forced labour and sex. It is a global tragedy. This global crime generates billions of dollars in profits for the traffickers.

Zimbabwe is a source, transit and destination country for victims of trafficking¹. There have been sporadic reports of the trafficking of Zimbabweans to other parts of the world². The most frequently detected forms of exploitation include forced labour and sexual exploitation³. Among those identified, adult women are the most frequently reported to be trafficked, followed by children⁴.

There is no reliable way of knowing the number of persons trafficked to and from Zimbabwe. The covert nature of trafficking in persons makes it difficult to provide accurate statistics of the crime. Inadequate knowledge of this crime is often a consequence of failure to identify victims as such. Trafficking in persons is a complex and multifaceted phenomenon that seems to be spread worldwide. Even if the statistics available cannot be considered completely reliable, the testimonies of many victims trafficked nationally or transnationally by individuals or by organised groups for a variety of purposes confirm its existence as a well-established illegal business.⁵

¹ Situational assessment of human trafficking A 2005 situational assessment of human trafficking in the SADC region A survey of South Africa, Zimbabwe and Mozambique; US Department of State Trafficking in Persons Report June 2014

² Zimbabwe remains transit point for human trafficking, <http://nehandaradio.com/> retrieved 6.23.2014, Zim border posts conduits for human trafficking, Newsday May 10 2014 , Woman in court for human trafficking February 21 2014 Newsday, Police bust human trafficking syndicate, Herald January 28, 2014

³ UNITED NATIONS OFFICE ON DRUGS AND CRIME GLOBAL REPORT ON TRAFFICKING IN PERSONS, 2012

⁴ Ibid p7 Women account for 55-60 per cent of all trafficking victims detected globally; women and girls together account for about 75 per cent, Twenty-seven per cent of all victims detected globally are children. Of every three-child victims, two are girls and one is a boy.

⁵ Trafficking in human beings: Modern Day slavery Silvia Scarpa 2008, Oxford University Press

CONSTITUTION OF ZIMBABWE AMENDMENT (NO. 20) ACT, 2013

The problem of trafficking can be addressed from a range of different perspectives including crime control, migration as well as human rights. Addressing trafficking using a criminal model means viewing those who breach criminal law as criminals deserving of punishment⁶, this approach also incorporates the rights of any person accused of a criminal offence. The reasoning behind this approach is that trafficking in persons poses a threat to the security of the society. In addition, it must be criminalised both at a national and transnational level, in order to ensure reduction of the phenomenon.⁷

A human rights based approach entails “the human rights of trafficked persons are to be at the centre of all efforts to prevent and combat trafficking and to protect, assist and provide redress to victims.”⁸ Under a human rights-based approach, every aspect of the national, regional and international response to trafficking is anchored in the rights and obligations established by international human rights law⁹ and fundamental rights established by the constitution.

The Declaration of Rights contained in chapter 4 of the constitution affords fundamental rights to all persons in Zimbabwe¹⁰. The declaration of rights provides that every person has the right to life¹¹ no one may be subjected to forced labour or compulsory labour¹² or slavery or servitude.¹³ It further provides that no person may be subjected to physical or psychological torture or to cruel, inhuman or degrading treatment or punishment.¹⁴ It also affirms the “democratic value” of human dignity¹⁵ and freedom of movement and residence¹⁶ and that in every matter concerning a child, that child’s best

⁶ Theories, Practices and Promises: Human Trafficking Laws and Policies in Destination States of the Council of Europe Elizabeth Ivana Yuko,2009 Dublin City University p23

⁷ Ibid p23

⁸ Principle 1 Recommended Principles on Human Rights and Human Trafficking , E/2002/68/Add.1

⁹ RECOMMENDED PRINCIPLES AND GUIDELINES ON HUMAN RIGHTS AND HUMAN TRAFFICKING New York and Geneva, 2010 COMMENTARY, UNHCHR p50

¹⁰ Section 45 (3) Constitution of Zimbabwe Amendment (No. 20) Act, 2013

¹¹ Ibid s 48

¹² Ibid s 55

¹³ Ibid s 55

¹⁴ Ibid s53

¹⁵ Ibid s 55

¹⁶ Ibid s 66



interest shall be paramount¹⁷. Section 12 of the constitution provides that Zimbabwe's foreign policy is to be based in part on the respect for international law. Section 34 of the constitution provides that the State must ensure that all international conventions, treaties and agreements to which Zimbabwe is a party are incorporated into domestic law¹⁸.

Section 2 of the constitution provides that the constitution is the supreme law of Zimbabwe¹⁹. The constitution further provides that the obligations imposed by the Constitution are binding on every person, natural or juristic, including the State and all executive, legislative and judicial institutions and agencies of government at every level, and must be fulfilled by them²⁰.

Trafficking in persons is both a crime and a violation of fundamental human rights. Trafficking in persons requires a forceful response founded on the assistance and protection for victims, rigorous enforcement by the criminal justice system, a sound migration policy and a firm regulation of labour markets for children.²¹

The dictates of the above (fundamental rights of the constitution) entails that every policy, programme and law aimed at combating trafficking in persons must be built with the human rights of the trafficked persons at the centre of anti-trafficking efforts.

THE UNITED NATIONS TRAFFICKING PROTOCOL AND THE TRAFFICKING IN PERSONS ACT

In December 2000, the United Nations adopted international instruments to fight transnational organized crime and additional protocols to combat trafficking in persons, and smuggling of firearms. The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (UN Trafficking protocol) entered into force on 25 December 2003²² and as of 26 June 2014, 159 countries had ratified the UN

¹⁷ Ibid s81 in terms of the constitution a child is a person under the age of eighteen year)

¹⁸ See further section 327(2) of the constitution which states that (2) An international treaty which has been concluded or executed by the President or under the President's authority—

(a) does not bind Zimbabwe until it has been approved by Parliament; and
(b) does not form part of the law of Zimbabwe unless it has been incorporated into the law through an Act of Parliament

¹⁹ Ibid s2 (1)

²⁰ Ibid s2 (2)

²¹ UNITED NATIONS OFFICE ON DRUGS AND CRIME GLOBAL REPORT ON TRAFFICKING IN PERSONS, 2012

²² Treaty Series, vol. 2 2 3 7 , p. 3 1 9 ; Doc. A/5 5 /3 83

Trafficking Protocol. The widespread ratification of the protocol is a success story in that it indicates the global community's commitment to combat trafficking in persons, which is a shift from past attitudes. There is still an uphill struggle to combat the crime. There remains a huge information gap and lax implementation of the full legal framework globally²³

The UN Trafficking Protocol is the only international legal instrument addressing trafficking in persons as a crime. A large number of international instruments have been produced over many years that are both highly applicable and relevant to the multifaceted issue of trafficking in persons²⁴. All in all, the global community has the tools to confront this crime.

²³ For example globally and indeed in Zimbabwe there remains very low conviction rates for trafficking in persons cross reference ²³ UNITED NATIONS OFFICE ON DRUGS AND CRIME GLOBAL REPORT ON TRAFFICKING IN PERSONS, 2012

²⁴ Council of Europe Convention on Action against Trafficking in Human Beings (2005), Recommended Principles and Guidelines on Human Rights and Human Trafficking of the Office of the United Nations High Commissioner for Human Rights (2002), Brussels Declaration on Preventing and Combating Trafficking in Human Beings (2002), South Asian Association for Regional Cooperation Convention on Preventing and Combating Trafficking in Women and Children for Prostitution (2002), Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (2000), Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime (2000), Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (2000), Optional Protocol to the Convention of the Rights of the Child on the involvement of children in armed conflict (2000), Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (International Labour Organization Convention No. 182) (1999), United Nations Declaration on Crime and Public Security (1996), Beijing Declaration and Platform for Action, adopted by the Fourth World Conference on Women (1995), Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights (1993), Declaration on the Elimination of Violence against Women (1993), International Convention on the Protection of All Migrant Workers and Members of Their Families (1990), Convention on the Rights of the Child (1989), Convention on the Elimination of All Forms of Discrimination against Women (1979), Convention concerning the Abolition of Forced Labour (International Labour Organization Convention No. 105) (1957), Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (1956), Convention relating to the Status of Refugees (1951), Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (1949) Geneva Conventions (1949) and Additional Protocols Universal Declaration of Human Rights (1948), International Convention for the Suppression of the Traffic in Women of Full Age (1933), Convention concerning Forced or Compulsory Labour (International Labour Organization Convention No. 29) (1930), Slavery Convention (1926), International Convention for the Suppression of the Traffic in Women and Children (1921), International Convention for the Suppression



The Trafficking in Persons Act, 2014 domesticates the UN Trafficking into Zimbabwean law. In keeping with the UN Trafficking Protocol, the Act provides for the prohibition, prevention and prosecution of the crime of trafficking in persons and the protection of victims of trafficking in persons. The Act provides for the appointment of a Committee on Trafficking in Persons with a mandate to formulate and implement a national plan of action against trafficking in persons. Finally, the Act will provide an enabling framework for the establishment and operation of centres for victims of trafficking in persons

This review highlights three main aspects of the Act i.e., the prosecution of traffickers and other role-players, and the protection of victims of trafficking as they are contained in the Act. It also evaluates whether or not the act fulfills the obligations of the Government of Zimbabwe (GoZ) obligations under the UN Trafficking Protocol.

CRIMINALISATION

THE INTERNATIONAL LAW OBLIGATION TO CRIMINALISE TRAFFICKING IN PERSONS

State parties to the UN Trafficking protocol have an obligation to criminalise trafficking. Trafficking is a crime as well as a violation of human rights. States that do not criminalise trafficking fully are failing in their obligation to protect victims of trafficking and to prevent future trafficking. A State that does not criminalise trafficking in Persons is failing to provide the necessary structures within which State agencies can investigate, prosecute and adjudicate trafficking in persons cases to the required standard of due diligence²⁵. Trafficking in Persons is a complex process. It involves multiple acts (and usually in multiple states) which are not easily distinguishable or recognisable. It is clandestine, operates within illegal systems, and structures which makes tracing and prosecuting the crime difficult²⁶. To combat this heinous crime, states must criminalise trafficking in persons. Trafficking is itself an act and the exploitation that follows it, exposes victims to a variety of criminal acts including deprivation of liberty, theft of identity documents, sexual, physical

of the White Slave Traffic (1910), International Agreement for the Suppression of the "White Slave Traffic" (1904)

²⁵ Prosecution of trafficking in persons cases: Integrating a human rights-based approach in the Administration of Criminal Justice, background paper by Anne T. Gallagher and Nicole Karlebach,

²⁶ Theories, Practices and Promises: Human Trafficking Laws and Policies in Destination States of the Council of Europe E I Yuko, 2009, Dublin City University

and psychological abuse and blackmail (threats to inform relatives or police about the victims' activity)²⁷

THE DEFINITION OF TRAFFICKING IN PERSONS

The definition of trafficking given by the UN (United Nations) Trafficking Protocol is the first definition given in an international law instrument tackling the phenomenon. Similar instruments such as the 1904 international agreement for the suppression of White Slave Traffic and various other international treaties deal with the issue of trafficking but do not define it.²⁸ The definition forms the basis of the subject matter covered in the Protocol, the basis of international cooperation and other fundamental elements of the treaty.²⁹ UN Member States adopted the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children Supplementing the United Nations Convention against Transitional Organised Crime (CTOC) on 15 December 2000, the Protocol entered into force on 29 September 2003.³⁰

According to Article 3 (a) of the UN Trafficking Protocol:

'Trafficking in persons' shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.'

²⁷ Trafficking in Human Beings Human rights and trans-national criminal law, developments in law and practices ,Kristina Touzenis, UNESCO 2010 p49

²⁸ International Agreement for the Suppression of the White Slave Traffic (adopted 18 May 1904, entered into force 18 July 1905) 1 LNTS 83, 1949 Protocol amending the 1904 International Agreement for the Suppression of the White Slave Traffic, and the 1910 International Convention for the Suppression of the White Slave Traffic United Nations, Treaty Series, vol. 30, No. 446, See also the 1904 International Agreement for the Suppression of the White Slave Traffic, as amended by the 1949 Protocol (United Nations, Treaty Series, vol. 92, No. 1257) and the 1910 International Convention for the Suppression of the White Slave Traffic as amended by the 1949 Protocol (United Nations, Treaty Series, vol. 98, No. 1358)), 1950 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others United Nations, Treaty Series, vol. 96, No. 1342 <http://www.unhchr.ch/html/menu3/b/33.html>

²⁹ Legislative guide p267

³⁰ 40 ILM 33



From this definition, three distinct phases emerge as the constituent elements of Trafficking in Persons: (a) The movement of victims from one place to another; (b) the achievement of their consent through improper means; and (c) their final exploitation. If one of these elements is missing, it not possible to consider a phenomenon as trafficking.³¹ The UN Trafficking protocol definition follows classical criminal law in giving intent (to exploit) a central role in the commission of a crime³². In the framework of the UN Trafficking Protocol, exploitation is a key component of the crime, it distinguishes trafficking from other phenomenon such as human smuggling which may be crimes in that they violate national immigration laws by crossing sovereign boundaries illegally, but the purpose of such movement is not the exploitation of others.

Article 3 (c) specifies that in the case of children, consent is irrelevant. Therefore, in prosecuting traffickers, improper means do not have to be established when persons under 18 years of age are involved.³³ Article 3(b) states that if one of the means set out in Article 3 (a) are used, it is irrelevant whether the person expressed their consent. Therefore, in criminal proceedings once it is established that any of the prohibited means are used; consent is irrelevant and is not available as a defence.³⁴ In terms of the UN Trafficking Protocol, the crime is completed at a very early stage. No exploitation needs to take place before acts can be construed as trafficking.³⁵

THE PROSECUTION OF TRAFFICKERS

Under the UN Trafficking Protocol, states are required to criminalise various conduct which amounts to human trafficking. The UN Trafficking Protocol describes in detail the nature of the crime³⁶. In the UN Trafficking Protocol, State parties must criminalise³⁷:

- a) The conduct set forth in article 3 of the Protocol, when committed intentionally (art. 5, para. 1);
- b) Subject to the basic concepts of its legal system, attempting to commit that offence (art. 5, para. 2 (a));

³¹ Trafficking in Human Beings: Modern Slavery, Silvia Scarpa, 2008 , Oxford University Press

³² Trafficking in Human Beings Human rights and trans-national criminal law, developments in law and practices ,Kristina Touzenis, UNESCO 2010

³³ Legislative guide p270

³⁴ *ibid*

³⁵ *Ibid*, 269

³⁶ The Annotated Guide to the complete the complete UN Trafficking Protocol, 2002 International Human Rights Law Group

³⁷ The United Nations Office on Drugs and Crime, Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto, United Nations publication, Sales No. E.05.V.2

- c) Participating as an accomplice in that offence (art. 5, para. 2 (b));
- d) Organizing or directing other persons to commit that offence (art.5, para. 2 (c)).

States must also ensure that criminal (and civil) liability can be extended to legal as well as natural persons.³⁸ Article 1 (2) of the UN Trafficking Protocol provides the provisions of the UNCTOC shall be applied, *mutatis mutandis* the Protocol³⁹. Article 1 (3) further provides that “the offences established in accordance with article 5 of this Protocol shall be regarded as offences established in accordance with the Convention.”

CRIMINALISATION UNDER THE TRAFFICKING IN PERSONS ACT, 2014

Part II of the Trafficking in Persons Act, 2014 (the Act) provides for the prohibition of trafficking in persons. Section 3 of the act criminalises the crime of trafficking in a long detailed provision, it provides for the penalties of the crime and sets out where the crime would be considered aggravating circumstances. The section further provides immunity to victims of trafficking for criminal activity they committed because of their trafficking experience.

THE CRIME OF TRAFFICKING IN PERSONS IN THE ACT

Conforming to the UN Trafficking Protocol, the Act criminalises trafficking in Persons as a crime that has three basic elements:

1. An act such as recruiting, transferring, harbouring any person (section (3) (1) (a))
2. Any means which facilitate an act such as using force, violence ,fraud, extortion or deception; or the abuse of power or trust over the victim (s (3) (1) (b));
3. Which end as the intended or foreseeable results in the exploitation of a person who becomes a victim of trafficking.

The Act does not specifically mention exploitation as the end result of the crime of trafficking but subsumes this within the framework of s (3) by criminalising conduct which is exploitative such as “ prostitution, child or

³⁸ See Organized Crime Convention Article 9

³⁹ UN Interpretative Note: “The travaux préparatoires should indicate that this paragraph was adopted on the understanding that the words “*mutatis mutandis*” meant “with such modifications as circumstances require” or “with the necessary modifications”. Provisions of the United Nations Convention against Transnational Organized Crime that are applied to the Protocol under this article would consequently be modified or interpreted so as to have the same essential meaning or effect in the Protocol as in the Convention.”



adult pornography, the unlawful removal of organs, forced marriage, debt bondage, illegal labour, forced labour or other forms of servitude”.⁴⁰ Contrary to international law, transportation of the victim is a necessary element of the crime of trafficking (s3 (1) (a)).

In terms of the Act, the consent of the victim is not a defence to the charge of trafficking nor is the fact that the purpose for which the offence was committed was not fulfilled.⁴¹ Within the framework of the Act, companies and other forms of legal persons are just as liable as natural persons.⁴²

The Act provides for stiff penalties for the crime of trafficking in persons, which is commensurate with the heinousness of the crime. Penalties for the crime will vary in gravity depending on whether the accused person is the actual trafficker himself or herself, or is simply an associate or assistant to the trafficker. In the first case, a mandatory sentence of 10 years imprisonment (without the option of a fine) is legislated, in the latter case, the courts are given a broader discretion to impose fines, imprisonment, or both. However, an associate or assistant to a trafficker will also be liable to the mandatory sentence of 10 years imprisonment if he or she is aware of the existence of certain aggravating features of the crime in the course of its commission.

EXTRATERRITORIAL JURISDICTION OF ZIMBABWEAN COURT

Trafficking in Persons is a crime, which is usually committed transnationally; under the act, Zimbabwean courts are provided with extra-territorial jurisdiction in certain circumstances in respect of an act committed outside Zimbabwe that would have constituted an offence if committed within Zimbabwe.⁴³ This means that Zimbabwean courts will have jurisdiction irrespective of where the offence was committed, by whom it was committed or against whom it was committed.⁴⁴ This provision is most welcome as it

⁴⁰ s (2) of the Act

⁴¹ In terms of the s (7) of the act the following do not constitute legal defences to the charge of trafficking:

- a) a victim consented to the act constituting the offence;
- b) or the victim had previously engaged in prostitution or pornography or has been convicted of any criminal offence; or
- c) where the victim is a child, that the victim, parent, guardian or other person who has parental authority over the child consented to the act constituting the offence; or
- d) the purpose for which the offence was committed was not fulfilled; or
- e) Any act constituting an essential element of the offence is customary or religious practice.

⁴² Section (3) of the Interpretation Act [chapter 1:01] provides that in every enactment “person” or “party” includes—

- (a) any company incorporated or registered as such under an enactment; or
- (b) anybody of persons, corporate or unincorporated; or
- (c) any local or other similar authority;

⁴³ Section 7 of the act

⁴⁴ Ibid (1) (a) through (d)

enhances the capacity of the state to fight what is in essence a transnational crime.

POWERS OF LAW ENFORCEMENT AGENTS

Trafficking in Persons is primarily a crime; in recognition of this, the Act sets out the powers of law enforcement agents in section 4 of the act. The act empowers the law enforcement officials the power to question, search and detain persons entering or leaving Zimbabwe, and to search and seize the property of suspected persons, where there exists a reasonable suspicion the crime of trafficking in persons is being or is about to be committed. The powers of the law enforcement agents are carefully limited, to ensure their in line with the limits set by the Constitution and the Declaration of Rights.

THE PROTECTION OF THE VICTIMS OF TRAFFICKING

At the core of all efforts of combating Trafficking in persons is the need to protect and assist the victims of trafficking, with full respect for their human rights⁴⁵. There is increasing recognition in the international fight against human trafficking that at the core of all efforts to combat trafficking should be the recognition and protection of the human rights of trafficked persons. The Special Rapporteur on Trafficking in Persons has previously emphasized the value of a rights-based approach to trafficking⁴⁶. This entails adopting a human rights approach to combating trafficking in persons. A human rights approach requires everyone involved in combating trafficking to consider, at each stage, the impact that a law, policy, practice or measure may have on persons who have been trafficked and persons who are vulnerable to being trafficked. It means rejecting responses that compromise rights and freedoms⁴⁷. This approach not only safeguards the most sacred of universal human rights such as the right to life and human dignity, but it is also a practical approach to reduce the conduct that constitutes the crime. Victims of trafficking are more likely to cooperate in the investigation and prosecution of traffickers if they feel safe and feel that the dehumanising effect of trafficking is over. It is therefore in everyone's interest to adopt human rights based approach in combating trafficking in persons.

⁴⁵ Article 2 of the UN trafficking Protocol

⁴⁶ See, for example, Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development: Report submitted by the Special Rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo, UN Doc. A/HRC/10/16 (20 February 2009)

⁴⁷ RECOMMENDED PRINCIPLES AND GUIDELINES ON HUMAN RIGHTS AND HUMAN TRAFFICKING New York and Geneva, 2010 COMMENTARY, UNHCHR



VICTIM IDENTIFICATION

Both the UN Trafficking Protocol and the Act are silent on victim identification. However, unidentified victims remain at the mercy of their traffickers. For victims who remain unseen and unheard, their exploitation appears seemingly unending. A failure to identify a trafficked person correctly is likely to result in a further denial of that person's rights⁴⁸. This poses serious practical challenges in protecting victims of trafficking. The challenges in identifying trafficking victims stem in part because of the nature of the crime of trafficking in persons itself; it is largely a clandestine crime preying on the most vulnerable and marginal members of society⁴⁹. The Special Rapporteur has noted that the issue of identification raises a number of complex pragmatic questions, in particular the issue of how, where and by whom identification should be performed.

Trafficking means much more than the organized movement of persons for profit. What distinguishes trafficking from migrant smuggling is “the presence of force, coercion and/or deception throughout or at some stage in the process — such deception, force or coercion being used for the purpose of exploitation”⁵⁰. Timely and efficient identification of victims is central to the criminalization of trafficking, as it affects the ability of law enforcement officials to prosecute traffickers effectively and is fundamental in terms of being able to provide trafficked persons with the necessary support services.⁵¹

That both the UN Trafficking protocol and Act are silent on the issue of victim identification is a “protective gap”. The Government of Zimbabwe (GoZ) should rectify this protective gap by formulating and implementing legislative and administrative directives that make victim identification an integral part of the fight against trafficking in persons. The GoZ has an obligation under international law to protect victims of trafficking. International law now recognises that individuals who have been trafficked have a special status and that the State owes a particular duty of protection and support to those persons. A failure to accurately and timeously identify

⁴⁸ *ibid*

⁴⁹ A lot of victims come from backgrounds that make them distrustful of authorities or are otherwise particularly vulnerable marginalised ethnic minorities, undocumented immigrants, the indigenous, the poor, persons with disabilities—whose experiences often make them reluctant to seek help from authorities. Trafficking In Persons Report 2013 US State Department

⁵⁰ GUIDELINE 2: IDENTIFICATION OF TRAFFICKED PERSONS AND TRAFFICKERS, Guidelines and Principles

⁵¹ Report of the Special Rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo, A/HRC/20/18

victims of trafficking renders any rights granted to such persons “purely theoretical and illusory”⁵².

COMPARATIVE OVERVIEW

Many Countries have taken steps to ensure timely and efficient identification of victims. Numerous countries, in particular, Sweden, Japan, Estonia, Malta, and Georgia, have created task forces or agencies coordinating nationwide anti-trafficking work and these countries have organized specialized training sessions to enhance the capacity of front-line officers, especially the police, immigration officers, border guards and labour inspectors, to identify actual and potential trafficking victims and to make referrals to appropriate services⁵³. Jamaica formed a National Task Force against Trafficking in Persons, which with the collaboration of non-governmental organizations has developed trafficking indicators, protocols and referral mechanisms for agencies involved in the identification, counselling and protective care of rescued or potential victims⁵⁴. In Scotland, local law enforcement officials facilitate better victim identification by taking children from cannabis farms to safe houses instead of taking them to detention centres⁵⁵.

Some countries have adopted a multi-disciplinary approach to victim identification. By encouraging collaboration in victim identification, governments ensure stakeholders can find victims between potential front line responders and NGOs. In the Netherlands, the “barrier-model” views trafficking as a business model, with different barriers to be passed before traffickers can start making money (entry, identification, housing, work, and financial situation). The approach attacks trafficking at these stages: local governments may detect trafficking through housing inspections and tax or fire protection inspectors may find irregularities that can trigger a law enforcement investigation into trafficking⁵⁶. In co-operation with NGOs, the Government of the Czech Republic has formalised its victim screening process by creating a list of ten questions for police to use in order to determine whether a person is a victim of trafficking. The government has further established an intranet site for police on how to identify and assist victims of trafficking⁵⁷. Japan’s National Police Agency provides guidelines on victim identification and treatment to local police forces⁵⁸. The National Anti-Human Trafficking Task Force in Sri Lanka is currently developing and implementing standard operating procedures that would assist in the accurate

⁵² Recommended Principles and Guidelines on Human Rights and Human Trafficking New York and Geneva, 2010 COMMENTARY p73

⁵³ A/HRC/20/18 p9

⁵⁴ *ibid*

⁵⁵ US Department of State Trafficking in Persons Report June 2013, p. 22.

⁵⁶ *Ibid* 23

⁵⁷ US Department of State Trafficking in Persons Report June 2005, p. 34.

⁵⁸ US Department of State Trafficking in Persons Report June 2004, p132 - 133.



and timely identification of victims of trafficking, and establish a referral mechanism to provide assistance and protection⁵⁹. In South Africa, the Prevention and Combating in Persons Act, 2013 provides for victim identification. The act provides for the reporting and dealing with child victims and adult victims, dealing with the two classes of victims separately⁶⁰.

RECOMMENDATIONS ON VICTIM IDENTIFICATION

Trafficking in Persons is primarily a crime, so it is appropriate that law enforcement agencies lead most trafficking interventions. It is essential that those who usually encounter victims of trafficking have necessary training on how to identify such victims. Victim identification efforts should focus on increasing the capacity and ability of law enforcement agencies, especially the police in identifying victims of trafficking timeously and efficiently. The GOZ should consider establishing a national referral mechanism for identifying and assisting victims, in close cooperation with all actors, especially victim service providers and non-governmental organizations⁶¹. The GOZ should also consider adopting practices that would enable timeous and best practices of identification. The Minister of Home Affairs must issue National Directives regarding the following matters⁶².

- A) The manner in which the reporting of an alleged trafficking case will be dealt with;
- B) The manner in which victims of trafficking should be identified, interviewed and treated, paying particular attention to the vulnerability of child victims;
- C) Measures to be taken in instances where foreign victims of trafficking are not conversant with any of Zimbabwe's official languages;
- D) The referral of victims of trafficking to social and health care services;
- E) The referral of victims of trafficking or other potential witnesses to the Zimbabwe Republic Police or other relevant institutions or organisations if there is likelihood that they may be harmed or killed.

The GOZ should consider empowering front line responders beyond just the police to identify victims. Many trafficking victims actively avoid law enforcement, but may be willing to open up to members of civil society. Approaches to identify trafficking victims should involve social workers,

⁵⁹ Ibid, A/HRC/20/18

⁶⁰ S 18 & 19 of the Prevention and Combating in Persons Act, 2013 (South Africa)

⁶¹ Ibid, A/HRC/20/18 p29

⁶² South African Law Reform Commission Discussion Paper 111 Project 131 Trafficking in Persons p148 ; S 44 of the Prevention and Combating in Persons Act, 2013 of South Africa provides for the issuing of National Instructions and directives by various agencies of the government in efforts to combat trafficking.

religious institutions, and other community leaders because of their ability to build trust within local communities. In Belgium, the government has a cooperation project with hospitals to improve detection of potential trafficking victims seeking medical care. Preliminary findings from the pilot project verified that trafficking victims are more willing to talk to medical staff than to the police⁶³.

The GOZ should consider enhancing its anti-trafficking efforts through partnerships. While the GOZ is ultimately responsible for identifying victims, protecting their rights, and providing support and services to survivors, Non-Governmental Organisations and International Organisations are experts in victim protection and provide comprehensive trafficking victim assistance services⁶⁴. The International Organization for Migration offers detailed training in procedures of screening for trafficking persons. The World Health Organisation has made Guidelines for the interviewing of trafficked women which are very helpful. It is recommended that the GOZ should take cognisance of these guidelines when determining the manner in which victims of trafficking will be interviewed⁶⁵.

VICTIM-WITNESS PROTECTION IN CRIMINAL PROCEEDINGS

Victims of trafficking often refuse to testify against traffickers if they fear for their own safety and for the safety of their families. This will hamper the effective prosecution of traffickers.⁶⁶ The victims of trafficking face risks when testifying against traffickers. Victim-witnesses are generally the most vulnerable witnesses in trafficking in persons cases.⁶⁷ Providing victims of trafficking with protection and effectively addressing their needs will facilitate the physical and psychological recovery of victims to enable them to participate effectively in the criminal justice process⁶⁸. Disclosing victim-witness identity in public (e.g. newspapers) increases the risk of retaliation by the victim's traffickers. If a government releases the names of victims and then deports them, traffickers often retaliate against the victims and their family members and sometimes even re-traffic them.⁶⁹ To facilitate maximum witness cooperation, any measure taken to protect witnesses, particularly

⁶³ US Department of State Trafficking in Persons Report June 2013, p. 23

⁶⁴ Ibid p17

⁶⁵ World Health Organization (WHO), "WHO Ethical and Safety Recommendations for Interviewing Trafficked Women", London, 2003.

⁶⁶ South African Law Reform Commission Discussion Paper 111 Project 131 Trafficking in Persons (DP 111) p 112

⁶⁷ In the criminal justice process a witness in trafficking cases can be a victim witness or a non-victim witness i.e. any other person who gives evidence in a case before a court who is not a victim witness;

⁶⁸ Anti-human trafficking manual for criminal justice practitioners Module 11: Victims' needs in criminal justice proceedings in trafficking in persons cases p1 United Nations Office on Drugs and Crime (Module 11)

⁶⁹ The Annotated Guide to the Complete UN Trafficking Protocol, Ann Jordan 2002 p19



victim witnesses must guarantee the safety of the witness at all stages of the criminal justice process. To do otherwise would be increasing the chances of the witness withdrawing their cooperation⁷⁰.

PROTECTION OF VICTIMS UNDER INTERNATIONAL LAW

Under the UN Trafficking Protocol, each State party is obliged to fulfil the following mandatory requirements in protecting witnesses in criminal proceedings:

- (a) Protect the privacy and identity of victims in appropriate cases under domestic law (art. 6, para. 1)
- (b) Ensure that victims receive information on relevant court proceedings in appropriate cases and have an opportunity to have their views presented and considered (art. 6, para. 2)⁷¹

Article 24 of the Convention requires state parties to “take appropriate measures within its means to provide effective protection from potential retaliation or intimidation for witnesses in criminal proceedings who give testimony...and, as appropriate, for the relatives and other persons close to them.” These measures may include”...“Providing evidentiary rules to permit witness testimony to be given in a manner that ensures the safety of the witness.”(Art 24) These requirements are mandatory, but only where appropriate and within the means of the State party concerned⁷². The convention has stronger protective requirements than the protocol, which in appropriate cases extends the protection given to witnesses to their families.

Article 25 of the Convention requires State Parties to “take appropriate measures within its means to provide assistance and protection to victims” of trafficking in persons, “in particular in cases of threat of retaliation or intimidation”.

PROTECTION OF VICTIM WITNESSES UNDER THE ACT

Section 5 of the Act provides for the protection of victims. Conforming to the legislative requirements for the protection of victims under the UN Trafficking Protocol, the Act provides that in “appropriate cases, a victim shall benefit from the provisions of Part XIVA (“Protection of vulnerable witnesses”) of the Criminal Procedure and Evidence Act [Chapter 9:07] (CP& EA) protecting vulnerable witnesses.” The Act further provides for the protection of the “privacy, reputation and other rights of the victim.” The court is empowered to make an order in terms of the Courts and Adjudicating Authorities (Publicity Restriction) Act [Chapter 7:04]⁷³.

⁷⁰ Ibid module 11 p3

⁷¹ Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocol thereto p 282

⁷² Ibid p 161

⁷³ S 5 (1) and 5 (2)

Part XIVA of the CP& E Act sets out the measures a court can take to protect vulnerable witnesses. The CP & EA provides that a court in any criminal proceedings should protect a vulnerable witness who is likely:

- (a) To suffer substantial emotional stress from giving evidence or
- (b) To be intimidated, whether by the accused or any other person or by the nature of the proceedings or by the place where they are being conducted, so as not to be able to give evidence fully and truthfully.⁷⁴

The court can take any of the following measures to protect the vulnerable witnesses.

- i. appoint a support person for the person;
- ii. direct that the person shall give evidence in a position or place, whether in or out of the accused's presence, that the court considers will reduce the likelihood of the person suffering stress or being intimidated;
- iii. Adjourn the proceedings to some other place, where the court considers the person will be less likely to be subjected to stress or intimidation.....
- iv. Make an order in terms of the Courts and Adjudicating Authorities (Publicity Restriction) Act [*Chapter 7:04*] excluding all persons or any class of persons from the proceedings while the person is giving evidence.⁷⁵

The CP & EA also sets out the factors to be considered in deciding whether to make an order for protection of a witness. Among the factors listed are “the vulnerable witness’s age, mental and physical condition and cultural background...” and “the feasibility of taking the measure concerned”⁷⁶.

⁷⁴ Section 319B of Criminal Procedure and Evidence Act [Chapter 9:07]

⁷⁵ Ibid. This procedure can be invoked either on the courts own initiative (*mero motu*) or on the application of a party to the proceedings. This mechanism affords the victim-witness an opportunity to seek the protective measures under the CP & E ACT

⁷⁶ The full list of considerations—

- a) the vulnerable witness’s age, mental and physical condition and cultural background; and
- b) the relationship, if any, between the vulnerable witness and any other party to the proceedings; and
- c) the nature of the proceedings; and



The CP & E Act further provides that before a court makes a decision in terms of s 319D “*the court shall afford the parties to the proceedings an opportunity to make representations in the matter*”⁷⁷. The Act also empowers the court to appoint an intermediary or a support person. This procedure will be useful in cases where the victim is a foreigner and cannot speak in Zimbabwe’s official languages⁷⁸.

COMPENSATING VICTIMS OF TRAFFICKING

Compensation is payment of damages, or any other act that a court orders to be done by a person who has caused injury to another⁷⁹. Compensation can be regarded as payment or reparation for injury or harm. Restitution can be regarded as a form of payment or action taken to restore the victim to the position he or she would have been but for the victimization⁸⁰.

Affording victims of trafficking compensation for their pain and suffering has two dimensions. It gives them financial relief as they are usually impoverished because of the trafficking experience. It also carries a symbolic value. At a societal level, awarding compensation acknowledges that trafficking is a crime. At an individual level, the victim feels society now acknowledges out in the open their individual suffering. In addition, compensation can constitute a first step towards overcoming trauma inflicted and abuse suffered. At a practical level, compensation can assist victims to rebuild their lives. At a retributive level, compensation paid by traffickers can constitute a form of punishment and deter other traffickers.⁸¹

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- d) the feasibility of taking the measure concerned; and
 - e) any views expressed by the parties to the proceedings; and
 - f) the interests of justice

⁷⁷ Each State Party shall ensure that its domestic legal or administrative system contains measures that provide to victims of trafficking in persons, in appropriate cases:Assistance to enable their views and concerns to be presented and considered at appropriate stages of criminal proceedings against offenders, in a manner not prejudicial to the rights of the defence. (art. 6, para. 2);

⁷⁸ Ibid; 319F and 319G of the CP & E ACT; The following languages, namely Chewa, Chibarwe, English, Kalanga, Koisian, Nambya, Ndau, Ndebele, Shangani, Shona, sign language, Sotho, Tonga, Tswana, Venda and Xhosa, are the officially recognised languages of Zimbabwe. S6 of Constitution of Zimbabwe Amendment (No. 20) Act, 2013.

⁷⁹ Black’s law Dictionary 9th edition

⁸⁰ See Anti-human trafficking manual for criminal justice practitioners module 13, UNITED NATIONS OFFICE ON DRUGS AND CRIME Vienna

⁸¹ Trafficking in Human Beings Human rights and trans-national criminal law, developments in law and practices ,Kristina Touzenis, UNESCO 2010

COMPENSATION UNDER INTERNATIONAL LAW

Article 25(2) of the Convention obliges State Parties to establish appropriate procedures to provide access to compensation and restitution for victims and requires that this right be communicated to victims. Article 14 of the UNTOC Convention requires State Parties to consider returning confiscated proceeds of crime or property to a requesting State Party so that it can give compensation to victims. Article 6(6) of the UN Trafficking Protocol obliges State Parties to ensure that its domestic legal system contains measures that offer victims the possibility of obtaining compensation for damages suffered. The Protocol does not prescribe potential sources of victim compensation⁸²

COMPENSATION UNDER THE ACT

Section (3) of the act provides that: Subject to Part XIX (“Compensation and restitution”) of the Criminal Procedure and Evidence Act [Chapter 9:07], a court, which has convicted any trafficker, shall forthwith order the trafficker to compensate the victim for any—

- (a) Damage to, or loss of, property, including money, suffered by the victim; or
- (b) Physical, psychological or other injury suffered by the victim, and any medical expenses incurred in connection therewith; or
- (c) Loss of income or support suffered by the victim.

For the provision to benefit victims, it will be essential to give victims access to information and the resources necessary to seek compensation. Without this information victims will not benefit from this provision, it is therefore essential that victims of trafficking be provided with information on the remedies available to them.

Prosecution and investigation of where the proceeds of trafficker’s profits go and confiscation of those profits would help in allowing the victim access to real compensation⁸³. Not doing so would risk having victim compensation available only as a theoretical remedy. The GOZ should therefore consider linking victim compensation with the confiscation of the proceeds of trafficking in persons, and not merely as provided in terms of s 6 of the Act, which provides for forfeiture of trafficking proceeds and property. The Special Rapporteur has noted that linking asset seizure to victim support is in line with a rights-based approach to human trafficking. Recovered assets can be a key source of funds when providing victims with compensation⁸⁴.

In Zimbabwe, the prerogative of the state to pursue a criminal prosecution does not affect the civil remedies available to a person who has been wronged⁸⁵. Therefore, it is possible for trafficking victims in addition of the

⁸² *ibid*

⁸³ *Ibid* p 79

⁸⁴ A/HRC/20/18 p20

⁸⁵ An Introduction of law, Lovemore Madhuku, 2010 Weaver Press.



criminal justice, to pursue civil remedies. Victims can claim damages for any of the following:⁸⁶

- Abuse and offences committed against the individual (i.e. physical or mental harm including pain, suffering and emotional distress);
- Money taken from the individual which he or she earned legitimately;
- Money taken from the individual which was acquired in the course of activities that he or she was instructed to carry out and worked to earn, even if the activities were not legal (e.g. through prostitution);
- Unpaid or underpaid wages or their equivalent in terms of the time which the individual was obliged to spend earning money for a trafficker or exploiter;
- Earnings or other property to which the individual was entitled but that were held by the traffickers or exploiters and not given back when the individual left their control;
- Lost opportunities, including education and loss of earnings potential;
- Harm to the reputation or dignity of the individual, including harm that is likely to continue in the future (e.g. as a result of stigmatisation);
- Medical and professional services related to physical, psychiatric or psychological care, including psycho-social counselling;
- Physical and occupational therapy or rehabilitation;
- Costs of transportation and residential care or temporary housing;

THE PROVISION OF SERVICES TO VICTIMS OF TRAFFICKING

To address the many problems that the victims of trafficking face during the trafficking process, services have to be offered to victims of trafficking. The responsibility to protect and assist the victims of victims of trafficking lies with the state.⁸⁷ Services have to be tailor-made for the victims of trafficking. Victims of trafficking go through traumatic experiences including physical abuse, emotional trauma, health problems such as HIV/AIDS, the effects of forced and unsafe abortions, social isolation, drug and alcohol abuse, injuries from assault and post-traumatic stress disorders. These victims also experience intense feelings such as guilt, fear, anger, shame, betrayal, depression, low self-esteem, disorientation and lack of trust in others, including those offering assistance⁸⁸.

⁸⁶ UNICEF, Reference Guide on Protecting the Rights of Child Victims of Trafficking in Europe, 2006, p. 101

⁸⁷ Article 6 of the Protocol.

⁸⁸ Ibid DP 111 p179

The UN Trafficking Protocol encourages State parties to provide for the physical, psychological and social recovery of victims of trafficking in persons.⁸⁹ The UN Trafficking Protocol also encourages states to consider working with non-governmental organizations and other elements of civil society were appropriate in providing these services⁹⁰

COMPARATIVE OVERVIEW

In many countries, NGOs and Governments work together to provide services to victims of trafficking⁹¹. In Gabon for example, four centres provide services to victims of trafficking. The government funds one centre completely, while the other three centres get funding partly from the government and through financial and donations from well-wishers, as well as the provision of service support, including social workers⁹². The government of the People's Republic of China funds programmes operated by an NGO to reintegrate trafficked women into their local communities and to relieve the stigma attached to victims of trafficking⁹³.

In Kosovo, the government supported nine shelters that accommodated trafficking victims, including a government-run high security trafficking-specific shelter, a specialized shelter for children, and a shelter dedicated to the long-term rehabilitation of trafficking victims. Through these shelters, the government provided care such as housing, medical care, clothing, counselling, legal and educational assistance. The government provided funding for 50 per cent of all direct services to all trafficking victims at all shelters, but not all operational costs of the NGO-run shelters⁹⁴.

Some countries have developed National Referral Mechanism (NRM) to provide effective ways to refer victims of trafficking to services. A National Referral System is a co-operative framework through which state actors fulfil their obligations to protect and promote the human rights of trafficked persons, co-ordinating their efforts in a strategic partnership with civil society.⁹⁵ The basic aims of an NRM are to ensure that the human rights of

⁸⁹ Article 3 of the UN Trafficking Protocol

⁹⁰ The protocol encourages states to consider giving the provision of Appropriate housing, Counselling and information, in particular as regards their legal rights, in a language that the victims of trafficking in persons can understand; Medical, psychological and material assistance; and Employment, educational and training opportunities. (Article 6 (3) of the UN Trafficking Protocol)

⁹¹ These include South Africa, Gabon, Czech Republic and China to mention but a few.

⁹² US STATE DEPARTMENT, Trafficking in Persons Report JUNE 2012

⁹³ US Department of State Trafficking in Persons Report June 2004, p.92; State Trafficking in Persons Report June 2005, p. 84

⁹⁴ US Department of State Trafficking in Persons Report JUNE 2012,

⁹⁵ NATIONAL REFERRAL MECHANISMS Joining Efforts to Protect the Rights of Trafficked Persons A Practical Handbook, OSCE/ODIHR, 2004



trafficked persons are respected and to provide an effective way to refer victims of trafficking to services⁹⁶.

In the Czech Republic the NRM is a protection and support system that includes identification; repatriation and social inclusion, including residence regimes; and victim/witness protection. The main tasks of the NRM in the Czech Republic are identification and the appropriate treatment of trafficked persons; as well as the establishment of officially binding mechanisms designed to harmonise the assistance of trafficked persons with the investigation and prosecution efforts. The Ministry of Interior co-operates, among others, with other Ministries, Police, NGOs, IOM, and Refugee Facilities.⁹⁷ In Portugal the NRM is done in three steps, the signalisation phase (strong suspicion that the person has been trafficked); the identification phase (person is officially identified as a trafficked person); the integration phase (in the home country or the destination country). In South Africa, the Prevention and Combating Act, 2013 provides for the accreditation of service providers to cater for the needs of victims of trafficking; the Act further provides for the referral to these accredited originations victims identified by the police⁹⁸

PROVISION FOR SERVICES UNDER THE ACT

Section 8 of the Act provides for the setup of Centres for victims. In terms of the Act, the centres should have staff consisting of appropriately trained personnel (social workers or qualified persons).⁹⁹ The Act also provides for the provision of services to victims of trafficking only by the GOZ . It is provided that the centres should be constructed and organised that (except under conditions of monitored supervision) children are segregated from adults, and women from men, with adequate and appropriate provision being made for each such group.¹⁰⁰

Victims of trafficking often face retaliation from their traffickers for seeking help or for helping authorities in prosecuting the traffickers; so in terms of the Act, the protection of victims from any harm by their traffickers or alleged traffickers is to be given by the Police.¹⁰¹ Importantly, the Act provides in mandatory terms for the provision of counselling to victims, it further provides the provision of rehabilitation services to victims, the reintegration of

⁹⁶ Ibid p 15

⁹⁷ Study on Post-Trafficking Experiences in the Czech Republic, Hungary, Italy and Portugal , Department for Equal Opportunities – Presidency of the Council of Ministers, Italy International Centre for Migration Policy Development (ICMPD) 2010

⁹⁸ Section 24 and Section 19 (5) (b) of the Prevention and Combating of Trafficking in Persons Act, 2013

⁹⁹ s 8 (2) (a)

¹⁰⁰ s 8 (2) (b)

¹⁰¹ “Those who man the centres for victims will be assisted by the police as far as securing the safety for victims from harm by traffickers is concerned” second reading speech on trafficking in persons BILL (H. B. 5, 2014) by the Deputy Minister of Home Affairs (MR. ZIYAMBI) May 14 2014

adult victims into their families and communities of reception, care, development of children and adult victims¹⁰². The Act also provides that in the case of child victims, the child's best interests are paramount in the rendering of any assistance to them¹⁰³

The Act further provides that for the assessment of victims when the victims are admitted to a centre for victims of trafficking. The provisions of s 8 meet the immediate needs of victims of trafficking by providing victims with physical safety and health services. It will be critical to provide adequate funding to the centres.

RECOMMENDATIONS ON THE PROVISION OF SERVICES

To enhance the provision of services to victims of trafficking, the GoZ should consider enhancing the provision of services to victims by partnership with civil society. In addition to the services, the GOZ intends to provide, it should consider working formally with civil society in providing services. Partnerships with civil society do not take away state obligations towards victims of trafficking; they are complimentary to government efforts. Such partnerships can play an important role in helping the governments fulfil its obligations to protect persons. The GoZ can do this by establishing a National Referral Mechanism, which uses the existing national and local infrastructure and different stakeholders should be identified, their potential contribution assessed, and strategic partnerships created.¹⁰⁴

POLICY FRAMEWORK UNDER THE ACT

Section 9 of the act provides for the establishment and functions of the Anti-trafficking Inter-Ministerial Committee. This committee has the primary responsibility of formulating an anti-trafficking policy and to monitor and evaluate the implementation of that policy. The committee has a mandate to formulate a national plan of action against trafficking in persons, to liaise with appropriate Government agencies to promote the rehabilitation and reintegration of victims, to take note of and implement appropriate measures to adopt or comply with international and regional developments and standards in the prevention and combating of trafficking in persons.

CONCLUSIONS

The ratification of the UN Trafficking Protocol and the enactment of the Combating Trafficking in Persons Act is a most welcome move taken by the GoZ, albeit , one which is long overdue. The GoZ ratified the UN Trafficking Protocol more than ten years after it came into force and enacted the legislation criminalizing trafficking. However, it is hoped this signals that the

¹⁰² s 8 (2) (d)

¹⁰³ S 8 (3)

¹⁰⁴ NATIONAL REFERRAL MECHANISMS Joining Efforts to Protect the Rights of Trafficked Persons A Practical Handbook, OSCE/ODIHR 2004 p105



GoZ is now prioritizing the fight against this heinous crime. It is also hoped that the GoZ will prioritize the fight against trafficking in persons. The Government of Zimbabwe now has the necessary tools at its disposal to begin the fight against trafficking in persons. While the promulgation of the Act is a welcome event, it has been shown in this review that major gaps exist in the legal framework created by the Act; most notably on victim identification and on the provision of services to victims. The GoZ should reconsider its position on these issues. That opportunity will arise when the GoZ creates and implements the national plan of action. Importantly, the government should consult and work with civil society in the fight against this heinous crime.

TREAT OR TRICK – THE IMPACT OF THE ADMINISTRATION OF ESTATES AMENDMENT ACT NUMBER 6 OF 1996 ON WOMEN’S PROPERTY AND INHERITANCE RIGHTS IN ZIMBABWE

Slyvia Chirawu*

ABSTRACT

The objective of this paper is to provide a reflection of whether or not the Administration of Estates Amendment Act Number 6 of 1997 has achieved its stated aim, that of protecting women and children from property grabbing and the need to ensure that they do not suffer undue hardship at the death of a spouse and a breadwinner. This objective becomes more significant given the high death rate due to HIV/AIDS in Zimbabwe. Whilst it remains to be seen how far the new Constitution will result in real gender equality, concerns still lie with property and inheritance laws of Zimbabwe that despite some progressive laws, challenges are still found in the implementation and interpretation

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INTRODUCTION

On the 16th of March 2013, over three-million Zimbabweans voted overwhelmingly in favour of a new Constitution. The Constitution is underpinned by the values and principles of gender equality.¹ Whilst it remains to be seen how far the new Constitution will result in real gender equality, concerns still lie with property and inheritance laws of Zimbabwe that despite some progressive laws, challenges are still found in the implementation and interpretation. The new Constitution states that the law to be administered by the courts of Zimbabwe is the law that was in force on the effective date.² This essentially means that the law as set out in the Lancaster House constitution remains in force as follows;

*" Subject to the provisions of any law for the time being in force in Zimbabwe relating to the application of customary law, the law to be administered by the Supreme Court , the High Court and any other courts in Zimbabwe subordinate to the High Court shall be the law in force in the Colony of the Cape of Good Hope on the 10th of June 1891, as modified by subsequent legislation having in Zimbabwe the force of law."*³

Essentially customary and general law will continue to apply side by side. In 1997, the Zimbabwean legislature passed the Administration of Estates Amendment Act Number 6 of 1997 (the act) that would apply to estates of persons who die on or after the 1st of November 1997. The act presented a substantial departure from the then existing laws as it is premised on the fact that the major beneficiaries of a deceased estate are the surviving spouse and children, with the former inheriting immovable property which hitherto had been going to mostly the eldest son. However the act has not been without critics and challenges but in terms of creating equality, the intention of the legislature was to protect women and children. This was succinctly stated by the Honourable Mr Justice Chiweshe as follows,

*" In reading the legislation governing deceased estates in so far as the rights of surviving spouses is concerned, it is important to bear in mind the intention of the legislature bearing in mind that this branch of law has in the last decade been the subject of much debate and controversy.....The chief driver of this process has been the desire by the legislature to protect widows and minor children against the growing practice by relatives of deceased persons to plunder matrimonial property acquired by spouses during the subsistence of the marriage"*⁴

¹ Section 3 (g)

² Section 92

³ Section 89

⁴ Chimhowa and another vs. Chimhowa and others HH-183-12 at page 4 and 5

The amendment also introduced a new section to the Deceased Estates Succession Act⁵ under general law which states as follows;

" The surviving spouse of every person who dies wholly or partially intestate shall be entitled to receive from the free residue of the estate the house or other domestic premises in which the surviving spouse, as the case maybe lived immediately before the person's death".⁶

Given this stated desire, the major question remains whether or not the Act is or has achieved its stated objective.

The objective of this paper therefore is to provide a reflection of whether or not the amendment has achieved its stated aim, that of protecting women and children from property grabbing and the need to ensure that they do not suffer undue hardship at the death of a spouse and a breadwinner. This objective becomes more significant given the high death rate due to HIV/AIDS in Zimbabwe.

This paper is divided into five parts. Part one will put women's rights in Zimbabwe before and after 1980 into context and also outline the concept of legal pluralism. Part two will give demographic and socio-economic characteristics of Zimbabwe especially based on the ZDHS. Part three will discuss women's inheritance rights in Zimbabwe prior to the passing of the Administration of Estates Amendment Act Number 6 of 1997 and also give a framework of the challenges caused by the old law of inheritance. Part four will discuss the drivers of the process of change in the law; what influenced the change and the significance of the new law. Part five will look at the impact of the new law in the context of HIV/AIDS and conclude by stating that the right to health is a must for every Zimbabwean.

PART 1

PUTTING WOMEN'S RIGHTS IN ZIMBABWE INTO CONTEXT

THE LEGAL SITUATION OF WOMEN IN ZIMBABWE BEFORE 1980 AND LEGAL PLURALISM

Welshman Ncube notes that;

"The colonization of Africa by European powers had profound implications for African law and African legal institutions. African legal orders were completely disrupted and replaced by European legal systems. In all areas affecting state power and security, the colonial governments imposed their legal systems and law. Accordingly, constitutional laws and criminal laws were completely Europeanized and all peoples in

⁵ Chapter 6:02

⁶ Section 3A Prior to this, the surviving spouse had no such explicit right to inherit the immovable property



a particular country were subjected to the same foreign constitutional and criminal laws.”⁷

The effect of this was that in the private realm, customary law was permitted to operate “*except in circumstances where it ran counter to the interests of the colonial state or where it was believed to be contrary to European notions of justice and morality.*”⁸ Therefore the notion of justice was squarely based on race and determined by the colonial power. Bennett succinctly puts it as thus,

“There was also, no doubt, a desire on the part of the settlers to preserve tranquillity among a potentially hostile population and a conviction that European law was too complex to be administered by an unsophisticated people.”⁹

The race criteria was reinforced through the years by the “repugnancy test”. For instance, the Southern Rhodesia Order in Council of 1898 provided that in all civil cases between “natives”, “native law and custom” were to be applicable in so far as they were not repugnant to natural justice or morality. Subsequent legislation defined the private realm as cases of adultery, lobolo (bride price), custody, guardianship of children, the devolution otherwise than by will of movable property and marriage contracted under customary law.¹⁰ These issues are where concerns by women were found.

Although not the focus of this paper, it is also interesting to note that anecdotal evidence shows that the customary law that existed during the time of colonization and that was carried forward to independence was a distorted version of that law which existed before colonization. The distortion manifested itself in court rulings. Section 3 of the then Customary Law and Local Courts Act stated that ,

“ If a court of law entertains any doubt as to the existence or content of a rule of customary law relevant to any proceedings after having considered such submissions thereon as maybe made, and such evidence thereof maybe tendered, by or on behalf of the parties, it may, without derogation from any other lawful source which it may have recourse to, consult reported cases, text books and other sources, and may receive opinions orally or in writing, to enable it to arrive at a decision in the matter.....”¹¹.

According to WLSA research, the construction of customary law by the courts had two profoundly negative effects. It has “*firstly ... created a rigid, false and distorted version of the ‘customs’ and ‘practices’ of the people which bears but a distant relationship to the reality of peoples’ lives*”.¹²

⁷ Family law in Zimbabwe page 3.

⁸ Id

⁹ T.W Bennett, “ Conflict of laws- The application of customary law in Zimbabwe”, ICLQ Vol. 30, 1981,59

¹⁰ African Law and Tribal Courts Act of 1969

¹¹ Now section 9 of the Customary Law and Local Courts Act

¹² Inheritance in Zimbabwe: Laws, customs and practices

The creation of general rules of customary law also resulted in the rich variety of African customary law being viewed as homogenous.¹³ Colonization was accompanied by a loss of power by elders in communities. As observed by Rwezaura,

*“What the elders and other witnesses gave as evidence of customary law was a distorted and rigid version of customary law designed to express their ideas of what the law should be and not what it really was.... Their versions were greatly influenced by the elders’ anger and frustrations over their loss of political power and the challenges they were facing at the time from women and the young.”*¹⁴

Consequently the customary law that was fed into the system was that of perceived versions and not what was on the ground. In this context, “customs and tradition became a means by which the local rulers and family heads bargained with the colonial state for power in their communities.”¹⁵

The WLSA research also revealed that the spirit and letter of customary law was the preservation of the family at death of a spouse or parent.¹⁶ The 1997 amendment was therefore an attempt to go back to the customary law as it originally existed.

THE SITUATION OF WOMEN AFTER 1980

The new government in 1980 chose to maintain legal pluralism in the new Constitution through section 89 of the Lancaster House Constitution as stated above. The effect of this section was to maintain customary law and general law as operating side by side. Both systems were at par. The new government moved swiftly to put in place a choice of law criteria that was not based on race. This came in the form of the Customary Law and Primary Courts Act of 1981¹⁷ that introduced a new criterion for the application of customary law. Section 3 of this act provided as follows:

3. (1) Subject to the provisions of this section and any other enactment, unless the justice of the case otherwise requires-
(a) customary law shall be applicable in any civil case where-
(i) the parties have expressly agreed that it should apply; or
(ii) having regard to the nature of the case and surrounding circumstances, it appears that the parties have agreed it should apply; or
(iii) having regard to the nature of the case and the surrounding circumstances, it appears just and proper that it should be apply; and
(b) the general law of Zimbabwe shall be applicable in all other cases.

Surrounding circumstances have been defined as the mode of life of the parties, the subject matter of the case, the understanding by the parties of the

¹³ Id

¹⁴ Changing political uses of customary law in modern Africa (1992) unpublished

¹⁵ Id

¹⁶ See generally : Inheritance in Zimbabwe : Law, custom and practices

¹⁷ This has since been replaced by the Customary Law and local Courts Act



provisions of customary law or the general law of Zimbabwe as the case may be and the relative closeness of the case and the parties to customary or the general law of Zimbabwe.¹⁸ This seemingly neutral choice of law process is largely based on social class but it did not resolve the issue of legal pluralism. The new Constitution maintains legal pluralism through Section 192.

THE LEGAL AGE OF MAJORITY (LAMA)

LAMA became law on the 10th of December 1982. Its effect was to bestow full legal capacity on everyone in Zimbabwe upon turning 18 years. Prior to that Act, African women were perpetual minors who needed the consent of their fathers or a guardian to be able to enter into a contract or sue in the courts.

The first test for LAMA came in the *Katekwe vs. Muchabaiwa* case. This case highlighted the tensions between customary law and general law. In that case, the Supreme Court held that due to LAMA, a father of an African woman who reached the age of 18 had no *locus standi* to sue for seduction damages. Rather, it was the seduced woman herself who could sue in her own right. The then Chief Justice also stated *obiter* that an African father could no longer claim *lobola* (bride price) for a major daughter as follows;

" As I see it, what the Legal Age of Majority Act has done with regard to roora is this: The major daughter will say to her father, " Father I want to get married, You have no right to stop me. I do not require your consent because I have majority status. But if you want lobola you are free to negotiate with my prospective husband. If he agrees to pay roora that is a contract, an agreement between you and my prospective husband.....If he refuses to pay roora, I shall go ahead with my marriage"¹⁹

On the face of it, African women had been emancipated by LAMA but in reality, the *Katekwe* case highlighted the power struggle between general and customary law. Both have competing claims and it was made clear in the case that an African father still maintained the right to sue under customary law for a daughter who is seduced whilst still a minor, that is, below the age of 18 years. The challenge posed by the power struggle is made more poignant by the observation that,

"The Chief Justice's conclusion leads to the somewhat ridiculous result that an African minor's rights and duties would, at all times be governed by customary law concepts of minority while on attaining the age of majority by the general law concepts of majority. That would mean that one system of law appliesas long as a person remains a minor, and another system (the general law) takes over on attainment of majority. African minor girls on attaining the age of eighteen years would "graduate" to a large extent from the operation of customary law".²⁰

¹⁸ Section 3 (2)

¹⁹ Page 19

²⁰ Ncube: *The decision in Katekwe vs. Muchabaiwa : A critique* Vol 1 and 2 Zimbabwe Law Review 1983-4 page 226

In the infamous *Magaya vs. Magaya* case of 1999²¹ the Supreme Court held that it was not discriminatory for the court to rule that an African woman had no right to inherit property from her late father since the Constitution permitted this discrimination. Other laws that deal with the rights of women include the following:

Act and Chapter	Date of commencement
1. Administration of Estates Act Chapter 6:01	5 July 1907
2. Administration of Estates Amendment Act Number 6/1997	1 November 1997
3. Antenuptial Contracts Act Chapter 5:01	10 June 1891
4. Births and Deaths Registration Act Chapter 5:02	20 June 1986
5. Child Abduction Act Chapter 5:05	1 st June 1996
6. Children's Act Chapter 5:06	27 October 1972
7. Civil matters (Mutual Assistance) Act Chapter 8:02	1 April 1996
8. Citizenship of Zimbabwe Act Chapter 4:01	1 December 1984
9. Communal Lands Act Chapter 20:04	1 February 1983
10. Criminal Procedure and Evidence Act Chapter 9:07	1 June 1927
11. Criminal Law (Codification and Reform) Act Chapter 9:23	1 July 2007
12. Customary Law and Local Courts Act Chapter 7:05	12 February 1992 and part 11 I November 1997
13. Customary Marriages Act Chapter 5:07	1 January 1951
14. Deceased Estates Succession Act Chapter 6:02	21 June 1929 Part 11 and 10 June 1891 Part 111
15. Deceased Persons Family Maintenance Act Chapter 6:03	19 January 1979
16. Disabled Persons Act Chapter 17:01	26 June 1992
17. Domestic Violence Act Chapter 5:16 enacted in 2007	25 October 2007
18. Guardianship of Minors Act Chapter 5:08	30 June 1979
19. Interpretation Act Chapter 1:01	1 November 1962
20. Land Acquisition Act Chapter 20:10	8 May 1992
21. Labour Act Chapter 28:01	15 December 1985
22. Magistrates Court Act Chapter 7:10	1 January 1932
23. Maintenance Act Chapter 5:09	1 December 1971
24. Maintenance Orders (Facilities for enforcement) Act Chapter 5:10	22 July 1921
25. Marriage Act Chapter 5:11	1 March 1965
26. Married Persons Property Act Chapter 5:12	1 January 1929
27. Matrimonial Causes Act Chapter 5:13	17 February 1986
28. Missing Persons Act Chapter 5:14	10 November 1978
29. National Registration Act Chapter 10:17	24 September 1976
30. Prevention of Discrimination Act Chapter 8:16	29 January 1999
31. Small Claims Court Chapter 7:12	19 February 1993
32. Termination of Pregnancy Act Chapter 15:10	1 January 1978
33. War Marriages Validation Act Chapter 5:15	18 January 1985
34. Wills Act Chapter 6:06	11 December 1987
35. Wills Amendment Act Number 21/1998	1998

²¹ 1999(1) ZLR 100 (S)



It is important to note that some of the laws were enacted during the colonial era and therefore have lost touch with reality. Zimbabwe is a signatory to CEDAW, the AU Optional Protocol to the Rights of Women in Africa and the SADC Protocol on Gender and Development. There is also in place a gender policy that recognises the need to instil values of equality in all facets of life. As stated in the introduction, what remains to be seen is whether a progressive legal framework translates into real change for women's rights. At the time of writing, Zimbabwe is undergoing a process where all laws are being aligned with the provisions of the new Constitution.

PART 2

DEMOGRAPHIC AND SOCIO-ECONOMIC CHARACTERISTICS OF ZIMBABWE

Although the prevalence rate of HIV infection in Zimbabwe declined from around 34% to around 13.4% by 2011, Zimbabwe is still one of the countries worst affected by HIV/AIDS.²² By 2009, an estimated 1.1 million adults and children were living with HIV/AIDS. The principal mode of transmission is heterosexual intercourse at 92%.²³ 15% of Zimbabwean adults are infected with women constituting 18% and men 12%.²⁴ For women the peak age is between 30-34 years at 29% and for men, 45-49 years at 30%.²⁵ Eight out of 10 women and men believe that a wife is justified in asking her husband to use a condom if she knows that he has an STI.²⁶ The ZDHS also noted a correlation between marital status and HIV prevalence with high infection rates among widows at 56% and widowers at 61%.²⁷

Given the correlation between violence and HIV infection, the study revealed that 30% of women between the ages of 15-49 have experienced physical violence since the age of 15 years. The most common perpetrator of the violence is a current or former husband and partner.²⁸ 22% of women who have had sexual intercourse reported that their first sexual encounter was through force and coercion.²⁹ 27% of women have experienced sexual violence with a former spouse or partner being the most common perpetrator.³⁰ Four out of five women believe that a husband is justified in

²² ZDHS report 2010-2011 page 180.

²³ Ibid

²⁴ Ibid page 215

²⁵ Ibid

²⁶ Ibid page 189

²⁷ Ibid page 221

²⁸ Ibid page 252

²⁹ Ibid.

³⁰ Ibid

beating his wife for among other reasons, refusal to have sexual intercourse with him.³¹

The median age of first marriage for women is 19.7 years and for men it stands at 24.8 years.³² 11% of currently married women are married to men who are in a polygamous union whilst 5% of men are in a polygamous union.³³ As far as economic empowerment is concerned, 63% of women do not own a house; 27% own a house jointly with someone else; 9% of women own a house in their own right.³⁴ In terms of women's participation in politics and decision making, the most worrying factor is the fact that in 2008, the percentage of women in Parliament dropped from 34% in 2000 to 18.1%. This means therefore that there are a few women who can influence positive change in the upper echelons of power.

The most poignant factor however remains the disproportionate effect of HIV/AIDS on women with life expectancy for women standing at 47 years and 60% of Zimbabwean adults living with HIV were females. The gap for women aged between 15-24 years is even wider standing at 77%. The reasons still remain rooted in gender inequalities. Therefore, passage of any law that promotes and protects the rights of women such as the Administration of Estates Amendment Act Number 6/97 can potentially reduce the devastating effects of HIV/AIDS on women.

PART 3

WOMEN'S INHERITANCE RIGHTS IN ZIMBABWE PRIOR TO THE ADMINISTRATION OF ESTATES AMENDMENT ACT NUMBER 6/97

At independence in 1980 inheritance rights were firmly rooted in one's race as aptly stated by Professor Stewart that, "*....at independence, the right to inherit from the estate of a deceased relative to a very large extent depended on the race of the deceased*".³⁵ The immovable property forming part of an estate of a person governed by customary law would be inherited by an heir in their individual capacity through the provision of Section 7 of the then African Wills Act which provided that,

"The heir at African law of any deceased African shall succeed in his individual capacity to any immovable property or any rights attaching thereto forming part of the estate of such deceased African and not devised by will."

The concept of heir was squarely rooted in patriarchal norms as follows;

"This meant that the intestate estate of a deceased African male would go to the eldest son as his heir or in the absence of a son, to the nearest male relative of the

³¹ Ibid page 231

³² Ibid page 47

³³ Ibid

³⁴ Ibid page

³⁵ Inheritance in Zimbabwe: The quiet revolution page 8



deceased.....A surviving wife or wives had no direct access to a share in the estate and were dependant on enforcing the customary law duty of support".³⁶

General Law on the other hand favoured the rights of the surviving spouse and children. The LAMA potentially gave African women rights to claim seduction damages if they were 18 at the time of seduction. This victory of sorts also gave African women an opportunity to inherit from their father's estates but it took court intervention to interpret these rights in view of LAMA.

GAINS AND DRAW BACKS THROUGH COURT CASES

The interpretation of LAMA in relation to property and inheritance rights revealed a pattern of inconsistency and at times it even depended on who was sitting in the court at that particular time. This did not augur well for the rights of women to inherit as gains made were reversed through court cases as will be shown below.

CHIHOWA V MANGWENDE

Bursting with confidence in LAMA, the first case on inheritance to interpret the implications on the concept of heirship was the Chihowa v Mangwende case.³⁷ The Supreme Court unequivocally ruled that due to LAMA, females had acquired the same capacity to inherit as is possessed by male heirs. It was argued that there was nothing in the wording of LAMA which remotely suggests that for the purposes of inheritance, a woman can still be regarded as a perpetual minor. The words used were clear and unambiguous. Therefore a female was appointed heir to her father's estate.

VARETA V VARETA

In Vareta v Vareta³⁸, a differently constituted Supreme Court departed fundamentally from the Chihowa case reasoning without expressly stating whether or not it had overruled the former. The Supreme Court held that one attribute of customary law is generally that the eldest son is the natural heir of his deceased's father's estate. For the court, it followed that where there is a son, he is preferred to the daughter even if the daughter is the elder. The court reasoned that this aspect of customary law remained unaffected by LAMA.

MWAZOZO V MWAZOZO

In the Mwazozo v Mwazozo case,³⁹ the Supreme Court went further than the Vareta case and looked at the patrilineal nature of the Shona people and went on to state that allowing daughters to inherit would result in son-in-laws

³⁶ Ibid pages 11 and 12

³⁷ 1987(1) ZLR 138

³⁸ SC 126-90

³⁹ SC 121/94

benefiting and that women would use their wealth not for the benefit of the deceased's family but for themselves.

MASANGO V MASANGO –DUTY OF CARE

In the Masango v Masango case,⁴⁰ the Supreme Court had occasion to discuss the duty of care by the heir that an heir owes a duty of support to the dependants of a deceased person. The duty of care took the form of providing suitable alternative accommodation for the widow and her children in fulfilment of the customary law obligation of care and support. What constituted alternative accommodation was never discussed and this meant that even a home in a rural area would constitute alternative accommodation.

Therefore, the cases discussed above reveal the following factors:

1. That the gains brought about by the Chihowa case of allowing females to inherit from their late father's estate was eroded in the Vareta case.
2. That the eldest male was the preferred heir to the estate and inherited immovable property in their personal capacity.
3. That a widow had no right under customary law to inherit from her late husband's estate.
4. That the heir had a duty of care towards the widow and dependants but this was not clearly defined in terms of immovable property. As long as the heir provided "suitable" accommodation, this would suffice.

PROBLEMS WITH THE OLD LAW OF INHERITANCE UNDER CUSTOMARY LAW

Perhaps the most compelling case for reform to the old law of inheritance was the Magaya v Magaya case⁴¹ which was a clarion call for action to reform the law. The Magaya case has been well documented by WLSA Zimbabwe⁴². Coming to the Supreme Court as an appeal, the court concluded that the appointment of male heirs remained unaffected by LAMA and expressly overturned the Chihowa v Mangwende judgement. More poignantly the court ruled that even if the practice of preferring male heirs was discriminatory, it did not contravene Section 23 of the Lancaster Constitution that allowed discrimination based on sex in the distribution of a deceased person's estate under customary law.⁴³ Venia Magaya looked after her family for most of her life. She contributed to the acquisition of her parent's house and took comfort in her father's words that she would get the house upon his death due to her

⁴⁰ SC 66-86

⁴¹ 1999 (1) ZLR 100

⁴² See generally Venia Magaya's sacrifice: A case of custom gone awry

⁴³ This particular reference to a deceased's person estate under customary law has since been repealed but the effect of Section 23 remains the same in that it allows discrimination in matters of personal law.



contribution. At the then Community Court, Venia was appointed heir to her late father's estate. This appointment was set aside on appeal to the then District Court and instead, Nakayi, a half –brother who had made no contribution to the acquisition of the property was appointed heir. Nakayi proceeded to sell the house leaving Venia homeless and heartbroken.⁴⁴The Supreme Court judgment was the last death knell for Venia who shortly thereafter fell sick and passed on.

Venia Magaya's case was heard in the Supreme Court in 1999, two years after the passing of the Administration of Estates Amendment Act but the reason why the law was not applied in that case was because the new act applies to estates of persons who die on or after the 1st of November 1997. The Magaya case is however a clear illustration of why the law needed to change to protect women and children from a patriarchal system that misplaced trust on male heirs.

The other major reason for change was that the WLSA research on inheritance and anecdotal evidence suggested that male heirs upon inheriting immovable property in their own right would swiftly proceed to sell the house. The only legal requirement was that they provide alternative accommodation. The issue was not about the quality of the accommodation but the very fact of providing such. This could mean that dependants and the surviving wife could be moved from an urban area where the children could access schools, health institutions and other amenities much easier to an area that was not yet fully developed.⁴⁵

PART 4

DRIVERS OF CHANGE OF THE LAW OF INHERITANCE

In 1991 -1992, WLSA Zimbabwe conducted research on inheritance in Zimbabwe.⁴⁶The research was influenced in part by the need to gather enough views of Zimbabwean society due to the lack of a common position or at the very least a correct position of the customary law of inheritance. In 1987, a Succession Bill had been drafted but it was not pushed through due to divergent views and therefore research was necessary to establish current laws, practices and possible solutions.⁴⁷More importantly,

“Media reports gave graphic tales on the plight of women and children on the death of a husband. Women themselves approached Government departments and NGOs for assistance in protecting what they perceived as their rights, on the death of their husbands. It became apparent that there was conflict between the widows expectations, those of in-laws and those of children, especially where there were step children. It seemed that when a

⁴⁴ Op Cit

⁴⁵ See note 38 supra

⁴⁶ See generally, Inheritance in Zimbabwe: Laws, customs and practices

⁴⁷ Ibid page 3

person died, especially a male, the in-laws descended on the surviving spouse and took all property and sometimes threw the widow out of her home".⁴⁸

The same realisation on why the legislature brought changes to the law as recognised by Justice Chiweshe in the Chihowa case therefore drove WLSA Zimbabwe to conduct the research.

The WLSA research provided significant data on the inheritance practices and customs of two of the major groupings in Zimbabwe- the Ndebele and the Shona. The study also revealed that,

".....the customary law as recorded in the books and as applied by the superior courts is more myth than reality, myths that were self-fuelled and internally reconfirmed by the judicial processes and by academic writers. In this context, it would appear that most of what is today presented as customary law in the field of succession is a distorted and constructed version of custom which bears little resemblance to the practice of the people".⁴⁹

In other words, what the research showed was that the overriding consideration in customary practices of inheritance was the preservation of the estate through an eldest male child but also ensuring that the widow was well looked after and not chased away from her husband's home. Armed with empirical evidence, the legislature passed the Administration of Estates Amendment Act Number 6/97 making the surviving spouse and the children the major beneficiaries of a deceased estate under customary law.

CURRENT CUSTOMARY LAW OF INHERITANCE – TREAT OR TRICK?

The amendment act introduced radical changes to the customary law of inheritance. Unlike the heir under the old law who was male and inherited immovable property in their personal capacity, the heir under the new law inherits the deceased persons' name and tsvimbo/intonga⁵⁰ and any traditional articles which under customary law, pass on to his heir on the person's death.⁵¹ The act specifically recognises an unregistered customary law union as a full marriage for purposes of inheritance.⁵² Under ordinary circumstances a man is not allowed to marry polygamously and monogamously. However one of the challenges that Zimbabwe faces due to dualism on marriage laws is the fact that some men marry under customary law and proceed to marry another wife under general law. If the letter of the law is followed, that means the customary law wife is not recognised since this is considered as bigamy. The act recognises that if a man is married under an unregistered customary law

⁴⁸ Ibid

⁴⁹ Ibid page 63

⁵⁰ Knobkerrie

⁵¹ Section 68C

⁵² An unregistered customary law union meets all the requirements of a customary law union save for registration. It is given limited recognition in terms of Section 3 of the Customary Marriages Act Chapter 5:07.



union and without dissolving it he goes on to marry another wife in terms of general law, both shall be regarded as valid marriages for purposes of inheritance.⁵³The inheritance pattern is guided by the following:⁵⁴

1. If the deceased person is male and has two or more wives and had one or more children; one-third of his net estate is divided between the surviving wives in the proportions, two shares to the first or senior wife and one third share to the second or other wives. This is based on the assumption that the senior or first wife was present in the deceased's life for much longer and therefore contributed more. The remaining two-thirds are shared between his child or children and in the event that any child predeceased him and left children, they inherit their parent's share.⁵⁵This excludes household goods and contents and immovable property.
2. If the deceased was male and is survived by two or more wives, regardless of whether there are any children or not, in addition to sharing the one third, the wives get the following: if the wives live in separate houses, each wife gets ownership or if that is impracticable, a usufruct over the house that each wife lived in at the time of the deceased's death together with all household goods and contents. If the wives lived together in one house at the time of death, they should get joint ownership of or if that is impracticable, a joint usufruct over the house and household goods and contents in that house.
3. Where the deceased person is survived by one spouse and one or more children, the surviving spouse will get ownership of or if that is impracticable a usufruct over the house which the spouse lived at the time of the deceased's person's death, together with all household goods in the house and a share in the remainder of the net estate.
4. If the deceased person was a woman whose husband at the time of her death had more than one wife, and she is survived by her husband and had one or more children, then one-third of her net estate goes to the surviving husband; the remainder of her net estate devolves around her child or children in equal shares and any descendants per stirpes.⁵⁶
5. If the deceased is not survived by spouse or child, the net estate goes to the deceased's surviving parents, brothers and sisters in equal shares.
6. If the deceased person is survived by one spouse but no children, the surviving spouse gets ownership of or if that is impracticable a usufruct over the house in which the spouse lived in at the time of

⁵³ Section 68 (3)

⁵⁴ Section 68 F

⁵⁵ This is known as *per stirpes* inheritance

⁵⁶ See note 37

deceased's death together with all household goods and contents; half of the remainder of the estate and the balance is shared by the deceased's surviving parents; brothers and sisters if any in equal shares.

7. If the deceased person is not survived by a spouse but had one or more children, the net estate goes to her or his child or children in equal shares and descendants *per stirpes*.

SIGNIFICANCE OF THE NEW LAW OF INHERITANCE FOR WOMEN'S INHERITANCE RIGHTS

The new law of inheritance as confirmed by the WLSA research is premised on preserving the family and ensuring that widows are not evicted by greedy and unscrupulous relatives. The new law though not perfect is a significant departure from the old law of inheritance that awarded immovable property to a male heir who more often than not proceeded to sell the property and provide mediocre alternative accommodation to the dependants of the deceased person under the guise of providing suitable alternative accommodation. In reality, the new law awards ownership of immovable property or if that is not practical, a usufruct which means that a surviving spouse becomes the new owner or is given the right to stay on the property.

But challenges still abound and if not addressed, they will derail progress on inheritance and property rights in Zimbabwe. The new law presents significant challenges in relation to certain issues such as proving the existence of an unregistered customary law union and the requirement that a spouse must have been physically present at the house at the time of death. Taken to its logical conclusion, it means that a spouse who for one reason or the other was not present would not be entitled to inherit. The High Court has also ruled in the Chimhova⁵⁷ case that the surviving spouse cannot inherit a house to which she made no contribution as this was not the intention of the legislature. In that case dealing with Section 3A of the Deceased Estates Succession Act which also gives ownership of immovable property to a surviving spouse (and is an equivalent to the Administration of Estates Act inheritance under customary law where there is only one wife) the surviving spouse was given a life time usufruct. It is worth noting that Section 3A does not have a clause on impracticability or usufruct.

In the case of *Ndoro v Ndoro and Another*,⁵⁸ there was a dispute as to whether or not the surviving wife was residing at the matrimonial home at the time of death. The surviving wife was employed in another town and hence when her husband passed away, she was not physically present at the matrimonial home at that time. The court ruled that the applicant was not living in the house immediately before the death of her husband and therefore she fell outside the

⁵⁷ HH – 183-12

⁵⁸ HH-198-12



ambit of Section 3A of the Deceased Estates Succession Act. She was therefore only entitled to a child's share. The Ndoro case demonstrates the challenges posed by lack of clarity in the law. If it is taken to its logical conclusion it may mean that every spouse who did not live in the house immediately before death of the other spouse for whatever reason will only get a child's share. It is the writer's submission that this could not possibly have been the intention of the legislature. It would mean that if a spouse stays in another area for work purposes, they would be taken as having abandoned the matrimonial home.⁵⁹

PART 5

IMPACT OF THE NEW LAW OF INHERITANCE ON WOMEN'S PROPERTY AND INHERITANCE RIGHTS IN THE CONTEXT OF HIV/AIDS

In March and April 2011, WLSA Zimbabwe conducted a baseline study on strengthening the legal framework to enhance women's access to property and inheritance rights in the context of HIV/AIDS. The study revealed the following; property grabbing cases were high among women who are HIV positive as compared to those who are negative. 42% of the respondents who faced property grabbing were women who were HIV positive; 27% were women who are HIV negative; 15% were women who do not know their status and 16% were men. The link therefore between HIV/AIDS and the law remains poignant.

Lack of access to economic resources remains a key driver to infection with HIV. In its research on gender, HIV/AIDS and the law from a rights based approach.⁶⁰ Most women have turned to sex work after losing all they had worked for when their husband died and they were disowned by the husband's family. They resort to unprotected sex since it "pays" more. Put simply, the economic hardships that they endure makes them engage in transactional sex. Although some have tried to engage in income generating projects (others even successfully), others are lured back into sex work. The situation has been worsened by the economic down turn in Zimbabwe beginning in 1998. By engaging in unprotected sex, they increase the risk of infection or re-infection with HIV. Therefore, the new law if applied in context will mean that widows are protected not only from property grabbing through the provisions of the Deceased Persons Family Maintenance Act⁶¹ but through ensuring that the wealth that a family works for remains within the family. Thus widows are given economic choices and options.

⁵⁹ WLSA has filed a case before the High Court seeking a liberal interpretation of Section 3A as a too strict interpretation leads to injustice.

⁶⁰ See generally WLSA: *Challenging the status quo: Gender, HIV/AIDS and the law in Zimbabwe; A rights based approach*

⁶¹ Chapter 6:03

CONCLUSION

HIV is no longer just a medical condition but affects a person's socio-economic wellbeing. By putting in place progressive laws on property and inheritance rights, it ensures that women who are disproportionately affected by HIV/AIDS have access to justice which will in turn protect their socio-economic rights. As the adage goes, rights are indivisible and this equally applies to women infected with HIV/AIDS. This is buoyed by the new Constitution which in section 76 recognizes that every Zimbabwean has the right to have access to basic health –care services.



HEADS OR TAILS? STILL PART OF THE SAME COIN: ACCOUNTABILITY, PARLIAMENT, THE EXECUTIVE AND THE JUDICIARY

Tafara Goro^{*}

ABSTRACT

“Accountability” is one of the most popular concepts dragged through centuries in the name of national and public interest. There has been a fair enough literature globally about public accountability, and accountability of governments¹. There has also been some discussion of judicial accountability. Zimbabwe is at present engulfed in a much acute debate on accountability features not only as a political debate, but also in public comment upon the conduct of the executive government and of Parliament. Accountability does not have a precise meaning. The Zimbabwean Constitution does not define what is meant by accountability notwithstanding referring to it more than 10 times. Among the many of its founding values and principles, Section 3 (2) (g) enshrines the notion of transparency, justice, accountability and responsiveness. This article seeks to survey the meaning of accountability in light of the new constitutional dispensation. The most important call of this article is that all administrative authorities, no matter how high-ranking, are obliged to obey the law and be accountable for their decisions.

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INTRODUCTION

The notion of accountability is a historical phenomenon traditionally understood within the framework of judicial review of decisions and conduct of the executive government as founded upon the common law doctrine of the rule of law and separation of powers. Although one cannot escape the point that the expression “rule of law” is used in many different senses¹, for the purposes of this article, a working definition will be the legal validity of decisions of the executive government which must conform to the law as administered by the courts. This is to be understood as the utmost and fundamental principle of our system of government. As already alluded to, the fact that the rule of law is still invoked as the foundation of judicial review has not relegated the notion of accountability as a pivot and a discourse on which our system of government rests. Accountability has attracted debate about the courts and their relationship to the executive government. Some scholars and analysts argue that judicial review is now often described as one of the many processes by which the executive government is held accountable for its actions.

This misconception has culminated in complaints that the courts, while unaccountable, seek to make the executive government accountable. This has instigated debate on the viability of judicial review with three main theories of judicial review taking centre stage. These have been the green light, red and amber theories. However, a discussion of how these theories have contributed to a deep understanding of the role of courts as far as accountability of the Executive is concerned is a broader subject in itself which would require a separate study. There is however some misunderstanding about this notion. Scholars would contend that courts exercise the power of judicial review in a manner that conflicts with the power and authority of the executive government as an elected government accountable to the people.² As such, they argue that judicial review goes a long way in defeating the essence of the doctrine of separation of powers under the cloak of legality, reasonability and the rule of law.

Within our municipal context, Section 62 of the Constitution enshrines the right to access of information. From the above provision, *every Zimbabwean citizen or permanent resident, including juristic persons and the Zimbabwean media, has the right of access to any information held by the state or by any*

¹ S Bottomley and S Parker, *Law in Context* (2nd ed 1997) at 46.

² T Ison, “The Sovereignty of the Judiciary” (1985) 10 *Adel L R* 1



institution or agency of government at every level, in so far as the information is required in the interests of public accountability. This is a significant right that the new constitutional dispensation accords to Zimbabwean citizens, permanent residents and the media as far as access to information needed to ensure public accountability is concerned. The conclusion reached in this article is premised upon this indispensable right that all administrative authorities, no matter how high-ranking, are obliged to obey the law.

ACCOUNTABILITY

Most of the debates about accountability are actuated by the different processes and meanings of accountability. There is often a silent assumption that only certain processes of accountability, such as loss of office, represent true accountability. This is not the case. As already highlighted, the scholars argue that the fundamental essence of accountability and the underlying idea of accountability is that of giving an account or an explanation, and that it is necessary to recognize that the process of accountability can vary widely.

If understood in this way, then all the three arms of the state, by virtue of the impact of their decisions on the citizenry, should be held accountable in accordance with the underlining founding values and principles of the Constitution. This is mostly derived from the provisions of Section 194 of Constitution providing for basic principles governing public administration. This provision entrenches one of the fundamental duties of public administrators. The duties enumerated in this provision are clear enough. However much of the controversies surrounding the notion of accountability relates to the form or process of accountability, as that term is used in debates. This has been seen to vary widely. Scholars articulate a position that the process of accountability ranges from merely being subject to comment or criticism right through to loss of office, to personal liability for damage caused by a poor decision, and to prosecution for criminal offences. In light of this, the diversity of views on this subject reflects that the notion of accountability lacks any precise clarity. It is rather embroiled in skepticism and uncertainty. It is at this juncture that one will briefly address the notion of accountability with respect to the three arms of government.

THE EXECUTIVE

The notion of Executive accountability remains at the centre of judicial review as understood globally. Eminent administrative law jurists agree that the rationale underpinning judicial review is the need to ensure that it checks and balances Executive powers within the framework of the rule of law, legality and separation of powers. This paper will therefore offer a general understanding of public power. First, public power would connote the powers conferred by statute and second, under the common law this refers to the

power that is exercised in the public interest. The crux of this article will therefore turn on the analysis of reviewable decisions as they have an element of public interest. The mandate of the Executive arm of the government as enshrined in the Constitution is to put the laws of the land into action. Because of this mandate shouldered upon the Executive arm, it is proper for one to briefly discuss reviewable decisions because of the scope of the subject.

For the purposes of this discussion, the Executive refers to Ministers and public servants or government employees. Ministers and members responsible for public administration are supposed to be accountable to the electorate³. However in our jurisdiction, Ministers are directly accountable to the President⁴ and to Parliament⁵. They are called upon to explain their decisions, and can lose their parliamentary seat or their ministerial position if they fail, refuse or neglect to do so⁶. But this form of accountability cannot really be described as accountability for reviewable decisions. In one's opinion, the link is too distant. This process of accountability is, in reality, not linked to the whole process of administrative decision making.

Ministers can be called upon to explain and account for their decisions. There is however no law providing for ministerial responsibility for reviewable decisions made by public servants⁷. Even at the level of reviewable decisions made by Ministers, the control that the executive government exerts over Parliament means that, in the ordinary sense, there is not effective accountability to Parliament for particular reviewable decisions.

Whether or not an adverse consequence will definitely flow from the making of a reviewable decision by a Minister, or by a Minister's Department, much depends upon political aspects of the decision, and the process of parliamentary accountability which is a highly political one. One would align oneself with scholars who argue that this is not an effective form of accountability for decision making. A similar comment applies to the accountability of an individual Minister to the President who leads the Government of which the Minister is a part and has sworn allegiance to.

In Zimbabwe, public servants are accountable to a departmental head, and sometimes to a Minister, for reviewable decisions that they make. But in a

³ Section 194 (1) (f) and (h) of the Constituion.

⁴ Section 107 of the Constitution.

⁵ Section 199 (2) and (3) of the Constitution.

⁶ Section 107 (2) of the Constitution.

⁷ In *R v Toohey; Ex Parte Northern Land Council* (1981) 151 CLR 170 at 222 Mason J noted that decline of the doctrine of ministerial responsibility underpins the comprehensive system of judicial review of administrative action which now prevails in Australia.



system in which most public servants can be punished or dismissed only for cause, erroneous reviewable decisions do not lead to sanctions against the decision-maker, unless the decision involves misconduct as distinct from mere error. Therefore, accountability involving loss of office or some formal punishment has only a slender link to decision making by Ministers and by public servants. To treat the executive government as accountable for the making of reviewable decisions, by a process involving loss of office is a dangerous route to take.

Experience has brought to light the fact that neither Ministers nor public servants are usually required to submit their decision making processes to contemporaneous public scrutiny. This aspect is critical in as far as participatory democracy is concerned in a constitutional democracy. However, this does not mean that there is a total absence of public scrutiny but in many circumstances where decisions to be made are susceptible to ignite public attention there can be contemporaneous comment upon a decision that is being made or is anticipated. That comment may take place in Parliament, in the media or elsewhere. This has since been seen in various Parliamentary sessions held under the pretext of curbing corruption in our country after the so called “salary gate scandal”. More to that, there can also be retrospective scrutiny, in particular through judicial review where the merits of administrative decisions can be reviewed when legislation so provides. However, it remains an ineradicable and inerrant hard token of reality that the decision making process of the executive government is not wholly transacted in public. There is no participatory democracy in Zimbabwe despite the entrenchment of this right in the Constitution itself. Reasons behind such reluctance are embroiled in the political legal framework, marginalization, victimization and inaccessibility of relevant information to ensure that the public make comments on an informed basis. Legislative instruments like the Access to Information and Protection of Privacy Act hinder access to information which is of course a prerequisite for an informed comment on Executive decision making. One would therefore argue that such authoritarian pieces of legislation are now unconstitutional when construed in tandem with Section 62 of the Constitution.

It is also true that history and practice has brought to light the fact that responsibility for reviewable decisions made by the executive government is often diffused and politically inept. Reviewable decisions made by the executive government are often made by a process of political consideration and political advice at various levels. For this reason, it is often difficult to identify a reviewable decision made by the executive government with a particular decision-maker. That can be a limit on accountability.

A further point to note is that Ministers and public servants are not routinely required to give full reasons for a reviewable decision as enshrined in Section 3 of the Administrative Justice Act. Ministers and public servants are usually

not personally liable for damage or loss caused by a poor decision. If a decision is ultra vires, i.e. it goes beyond power, the decision maker might then be liable in damages, but even then, he/she would usually be indemnified by the executive government.

Decisions made by the executive government are, of course, subject to judicial review to determine whether they are made within power (jurisdiction), whether they are in compliance with the law, and for fairness or natural justice. These requirements were outlined in *Affretair (Pvt) v. MkAirlines (Pvt) Ltd*. This notion, however, is quite incomplete, and fairly general.

THE JUDICIARY

One wishes to throw a lot with the contention that the judiciary as an institution is accountable as fully as its function permits. However, it must be noted that its accountability differs from that of the executive government only in its form. On the far end of the spectrum, one would like to bring home the point that resting the enforcement of accountability of the executive government on judicial review can cause confusion and political commotion. Judicial review must always pay heed to the notions of separation of powers and the rule of law. Therefore, courts are granted a limited elbow room to contribute to accountability and to quality executive decision making. However, an inerrant central element of this process is that judicial review is the pivot that ensures maintenance of the rule of law. As part of the same package of administrative law, judicial review remains that part most closely identified with the maintenance of the rule of law. That is a sufficient justification for it, and it should not be overburdened with other expectations.

The question which then begs for an answer relates to the extent the judiciary is accountable for decisions made in the exercise of judicial power. Section 165 (2) of the Constitution provides that members of the judiciary, individually and collectively, must respect and honour their judicial office as a public trust and must strive to enhance their independence in order to maintain confidence in the judicial system. Therefore, this remains the central basic tenet underpinning our justice system. However, the notion of accountability for this branch is such that judges are not liable to the loss of office, or to other sanctions, as a consequence of a decision they have made. They are not liable to such consequences at the instance of the public, on whose behalf they exercise judicial power, or at the instance of the executive government which appoints them and remunerates them, or at the instance of a litigant who brings a dispute before them. Judges can be removed from office for proved misconduct, by a process that is rarely used and is difficult to implement⁸. On the other hand, convention ensures that the process is not implemented in

⁸ See Section 187 of the Constitution.



relation to making of a particular decision. This practice has been ripe in Zimbabwe as judges have been sacked on political lines especially in light of politically sensitive decisions. In addition, the principle of judicial independence is as fundamental as that of the rule of law which supports the independence of the judiciary as an institution as well as in its decision making.

The fundamental importance of judicial independence is most obvious in judicial review proceedings where the government is a litigant before the court. Independent determination of citizens' rights against the executive government is a hallmark of a modern democracy. If the judiciary is not independent of the other arms of government, the legislature and the executive government of the day, then individuals would not be guaranteed, nor perceived to be guaranteed, of a fair and impartial determination of their legal rights.

Despite the unhealthy encroachment of the Executive arm in the affairs of the judiciary, it is fair to say that the executive government is more exposed than the judiciary to a personal sanction as part of the process of accountability. However, as argued above, the link between reviewable decisions made by the executive government and loss of office is a slender one. Judges often transact their business in public. In this manner, they are fully exposed to contemporaneous and retrospective scrutiny, comment and criticism. Thus, it can safely be argued that they are more accountable than the executive government. It is also a basic tenet of judicial decision making that judges are required to give full reasons for all significant decisions that they make. Therefore, they are also held more accountable than the executive government. At first impression one would ponder the extent these phenomena can go. Here, the need for the judicial duty to give reasons cannot be overemphasized as in one's view; the hallmark of the judicial process is to give written reasons. This is done in a bid to doing justice in the instant case, the individual litigants and public perception that justice has been done. Moreover, reasons constitute the most significant form of judicial accountability in a democracy which values the high constitutional importance of judicial independence. With a few minor exceptions, an exercise of judicial power in the absence of the publication of written reasons is an abnegation of a judge's constitutional responsibility.⁹

Reasons are also essential to the integrity of appellate review, another important form of judicial accountability. Unless the judge adequately discloses every element in his or her reasoning the decision cannot be correctly evaluated on appeal. Finally, not only are the reasons for judgment exposed to the litigants and to the scrutiny of judges on appeal, they are also subject to contemporaneous public analysis as some of the judgments are

⁹ Section 165 (1) (b) of the Constitution

published in newspapers. They is also appraisal by the legal profession or by law journals. With written reasons, the legislature may also subsequently choose to change the law based on the cogency of the reasons, as well as the political ramifications of the decision¹⁰. Of course, constitutional convention and doctrine prevents the decision itself being tampered with by Parliament. Curious as it may be, one would argue that judges must accept individual responsibility for decisions that they make. There can be no dispersion or diffusion of responsibility, except to the law that the judges apply. In this respect, individual accountability is clearer in the case of the judiciary than in the case of the executive government. This is necessarily so, having regard to the nature of judicial independence. The other relevant distinction is that judicial decision making must be independent of the parties, of the executive government and of external influences generally. Essentially, it must be seen to be independent. Public opinion has generally been that our judiciary is at the whims of the Executive.

THE RELATIONSHIP BETWEEN THE EXECUTIVE AND THE JUDICIARY

The relationship between the Executive reflects acute tension. This is so largely because the executive government is a regular litigant before the courts. It is a party to all serious criminal cases. It is a litigant in many civil cases. Being a regular litigant before the courts, the executive government does not always get the outcome that it seeks. Further, judicial review subjects the executive government to a powerful form of scrutiny and accountability, one that other interests such as the media and opposition parties would then rely upon as a basis for criticism of the executive government.

This tension also spreads through to legality and fair procedures, as well as the concern of the executive government with efficient decision making, the making of decisions that reflect its policies, and its wish to use public resources as it considers best in the public interest. As a result of this tension, it is not surprising to note that there has been some resistance to the extent of judicial review. First, the Legislature has sought to exclude or limit the power of the courts to examine the decision-making processes of the executive either on the grounds that review compromises efficient decision-making and spawns unnecessary formality and technicality¹¹. To this end, government has just set up tribunals to review decisions and has actually attempted to create a buffer zone from judicial review¹². No doubt, there is a legitimate role for tribunals, particularly specialist tribunals. However, the fundamental constitutional distinction between tribunals and courts should not be

¹⁰ G. Feltoe, *A Guide to Administrative and Local Government Law in Zimbabwe at page 34.*

¹¹ See Section 72 () of the Constitution.

¹² See Section of the Administrative Court Act.



forgotten¹³. Second, the practice based observation in Zimbabwe is that appellate courts are reluctant to accept that Parliament could have intended to exclude judicial scrutiny of the lawfulness of executive action because that is perceived to frustrate the observance of the rule of law¹⁴. It is the constitutional function of superior courts, in discharging their duty to maintain the rule of law, to ensure that such limits are respected, not flouted. Accordingly, and in one's opinion, the fundamental importance of the adherence to the rule of law, and the unique place which judicial review plays in ensuring adherence to the rule of law, would mean that one should always scrutinize carefully, and view with concern, attempts to exclude judicial review.

JUDICIAL REVIEW

For the purposes of this article, judicial review is defined as a procedure by which the courts scrutinize decisions made by the executive government, exercising statutory and certain common law powers. The purpose of the scrutiny is to determine if the decision is of a kind that the decision maker has the power to make (*ultra vires doctrine*), to determine whether the decision is lawful, in the sense of being made by reference to the authorized criteria, and to determine whether the decision is made fairly, to the extent that the requirements of fairness have not been excluded¹⁵. Australian courts have abandoned significant limitations that existed on the range of decisions subject to judicial review. They have also applied the duty to act fairly to decisions that affect rights, interests or legitimate expectations, and have more firmly insisted that fairness be accorded unless clearly excluded by Parliament¹⁶.

The increased assertiveness of the judiciary as far as judicial review is concerned is attributable to a realization of the very wide range of powers exercised by the executive government, and other public bodies, affecting individual rights and interests, and attributable to a realization that individuals had very limited rights of redress in respect of those decisions. In other words, the rule of law had been eroded by the huge growth in the powers of the executive government, and the response of the courts was to reassert their

¹³ See G. Feltoe, *A Guide to Administrative and Local Govt Law in Zimbabwe*, at page 22.

¹⁴ Most of the *Commercial Farmers Union* cases up to 2010 which challenged farm invasions were found in favor of the Minister responsible for Land Reform. The judiciary succumbed to Executive pressure and the political whims of political militants and protagonists.

¹⁵ See Section 3 of the Administrative Justice Act [Chapter 10:28], as read with Section 26 and 27 of the High Court Act [Chapter 7:06].

¹⁶ Judicial review, as it is exercised today, is the product of a change of approach by the judiciary that occurred during the 1960's. The decision in *Ridge v Baldwin* 15 [1964] AC 40 can be seen as a turning point. Since that decision was given by the House of Lords.

right and obligation to enforce the rule of law especially from the period 2000 in Zimbabwe. Following the land invasions, there has been a shift of the balance of power between the individual and the executive government which had swung in favour of the executive government to an intolerable extent. This set of events was the genesis of the problem Zimbabwe is engulfed in at the moment. However, if proper respect of the rule of law was at play, this could have provided the opportunity for the courts to reassert their positions as guardians of the rule of law. To those who would argue otherwise, it is relevant to say that the political volatility of the period 2000 was no coincidence. It is the time that Parliament and the executive government provided for various other forms of illusory accountability, rampant and unwarranted amendments to the old Constitution in order to entrench certain manifestoes and ideologies. Thus, against this historical period, the greater assertiveness by the judiciary in protecting individuals affected by decisions of the executive government has to be seen in the context of a widely acknowledged political problem which swallowed the virginity of judicial independence in Zimbabwe.

THE RATIONALE UNDERPINNING JUDICIAL REVIEW

Judicial review can be described as a useful tool of ensuring the accountability of the executive government to the people for reviewable decisions. However, the hard reality is that judicial review is one of a number of means by which the accountability of the executive government is enforced. Some of these processes have been already discussed above.

Judicial review has certain unique features in the field of administrative law. In Zimbabwe, the High court is vested with the power to review the proceedings of all administrative bodies, both statutory and domestic¹⁷. This accords an individual whose rights, interests or legitimate expectations affected by a decision with the right to approach the court for an order requiring the executive government to submit its decision to scrutiny¹⁸. That mandate is carried out by an independent judiciary. The judiciary has power to quash a decision, and is not limited to the making of a recommendation¹⁹. The complainant can require the court to decide a case brought before the court and make any relevant order in order to do justice between the parties. The scrutiny is wide ranging, in terms of lawfulness, although it does not necessarily go to merits although this can now be queried in view of section 68 of the Constitution providing for right to administrative justice. In short, judicial review is central to the enforcement of the rule of law as against the executive government. It enables the individual to require the executive

¹⁷ See Section 26 and 27 of the High Court Act; see G. Feltoe, *A Guide to Administrative and Local Govt Law in Zimbabwe*, 4ed at p 41.

¹⁸ See *Fikilini v Attorney General 1990 (1) ZLR 105 (S)*.

¹⁹ See *Affretair (Pvt) Ltd v MK Airlines (Pvt) Ltd 1996 (2) ZLR 15 (S)*.



government to demonstrate that its decision is rational, reasonable and lawful. Put this way, it is difficult to understand how there can be an objection to judicial review, in a modern democracy in which the executive government exercises significant controls over the individual by making of reviewable decisions.

The other limb of the argument advanced here is that it is wrong to argue that the courts do not err, or that decisions given by the courts always have adequate regard to the need for efficient decision making by the executive government. Nor is it to say that judicial review comes without a cost in terms of the effort that it may require the executive government to devote to process rather than to outcomes. Even after acknowledging the limitations of judicial review, it remains an indispensable element in our society, simply because it is the key to the maintenance of the rule of law and legality.

Judicial review at its best can do no more than secure for a successful complainant an opportunity to have a decision reconsidered. Judicial review supports the legitimacy of the decision making process that it reviews. A decision-maker whose decisions are reviewable can claim that because the decision is reviewable for its legality, as determined by an independent judiciary, the decision has a legitimacy that it otherwise would not have. Its legitimacy lies in the fact that it is open to a dissatisfied person to challenge its validity.

It can also be said that a decision reached through a fair decision making process is likely to be a better decision. It is likely to be better because requiring the decision maker to hear both points of view can make a contribution to the soundness of the decision. Beyond that, as it would appear, it must be acknowledged that judicial review does not have a great deal to contribute to the quality of decision making by the executive government. Its ultimate rationale remains the maintenance of the rule of law and legality.

There are various reasons why judicial review has little to contribute to the overall quality of decision making. Judicial review occurs sporadically, and only at the instance of a disaffected individual. It does not occur in response to an informed assessment that decision making in a particular field is of poor quality. Not many decisions made by the executive government are subjected to judicial review. When judicial review occurs, the focus is on a particular decision, not upon the process generally. While a court can be expected to treat the particular case before it as an instance of a type, the nature of the judicial process is such that there is not a great deal of scope for consideration of the broader picture. Judicial review is also relatively costly. The impact of a court decision on other decision-makers in the executive government will depend upon a lot of factors. It is naive to assume that, when a court quashes a particular decision, other decision-makers in the executive government routinely and as of course take the decision of the court as providing a benchmark for their conduct. Commonsense would therefore suggest that the

educative effect of a particular decision will depend very much upon the response of the executive government itself to the decision of the court. That is so because the response of other decision-makers in the executive government will depend upon the extent to which they are informed of the decision that the court has made, of the principles that underlie it, and upon the extent to which they are advised to apply the underlying principles and given the resources to do so.

In Zimbabwe it will be unrealistic to regard judicial review as a process that naturally and inevitably contributes to a better standard of decision making. It can do that, but one believes that it must be recognized that more will depend upon a lot of factors ranging from political, social and economic. The most of important of this is political because most of the decisions that are made by administrative authorities are based on political considerations.

CONCLUSION

In conclusion, one would highlight that accountability is still a debatable notion in Zimbabwe. The most important call of this article is that all administrative, no matter how high-ranking, are obliged to obey the law. A comparison of the forms of accountability of the judiciary and of the executive reveals that the accountability of the judiciary is significant, and at a practical level not much different from that of the executive. The main difference lies in the security of tenure afforded to judicial officers. However, there are compelling constitutional reasons for the security of tenure; namely, the critical importance of judicial independence. In short therefore, one would argue that the judiciary is highly accountable, but in ways compatible with its constitutional independence. One also argued that whilst judicial review is a means of ensuring executive accountability, it should not be ascribed purposes and a role to which it is not suited and which it is not capable of performing. Its ultimate constitutional rationale is to sustain the rule of law. In this respect judicial review plays an indispensable role in our democratic system of government. However, judicial review has its limits. It is not the alpha and omega for all the imperfections of public administration. After all, it can do no more than secure for a complainant an opportunity to have a decision reconsidered; it is by its nature event-specific and infrequently deployed; and it does not usually concern itself with the merits. Within these parameters it can make no more than a modest contribution to the overall quality of administrative decision making. Judicial review should however be viewed as an integral part of our system of government.



DEVOLUTION OF GOVERNMENT UNDER THE NEW CONSTITUTION

EDITORIAL



Whereas it is desirable to ensure:

(a) The preservation of national unity in Zimbabwe and the prevention of all forms of disunity and secessionism;

(b) The democratic participation in government by all citizens and communities of Zimbabwe; and

(c) The equitable allocation of national resources and the participation of local communities in the determination of the development priorities within their areas;

There must be devolution of power and responsibilities to lower tiers of government in Zimbabwe.”

Preamble, Chapter 14 on Provincial and Local Government, Constitution of Zimbabwe



THE IDEA OF DEVOLUTION IN THE NEW CONSTITUTION

The new Constitution in its Chapter 14 provides for the devolution of governmental power and responsibilities in Zimbabwe. Section 264 (1) of the Constitution provides that whenever appropriate, governmental powers and responsibilities must be devolved to provincial and metropolitan councils and local authorities which are competent to carry out those responsibilities efficiently and effectively.

THE OBJECTIVES OF DEVOLUTION

From section 264 (2), the objects of devolution of governmental powers and responsibilities to provincial and metropolitan councils and local authorities are outlined as the following;

- (a) To give powers of local governance to the people and enhance their participation in the exercise of the powers of the State and in making decisions affecting them;
- (b) To promote democratic, effective, transparent, accountable and coherent government of Zimbabwe as a whole;
- (c) To preserve and foster the peace, national unity and indivisibility of Zimbabwe;
- (d) To recognise the right of communities to manage their own affairs and to further their development;
- (e) To ensure the equitable sharing of local and national resources; and
- (f) To transfer responsibilities and resources from the national government in order to establish a sound financial base for each provincial and metropolitan council and local authority.

GENERAL PRINCIPLES OF PROVINCIAL AND LOCAL GOVERNMENT

Section 265, for its part, sets out the general principles of provincial and local government. These are stated as the following;

- (a) Ensure good governance by being effective, transparent, accountable and institutionally coherent;
- (b) Assume only those functions conferred on them by this Constitution or an Act of Parliament;
- (c) Exercise their functions in a manner that does not encroach on the geographical, functional or institutional integrity of another tier of government.
- (d) Co-operate with one another, in particular by-
 - (i) Informing one another of, and consulting one another on, matters of common interest;

- (ii) Harmonising and co-ordinating their activities
- (e) Preserve the peace, national unity and indivisibility of Zimbabwe;
- (f) Secure the public welfare; and
- (g) Ensure the fair and equitable representation of people within their areas of jurisdiction.

Whilst the objects and aspirations of devolution seem noble, it remains quite unclear as to the true structural and functional nature of the system set out in the Constitution.

THE DIFFERENCE BETWEEN LOCAL AND PROVINCIAL GOVERNMENT

Whilst local authorities are composed of councils made up of councillors elected by registered voters in the urban or rural areas concerned and presided over by elected mayors or chairpersons, provincial councils are largely composed of a compilation of members including members of the National Assembly whose constituencies fall within the province concerned, the Senators elected for the province, two senator chiefs for each province as well as the president and deputy president of the National Council of Chiefs, where their areas fall within the province concerned. Essentially, whilst members of local authorities are elected directly into office as councillors to serve in rural or urban councils, provincial and metropolitan governments are composed of individuals who form part of these bodies by virtue of some other designation or office, e.g. members of the National Assembly whose constituencies fall within the province concerned. Section 268 (1) (f) only provides for the election, by a system of proportional representation, of ten people directly into provincial or metropolitan governments.

A close look at the new Constitution reveals that the local authorities, subject to the Constitution and any Act of Parliament, have the right to govern, on their own initiative, the local affairs of the people within the area for which it has been established, and have all the powers necessary for it to do so. It would appear that there is no relationship between provincial and local authorities since the Constitution only allows Parliament to pass legislation which would affect the functions and processes of local authorities.

THE STRUCTURE OF LOCAL AND PROVINCIAL GOVERNMENT

DIVISION OF PROVINCES

Section 267 of the Constitution lists Bulawayo Metropolitan Province, Harare Metropolitan Province, Manicaland, Mashonaland Central, Mashonaland East, Mashonaland West, Masvingo, Matabeleland North, Matabeleland South and Midlands. In this light, the Constitution, by clearly stating the provinces, makes an important improvement from the old Constitution which provided an ambiguous definition of province in its section 113.



The Constitution also provides that the boundaries of these provinces are (or to be) fixed by an Act of Parliament. The Constitution provides that an Act of Parliament must provide for the division of provinces into districts as well as providing for the alteration of the provincial and district boundaries after consultation with the Zimbabwe Electoral Commission and the people in the provinces and districts concerned. The new Constitution, unlike the former Constitution, does not make it possible for an Act of Parliament to fix, or indeed change, the number of provinces as laid out in section 267. It appears that what the Act of Parliament can do is division of provinces into districts as well as providing for the alteration of provincial and district boundaries.

THE STRUCTURE AND COMPOSITION OF PROVINCIAL AND METROPOLITAN COUNCILS

The Constitution draws a distinction between the Bulawayo Metropolitan and Harare Metropolitan Provinces and the rest of the Provinces. The difference is that whilst the Provincial Councils are headed by a chairperson elected at the council's first meeting, the Metropolitan Councils are chaired by the Mayors of Harare and Bulawayo respectively. Section 268 and 269 provide that there is a provincial council for each province and metropolitan councils for Bulawayo and Harare, consisting of –

- (a) A chairperson of the council for Provincial Councils or the Mayors of Bulawayo and Harare for Metropolitan Councils;
- (b) All the Members of the National Assembly whose constituencies fall within the province or metropolitan province concerned;
- (c) The women Members of the National Assembly who are elected in terms of section 124(1) (b) from the province or metropolitan province concerned;
- (d) The mayors and chairpersons, by whatever title they are called, of all urban and rural local authorities in the province or metropolitan province concerned;
- (e) The senators elected from the province or metropolitan province concerned;
- (f) Ten persons elected by a system of proportional representation;
- (g) the two senator chiefs elected from the province concerned in terms of section 120(1)(b); and
- (h) The president and deputy president of the National Council of Chiefs, where their areas fall within the province concerned.

It must be noted that from the composition the Provincial and Metropolitan Councils laid out in the Constitution, it is difficult, if not impossible to come up with a number of members for each Provincial or Metropolitan Council. This is so for the reason that issues relating to proportional representation as well as the variables in the number of Members of the National Assembly and

Senators whose constituencies fall within the province or metropolitan province concerned.

FUNCTIONS OF PROVINCIAL AND METROPOLITAN COUNCILS

Under section 270 of the Constitution, a provincial or metropolitan council is responsible for the social and economic development of its province, including –

- (a) Planning and implementing social and economic development activities in its province;
- (b) co-ordinating and implementing governmental programmes in its province;
- (c) Planning and implementing measures for the conservation, improvement and management of natural resources in its province;
- (d) Promoting tourism in its province, and developing facilities for that purpose;
- (e) Monitoring and evaluating the use of resources in its province; and
- (f) Exercising any other functions, including legislative functions, that may be conferred or imposed on it by or under an Act of Parliament.

Of importance is that the legislative functions of the provincial and metropolitan governments have not been spelt out in the Constitution. What this means is that the devolution of specific aspects of governance will depend heavily on the willingness of central government to shed particular powers and responsibilities to local governments.

Even if provincial governments are given legislative powers, an issue to be settled is one concerning the relationship of such legislation to national legislation. It still remains to be answered whether or not the national legislature can in certain instances override the legislation of the provincial and metropolitan councils.

THE PLACE OF MINISTERS OF STATE FOR PROVINCES

The President appointed Ministers of State for the ten provinces in section 267 of the Constitution. Under section 104 of the Constitution, the President is mandated to appoint Ministers and to assign functions to them, including the administration of any Act of Parliament or of any Ministry or department. In light of the provisions relating to provincial government set out, it remains unanswered as to the proper place of these government ministers appointed for each province. This is so because the Constitution makes it clear that provincial and metropolitan councils are chaired by either chairpersons or by mayors in the case of metropolitan councils. It is difficult to conclude that the role of these Ministers is to chair or indeed supervise the activities of provincial governments. As the true nature of the system of devolution under the Constitution evolves, it remains to be seen what these Ministers functions



really are. Conclusively, the system of provincial government set out above does not include in its hierarchy ministers of state.

THE CO-ORDINATION BETWEEN LOCAL AND CENTRAL GOVERNMENT

Section 265 (3) of the Constitution provides that an Act of Parliament must provide appropriate mechanisms and procedures to facilitate co-ordination between central government, provincial and metropolitan councils and local authorities.

EDITORIAL COMMENTS

Provisions of the new Constitution



THE RIGHT TO LIFE

Section 48 (1) of the Constitution provides that every person has the right to life. Section 86 (3) further provides that no law may limit the right to life, except to the extent specified in section 48 (death penalty for murder committed under aggravated circumstances). Even when a public emergency has been declared, the right to life can never be limited. The wording of the new Constitution is rather different from that in the former Constitution. Section 12 (1) of the former Constitution provided that no person could be deprived of his/her life intentionally save in the execution of the sentence of a court in respect **of a criminal offence** of which he/she is convicted. Further, s 12 (2) provided that no person could be regarded as having been deprived of his/her life if he/she 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 certain circumstances. These circumstances included death occasioned as a result or in the process of 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 and in order to prevent the commission by a person of a criminal offence. The change in the wording has implications on the limitations which can be placed on the death penalty.

DEATH PENALTY

Section 48 (2) provides that a law **may** permit the death penalty to be imposed only on a person convicted of murder committed in aggravating circumstances. Such a law must permit the court discretion whether or not to impose the penalty and the penalty may be carried out only in accordance with a final judgment of a competent court. The penalty must not be imposed (i) on a person who was less than twenty-one years old when the offence was committed or (ii) who is more than seventy years old at time the penalty is to be imposed. Further, the penalty must not be imposed or carried out on a woman and the person sentenced must have a right to seek pardon or commutation of the penalty from the President. The effect of this provision is twofold. First, it provides that an Act of Parliament “**may**” provide for the imposition of the death penalty which means that it is directory rather than mandatory. The Legislature is only **authorised but not obliged** to limit the right to life by way of the death penalty. Second, should there be an Act of Parliament limiting the right to life, such law must comply with the Constitution. This means that the law may only provide for the death penalty for **murder committed in aggravating circumstances**. Even so, that law must permit the court discretion in deciding whether to impose the penalty. In addition, such a law cannot allow the death penalty to be imposed on a person

younger than twenty-one at the time the murder was committed, a person who is seventy years or older at the time the penalty is to be imposed and on a woman convicted of murder even in aggravating circumstances.

EFFECT ON EXISTING LAW

Section 14 of the Sixth Schedule of the Constitution provides that although all laws in force before the new Constitution came into force continue to be valid, they must be construed in a manner consistent with the new Constitution. As such, even in the absence of amendments to the various legislative instruments limiting the right to life, the following provisions have become unconstitutional and inapplicable by virtue of s 14 of the Sixth Schedule of the Constitution:

1. **Section 337 (a) of the Criminal Procedure and Evidence Act [Chapter 9:07]** which provides that the High Court shall pass a sentence of death upon an offender convicted by it of murder. The proper construction of this provision would be to read the “shall” as “may” to give effect to the provision that the High Court must be given a discretion in deciding whether or not to impose the death penalty.
2. **Section 338 (a) of the Criminal Procedure and Evidence Act [Chapter 9:07]** which had the effect of disallowing the High Court to pass a death penalty on a pregnant woman. The new provision of the Constitution states that the death penalty cannot be imposed or carried out on a woman. This renders the requirement of the C.P & E Act redundant. A key point here is the requirement in the Constitution that the penalty cannot be “*imposed or carried out*” on a woman”. Clearly, this provision evinces an intention to make the provision apply in retrospect.¹ As such, any woman who was sentenced to death even before the new Constitution came into force cannot be executed.
3. **Section 338 (c) of the Criminal Procedure and Evidence Act [Chapter 9:07]** which provides that the death penalty cannot be passed on a person who was under the age of eighteen at the time the offence was committed. This provision has been superseded by the Constitution which provides that the penalty may not be imposed on a person who was below the age of twenty one at the time the offence is committed. It is doubtful that this provision has retrospective effect to benefit persons below twenty-one but over eighteen sentenced to death before 22 May 2013 (the day the new Declaration of Rights came into force). The wording of the Constitution does not seem to

¹ There is a rule of interpretation that obliges the court to give effect to all the words used in a provision under consideration. To give effect to the words “carried out”, the court will have to hold that women sentenced to death before 22 May 2013 cannot be executed.



evinced an intention to apply in such a manner. This becomes obvious when compared to the provision on women in s 48 (2) (d).

4. **The proviso to s 20 (1) (b)** of the Criminal Law (Codification and Reform) Act [Chapter 9:23] which provides that a person found guilty of treason shall be liable to be sentenced to death or to imprisonment for life.² This provision falls foul of the Constitution because the Constitution only authorises the Legislature to limit the right to life through the death penalty in instances of murder committed in aggravating circumstances.
5. **The proviso to s 23 of the Criminal Law (Codification and Reform) Act [Chapter 9:23]** which provides for the imposition of the death penalty on a person found guilty of insurgency, banditry, sabotage or terrorism which results in the death of a person.³ Again, this provision falls foul of the Constitution because the penalty may only be imposed for murder committed in aggravating circumstances. The mere fact that acts of insurgency, banditry, sabotage or terrorism have led to the death of a person should not by itself invite the application of the death penalty. The court still needs to assess whether the “murder” was committed in aggravating circumstances and should still possess discretion in the matter.
6. **Section 47 (2) of the Criminal Law (Codification and Reform) Act [Chapter 9:23]** which provides that a person convicted of murder (or attempted murder or of incitement or conspiracy to commit murder) shall be sentenced to death unless the convicted person is under the age of eighteen years at the time of the commission of the crime or if the court is of the opinion that there are extenuating circumstances. This is now inapplicable in as much as it relates to the discretion of the court, the age and to imposition on women.
7. **The First Schedule of the Defence Act [Chapter 11:02]** which provides that a person guilty of intentionally aiding the enemy ,

² Treason is committed by any person who is a citizen of or ordinarily resident in Zimbabwe and who does any act, whether inside or outside Zimbabwe, with the intention of overthrowing the Government or incites, conspires with or assists any other person to do any act, whether inside or outside Zimbabwe, with the intention of overthrowing the Government (s 20 of the Criminal Law Code)

³ Acts of Insurgency, banditry, sabotage or terrorism are committed when any person commits any act accompanied by the use or threatened use of weaponry for the purposes of causing or furthering an insurrection in Zimbabwe or causing the forcible resistance to the Government or the Defence Forces or any law enforcement agency or procuring by force the alteration of any law or policy of the Government. Such person must have the intention or realise a real risk or possibility of killing or injuring any other person or damaging or destroying any property, inflicting substantial financial loss upon any other person or obstructing or endangering the free movement in Zimbabwe of any traffic on land or water or in the air or disrupting or interfering with an essential service. (s 23 Criminal Law Code)

intentionally engaging in communications with the enemy and making injurious disclosures, mutiny or failure to suppress mutiny shall be liable to suffer death or imprisonment or any lesser punishment. These provisions are now inapplicable as the Constitution does not allow the Legislature to limit the right to life except for murder committed in aggravating circumstances.

ABOLISHING THE DEATH PENALTY

Should the Legislature decide to abolish the death penalty completely, it can do so by repealing the provisions of the Criminal Law Code and the CP & E Act which provide for the death penalty for murder which have remained consistent with the new Constitution in as much as it relates to limitations of the right to life. This is so because the Constitution only authorises but does not oblige the Legislature to limit the right to life by way of the death penalty.

TERMINATION OF PREGNANCY

Section 48 (3) of the Constitution provides that an Act of Parliament **must** protect the lives of unborn children, and that Act must provide that pregnancy may be terminated only in accordance with that law. The provision is rather mandatory in nature and seems to oblige Parliament to pass an Act protecting the “lives of unborn children.” The Constitution appears to take a strong anti-abortion stance. Even in light of these provisions, there is nothing in the Constitution to bar the Legislature from widening the grounds of lawful termination under the Termination of Pregnancy Act. An instance of a further ground is that appearing in s 2 (1) (iv) of the South Africa Choice of Termination of Pregnancy Act which provides that a pregnancy can be terminated if the continued pregnancy would significantly affect the social or economic circumstances of the woman or her family. The Termination of Pregnancy Act currently provides that a pregnancy cannot be terminated unless the continuation of the pregnancy so endangers the life of the woman concerned. It also provides for termination when it constitutes a serious threat of permanent impairment to the physical health of the woman such that the termination of the pregnancy is necessary to ensure her life or physical health. It further provides for termination where there is a serious risk that the child to be born will suffer from a physical or mental defect of such a nature that he will permanently be seriously handicapped or where there is a reasonable possibility that the foetus is conceived as a result of unlawful intercourse.⁴

⁴ See s 4 Termination of Pregnancy Act [Chapter 15:10]



COMMENT ON POLICE INVESTIGATIONS, SEARCHES AND ARRESTS

Search and Seizure - Section 57 of the Constitution provides that every person has the right to privacy, which includes the right not to have their home, premises or property entered without their permission. The right also protects one from having their person, home, premises or property searched, their possessions seized or the infringement of the privacy of their communications. Although the law allows the police to effect a search without a warrant, they can only do so if there is consent from the person concerned or if the police officer believes on reasonable grounds that a search warrant would be issued to him if he applied for one, and that delay in obtaining a warrant would prevent the seizure of the article or defeat the object of the search. However, s 57 of the Constitution which emphasises the right to privacy makes it clear that a search without a warrant is almost always inconsistent with the Constitution.

Arrest and Investigation - Section 50 (1) of the Constitution provides that any person who is arrested must be informed at the time of arrest of the reason for the arrest. Further, the police can only effect an arrest for the purpose of bringing a person before a court to answer to an alleged offence (See note below).¹ This requirement means that the police cannot arrest and then seek to investigate later. In any case, the purpose of remand is not to allow the state to make a case or to begin investigations, it is only a measure adopted because the court is usually not in a position to immediately try a person brought before it. As such, the proper course for the police is to investigate and when satisfied that an offence has been committed, to charge the accused and secure his/her attendance in court to answer to the charge.

Securing attendance in court - The law provides that the police are *authorised* to arrest under certain specified circumstances. The use of the word “authorised” indicates that the police, whilst authorised to arrest, are not *obliged* to do so in all circumstances (see note below).² The C.P & E Act provides for other means to secure the attendance of a person in court such as summons to appear. In light of s 49 of the Constitution which emphasises

¹ This is supported by the provision that any person who is not brought to court within the forty-eight hour period must be released immediately unless their detention has earlier been extended by a competent court

² B Crozier writes that the Police have a discretion in the matter and should only arrest a person if he considers the arrest is necessary after taking into account such factors as the possibility of escape, the prevention of further crime and the obstruction of police enquiries (i.e. the same sort of considerations as apply to the grant or refusal of bail).

personal liberty, the drastic nature of arrest means that it should not be the primary manner for securing that a person who has allegedly committed an offence appears in court. As such, the fact that the police have evidence that an offence is likely to have been committed is not in itself a reason to resort to arrest. Unfortunately, the approach of the police has been to arrest, seek remand and then attempt to start investigations. This practice is clearly inconsistent with the Constitution.



ACCESS TO INFORMATION

“As a rule, he or she who has the most information will have the greatest success in life”

Benjamin Disraeli

Section 62 (1) of the Constitution provides that every Zimbabwean citizen or permanent resident, including juristic persons and the Zimbabwean media, has the right to access any information held by the State or by any institution or agency of government at every level, in so far as the information is required in the interests of public accountability. The constitution further provides that every person, including the Zimbabwean media, has the right of access to any information held by any person, including the State, in so far as the information is required for the exercise or protection of a right. It guarantees the right to the correction of information, or the deletion of untrue, erroneous or misleading information, which is held by the State or any institution or agency of the government at any level. The Legislature is obliged to enact legislation to give effect to this right. Such legislation may, however, restrict access to information in the interests of defence, public security or professional confidentiality, to the extent that the restriction is fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom. This comment addresses three issues. First, it highlights the incompatibility of the Access to Information and Protection of Privacy Act [*Chapter 10:27*] with the Constitution. Second, it reiterates the importance of access to information in any society based on the principles of democracy and good governance.¹ Third, it offers thoughts on what can be viewed as the three key factors to be considered in coming up with an access to information law.

¹ Section 1 of the Constitution declares that Zimbabwe is a unitary, democratic and sovereign republic. Section 3 (1) (h) further provides that Zimbabwe is founded on respect good governance. Section 9 states that the State must adopt and implement policies and legislation to develop efficiency, competence, accountability, transparency, personal integrity and financial probity in all institutions and agencies of government at every level and in every public institution.

THE ACCESS TO INFORMATION AND PROTECTION OF PRIVACY ACT [CHAPTER
 10:27]

This Long Title of the Access to Information and Protection of Privacy Act (AIPPA) states that its objectives are to provide members of the public with a right of access to records and information held by public bodies; to make public bodies accountable by giving the public a right, to request correction of misrepresented personal information; to prevent the unauthorised collection, use or disclosure of personal information by public bodies; to protect personal privacy and to provide for the regulation of the mass media. The Act also restricts the public from accessing information relating to deliberations of cabinet, deliberations of local government bodies, information on advice relating to governmental policy and information whose disclosure will be harmful to law enforcement process and national security.

Section 14 of the Sixth Schedule to the Constitution provides that all laws existing in Zimbabwe when the new Constitution came into force continue to be valid but must be construed in light of the new Constitution. As such, the following provisions of AIPPA have become incompatible with the Constitution:

1. **Section 3 which provides that if any other law relating to access to information, protection of privacy and the mass media is in conflict or inconsistent with the Act, the Act shall prevail.** This provision has become legally void by virtue of s 2 of Constitution which provides that the Constitution is the supreme law of Zimbabwe and that any law, practice, custom or conduct inconsistent with it is invalid to the extent of the inconsistency. Section 3 of AIPPA could have been tenable under the former Constitution as that Constitution did not grant a right to access to information in its Declaration of Rights. As the Constitution now specifically provides for such right in s 62, it is the Constitution which takes precedence in matters of access to information. The limitations to access to information under AIPPA, therefore, are subject to the test under s 62 of the Constitution. The Constitution requires that any limitation to access to information should be fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom.
2. **Section 14 which protects information relating to the deliberations of Cabinet or any of its committees and deliberations of a local government bodies.** Construing this provision in light of the new Constitution as required by the Sixth Schedule, the need for public accountability militates against the protection of such deliberations. Public accountability relates to the obligations of agencies and public enterprises that have been trusted with the public resources and political authority. These persons or organs must be answerable to the fiscal and the social



responsibilities that have been assigned to them.² As such, this provision runs counter to the interests of public accountability. Even after considerations of defence, public security or professional confidentiality as allowed by the Constitution, it is preposterous to conclude that restricting access to **all** information reflecting on the performance of the very authorities charged with making the key national and local decisions is at all fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom.³ Openness would suggest that there must be information upon which persons can scrutinise and assess the performance of Government. This is particularly so in light of the provision in s 3 (2) (f) of the Constitution which affirms that the authority to govern derives from the people of Zimbabwe.

3. **Section 17 which protects information whose disclosure will be harmful to law enforcement process and national security.** Indeed, it is necessary for every Government to protect information relating to national defence and national security. Be that as it may, the grounds in section 17 are too broad to be fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom. To deal with this, the law can provide for a blanket requirement that in cases of well-founded allegations of corruption and human rights violations, an authority would be compelled to produce information.⁴ This would be in line with s 9 (1) (b) of the Constitution which provides that the State must implement measures to expose, combat and eradicate all forms of corruption and abuse of power by those holding political and public offices. Similarly, **section 19** of AIPPA which protects information relating to the financial or economic interests of public body or the State can be viewed in the same light.⁵

² Transparency and Accountability Initiative 2014

³ In *Law Society of Zimbabwe & Ors v. Minister of Finance (Attorney-General Intervening)* 1999 (2) ZLR 231, the Supreme Court of Zimbabwe stated that in such instances, the question is not whether the importance of the objective justifies the limiting of a fundamental right, but whether the method of limitation is shown "not to be reasonably justifiable in a democratic society".

⁴ Section 8 of the India Information Act provides a list of exceptions whose fairness, reasonability and justifiability have been extensively tested by the judiciary in India. This list can be a useful comparative tool when drafting a new access law under s 62 of the Constitution of Zimbabwe.

⁵ Clearly, the "financial probity in all institutions and agencies of government at every level and in every public institution" referred to in s 9 (1) of the Constitution militates against this limitation.

THE NEED FOR A NEW ACCESS TO INFORMATION LAW

Access to information is such a vital tool in securing openness and accountability in any democracy. It has been stated that success, if measured as the increase in transparency in government, and thus decrease in corruption, and the citizen's capacity to exercise his/her rights, is achievable through the passage, implementation and enforcement of strong access to information laws (Laura Neuman, 2002). In this light, it is important that the issue of access to information under section 62 of the Constitution be set apart in a separate Act, rather than be muddled together with other issues as is the case under the present AIPPA.

KEY FACTORS OF A NEW ACCESS TO INFORMATION LAW

The following issues are important in giving effect to s 62 of the Constitution.

1. Which institutions should be subject to an access law?

The answer to this question can be partly found in the Constitution itself. Section 62 (1) provides that every Zimbabwean citizen or permanent resident, including juristic persons and the Zimbabwean media, has the right of access to any information held by the State or by any institution or agency of government at every level, in so far as the information is required in the interests of public accountability. As such, information covered by this section is ordinarily that which is held by the State or by any institution or agency of government at every level. However, with the recent trend in which the State contracts on essential services with non-state agents, the principle should be that any organ exercising some sort of governmental power should be the subject of access laws regardless of its official status.

2. Under what circumstances can an institution be justified to withhold information?

As has already been commented above, any limitation should be fair, reasonable and justifiable in a democratic society based on openness. Further, there should be an overarching requirement compelling disclosure of information pertaining to well-founded allegations of corruption and human rights violations. The limitations must also be carefully drafted to avoid exceptions which would be too vague as to allow abuse.

3. How can efficiency and cost effectiveness in managing access laws be achieved?



Access to information should ideally consist of two distinct processes. First, there should be a reactive process of access to information where a request for information to the State or a state organ initiates the process. Second, there should be a proactive process which requires every public authority to computerise their records for wide dissemination and to proactively publish certain categories of information so that the citizens need minimum recourse to the reactive process (this might include information like Local Council Budgets and Summary of Expenditure). With the role that the internet plays today, this should be reasonably easy to achieve. The modalities of the reactive process would entail the appointment of Information Officers by Ministries and other Government departments. A Government website should maintain an up-to-date list of the names and contact details of all information officers. Citizens can then be allowed to submit a request for information to the relevant information officer. Information officers should then be required to reply to the requests within a stipulated time. The High Court must be given jurisdiction to review any refusal of a request to the information officer at the instance of the applicant. There should also be an obligation on every information officer who receives a request pertaining to another public authority to forward such request to the relevant officer within a stipulated time limit.

CITIZENSHIP

THE NEW DIMENSION IN THE CITIZENSHIP LAW OF ZIMBABWE

Constitution Amendment (No. 20) Act has introduced a number of changes to the law on citizenship in Zimbabwe. Section 35 (1) states that persons are Zimbabwean citizens by birth, descent or registration. All Zimbabwean citizens are equally entitled to the rights, privileges and benefits of citizenship and are equally subject to the duties and obligations of citizenship. The rights of citizens under the Constitution include the protection of the State wherever they may be, passports and other travel documents and birth certificates and other identity documents issued by the State.¹ Citizens have a duty to be loyal to Zimbabwe, to observe the Constitution and to respect its ideals and institutions, to respect the national flag and the national anthem and to the best of their ability, to defend Zimbabwe and its sovereignty.

BIRTH

A person is a citizen by birth if they were born in Zimbabwe and when they were born either their mother or their father was a Zimbabwean citizen. A person is also a citizen by birth if any of their grandparents was a Zimbabwean citizen by birth or descent.² Persons born outside Zimbabwe are Zimbabwean citizens by birth if, when they were born, either of their parents was a Zimbabwean citizen and ordinarily resident in Zimbabwe or working outside Zimbabwe for the State or an international organisation. Further, a child found in Zimbabwe who is, or appears to be, less than fifteen years of age, and whose nationality and parents are not known, is presumed to be a Zimbabwean citizen by birth. This provision on children found in Zimbabwe is peculiar to the new Constitution and did not appear in the former Constitution.

DESCENT

A person born outside Zimbabwe is a Zimbabwean citizen by descent if when they were born either of their parents or any of their grandparents was a Zimbabwean citizen by birth or descent. A person is also a citizen by descent if either of their parents was a Zimbabwean citizen by registration and their birth is registered in Zimbabwe in accordance with the law relating to the registration of births.³

¹ See s 35 (3) of the Constitution

² See s 36 (1) of the Constitution

³ See s 37 of the Constitution



REGISTRATION

Any person who has been married to a Zimbabwean citizen for at least five years, whether before or after the effective date, and who satisfies the conditions prescribed by an Act of Parliament, is entitled, on application, to be registered as a Zimbabwean citizen.⁴ Further, any person who has been continuously and lawfully resident in Zimbabwe for at least ten years, whether before or after the effective date, and who satisfies the conditions prescribed by an Act of Parliament, is entitled, on application, to be registered as a Zimbabwean citizen.⁵ A child who is not a Zimbabwean citizen, but is adopted by a Zimbabwean citizen, whether before or after the effective date, is also entitled, on application, to be registered as a Zimbabwean citizen.⁶ The former Constitution provided that a minor child of a person who has become a Zimbabwean citizen by registration is entitled, on application, to become a Zimbabwean citizen by registration.⁷ The absence of this provision in the new Constitution does not mean that the minor children of persons who are Zimbabwean citizens by registration need to satisfy their own residence criteria to be citizens of Zimbabwe by registration. This is so because s 37 provides that persons born outside Zimbabwe are Zimbabwean citizens by descent if either of their parents was a Zimbabwean citizen by registration and the birth is registered in Zimbabwe in accordance with the law relating to the registration of births.

REVOCATION OF CITIZENSHIP

Section 39 (1) provides that Zimbabwean citizenship by registration may be revoked if the person concerned acquired the citizenship by fraud, false representation or concealment of a material fact. Citizenship by registration can also be revoked if during a war in which Zimbabwe was engaged, the person concerned unlawfully traded or communicated with an enemy or was engaged in or associated with any business that was knowingly carried on so as to assist an enemy in that war. Zimbabwean citizenship by birth may also be revoked if the citizenship was acquired by fraud, false representation or concealment of a material fact by any person. In the case of children found in Zimbabwe who are below, or appear to be below the age of fifteen, citizenship is revoked if the person's nationality or parentage becomes known, and reveals that the person was a citizen of another country.⁸ Section 39 (3) however provides that Zimbabwean citizenship must not be revoked on any of the grounds enumerated in the Constitution if doing so would render the

⁴ See s 38 (1) of the Constitution

⁵ See s 38 (2) of the Constitution

⁶ See s 38 (3) of the Constitution

⁷ See s 7 (3) of Constitution of Zimbabwe Amendment (No. 19) Act

⁸ See s 39 (2) (b) of the Constitution

person concerned stateless. Further, Zimbabwean citizenship is not lost through marriage or the dissolution of marriage.⁹

CITIZENSHIP AND IMMIGRATION BOARD

Section 41 provides that an Act of Parliament must provide for the establishment of a Citizenship and Immigration Board consisting of a chairperson and at least two other members appointed by the President. The board is responsible for granting and revoking citizenship by registration, permitting persons, other than citizens, to reside and work in Zimbabwe, and fixing the terms and conditions under which they may so reside and work. The Board may also exercise any other functions that may be conferred or imposed on it by or under an Act of Parliament. The former Constitution under s 8 of Constitution of Zimbabwe Amendment (No. 19) Act also established a Citizenship and Immigration Board with similar functions and composition as the board under the new Constitution.

POWERS OF PARLIAMENT WITH REGARDS TO CITIZENSHIP

Section 42 of the Constitution provides that an Act of Parliament may make provision consistent with the Constitution to deal with procedures by which Zimbabwean citizenship by registration may be acquired, the voluntary renunciation of Zimbabwean citizenship, procedures for the revocation of Zimbabwean citizenship by registration, the restoration of Zimbabwean citizenship, **the prohibition of dual citizenship in respect of citizens by descent or registration and** generally giving effect to provisions on citizenship in the Constitution. An important point to note here is that Parliament **may** make provision for the prohibition of dual only in respect of citizens by descent or registration. It is beyond the power of Parliament, therefore, to restrict citizens by birth from having dual citizenship. This provision has been the subject of two very important cases detailed below.

THE MUTUMWA MAWERE CASE

On 26 June 2013 the Constitutional Court of Zimbabwe made an order to the effect that Mutumwa Mawere is a citizen of Zimbabwe by birth in terms of s 36 (1) of the Constitution. Mutumwa Mawere was born in Zimbabwe in 1960 but had moved to South Africa and acquired South African citizenship by registration. When the new Constitution came into force on 22 May 2013, Mawere approached the Registrar General on 27th May 2013 requesting that he be granted with a national registration identity card to allow him to register and vote in the impending election. The Registrar General refused to issue the national identity card stating that since he was a South African citizen, he had to first renounce his South African citizenship if he was to be issued with Zimbabwean national registration documents. Mutumwa Mawere then seized the Constitutional Court with an application requesting an order confirming that he is a Zimbabwean citizen by birth and could not be required to renounce

⁹ See s 40 of the Constitution



such citizenship under the law. A nine member bench of the Constitutional Court ordered that Mutumwa Mawere “is a citizen of Zimbabwe by birth under s 36 (1) of the Constitution of Zimbabwe Amendment (No. 20).” It also interdicted the Registrar General from demanding the applicant to first renounce his foreign acquired citizenship before he could be issued with national identity documents. The court directed the Registrar General to issue the applicant with national registration documents.¹⁰ Unfortunately, at the time of publication (June 2014), the Court had not given written reasons for its order.

THE FARAI MADZIMBAMUTO CASE

On 12 February 2014 the Constitutional Court was seized with yet another application relating to citizenship. The applicant in this case was Farai Madzimbamuto, a medical practitioner resident in South Africa. Although born in Zimbabwe, the applicant had acquired South African citizenship by registration. His application before the court sought an order that his South African passport be endorsed to the effect that he can freely enter and exit Zimbabwe as a citizen using the South African passport. Basing his application on the order of the court in Mawere, the applicant argued that an endorsement to his South African passport to the effect that he is a citizen of Zimbabwe would allow him to move freely between Zimbabwe and South Africa. He highlighted the undesirability of having to use two passports in his movements between Zimbabwe and South Africa. He also argued that the fact that immigration authorities endorse a temporary residence permit to his passport whenever he enters Zimbabwe on his South African passport has the effect of limiting his right of movement and residence granted to citizens under s 66 of the Constitution. He therefore argued that although the endorsement he sought was not provided for under the Immigration Regulations, it was the most practical way to deal with the situation. The Registrar General, on the other hand, argued that once a person presents a foreign passport to an immigration officer, he/she is treated as an alien who can only be issued with a temporary residence permit under s 37 of the Immigration Regulations 1998 SI 195/1998 as amended by SI 126/2005. The Constitutional Court confirmed that the powers given to Parliament in respect of revocation of Zimbabwean citizenship and the prohibition of dual citizenship relate only to citizens of Zimbabwe other than by birth. It confirmed that a Zimbabwean citizen by birth does not lose citizenship on acquiring foreign citizenship. The court then affirmed the right to freedom of movement in the Constitution and directed the Registrar General to endorse

¹⁰ Civil Application No. CCZ 30/2013 (Court Order of 27 June 2013)

the applicant's South African passport with a permanent and indefinite residence permit.¹¹

¹¹ CCZ 5/14



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THE COURTS

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THE STRUCTURE OF THE COURTS

EDITORIAL



ABSTRACT

What follows is a summary of the court system established by the new Constitution of Zimbabwe. Note is made of the Constitutional Court, the Supreme Court and the High Court. Reference is made to the Constitutional Court of South Africa and the Supreme Court of Appeals of South Africa.



THE COURT SYSTEM

Chapter 8 of the new Constitution of Zimbabwe establishes the court system for Zimbabwe. The judicial authority of Zimbabwe derives from the people and is vested in the courts. The Constitution establishes seven courts namely which are the Constitutional Court, the Supreme Court, the High Court, the Labour Court, the Administrative Court, the Magistrates courts and the customary law courts.¹ The Constitution also provides that other courts may be established by or under an Act of Parliament.² The judiciary consists of the Chief Justice, the Deputy Chief Justice and the other judges of the Constitutional Court, the judges of the Supreme Court, the Judge President of the High Court and the other judges of that court, the Judge President of the Labour Court and the other judges of that court, the Judge President of the Administrative Court and the other judges of that court, persons presiding over magistrates courts, customary law courts and other courts established by or under an Act of Parliament.³ The Chief Justice is the head of the judiciary and is in charge of the Constitutional Court and the Supreme Court. The High Court, the Labour Court and the Administrative Court are headed by the respective Presidents of those courts.

INDEPENDENCE OF THE JUDICIARY

The United Nations Basic Principles on the Independence of the Judiciary declare that the independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country and that it is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.⁴ Indeed, the independence of the judiciary from the other two arms of the state is the cornerstone of the theory of ‘separation of powers’.⁵ Scholars are agreed that judicial independence is central to the rule of law.⁶ The Bangalore Principles on Judicial Conduct confirm that the importance of a competent, independent and impartial judiciary to the protection of human rights should be given emphasis because the implementation of all the other rights ultimately depends upon the proper administration of justice.⁷

¹ See s 162 of the Constitution

² Section 79 of the Constitution vested the judicial authority of Zimbabwe in the Supreme Court, the High Court and such other courts subordinate to the Supreme Court and the High Court as could be established by or under an Act of Parliament

³ See s 163 of the Constitution

⁴ Principle 1 of the U.N. Basic Principles on the Independence of the Judiciary (Adopted by **General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985**)

⁵ Madhuku (2010) 47

⁶ See generally Boies (2005) and Crozier (2009)

⁷ Bangalore Principles of Judicial Conduct, Preamble, para 4

The Constitution provides that the courts are independent and are subject only to the Constitution and the law, which they must apply impartially, expeditiously and without fear, favour or prejudice.⁸ It is declared that the independence, impartiality and effectiveness of the courts are central to the rule of law and democratic governance such that neither the State nor any institution or agency of the government at any level, and no other person, may interfere with the functioning of the courts.⁹ The Constitution places an obligation on the State to protect the courts to ensure their independence, impartiality, dignity, accessibility and effectiveness through legislative and other measures. Under the Constitution, an order or decision of a court binds the State and all persons and governmental institutions and agencies to which it applies, and must be obeyed by them. However, under section 164 (4) of the Constitution, the independence of the judiciary does not prevent an Act of Parliament from vesting functions other than adjudicating functions in a member of the judiciary. Be that as it may, it is also provided that the exercise of any other functions by members of the judiciary must not compromise the independence of the judicial officer concerned in the performance of his or her judicial functions and does not compromise the independence of the judiciary in general.

PRINCIPLES GUIDING THE JUDICIARY

Section 165 of the Constitution outlines principles which ought to guide the judiciary in the exercise of its functions. In exercising its functions, members of the judiciary must ensure that justice is done to all, irrespective of status, ensure that justice must not be delayed, and to that end members of the judiciary must perform their judicial duties efficiently and with reasonable promptness. The judiciary is also mandated to uphold the role of the courts as paramount in safeguarding human rights and freedoms and the rule of law.¹⁰ The Constitution also provides that members of the judiciary, individually and collectively, must respect and honour their judicial office as a public trust and must strive to enhance their independence in order to maintain public confidence in the judicial system.¹¹ Further, when making a judicial decision, a member of the judiciary has a constitutional obligation to make it freely and without interference or undue influence.¹² The Constitution prohibits members of the judiciary from engaging in any political activities, holding office in or membership of any political organisation, soliciting funds for or contributing towards any political organisation or attending political meetings.¹³ Members of the judiciary are also prohibited from soliciting or accepting any gift, bequest, loan or favour that may influence their judicial conduct or give the

⁸ See s 164 (1) of the Constitution

⁹ See s 164 (2) of the Constitution

¹⁰ See s 165 (1) (a), (b) and (c) of the Constitution

¹¹ See s 165 (2) of the Constitution

¹² See s 165 (3) of the Constitution

¹³ See s 165 (4) of the Constitution



appearance of judicial impropriety. Section 165 (7) also creates an obligation on members of the judiciary to take reasonable steps to maintain and enhance their professional knowledge, skills and personal qualities, and in particular to keep themselves abreast of developments in domestic and international law.¹⁴

THE CONSTITUTIONAL COURT

Section 166 of the Constitution establishes the Constitutional Court as a superior court of record consisting of the Chief Justice, the Deputy Chief Justice and five other judges of the Constitutional Court. However, the Sixth Schedule of the Constitution provides that notwithstanding section 166 and for seven years after 22 May 2013, the Constitutional Court consists of the Chief Justice, Deputy Chief Justice and seven other judges of the Supreme Court. These nine judges must sit together as a bench to hear any constitutional case. The Constitution also provides that a vacancy on the Constitutional Court occurring in the first seven years after the publication date must be filled by another judge or an additional or acting judge of the Supreme Court. After 22 May 2020, however, the Constitutional Court will have different judges with the Supreme Court.

JURISDICTION OF CONSTITUTIONAL COURT OF ZIMBABWE

The Constitutional Court is the highest court in all constitutional matters, and its decisions on those matters bind all other courts.¹⁵ The jurisdiction of the court is limited to deciding only constitutional matters and issues connected with decisions on constitutional matters. This would include considering referrals presented to the court to advise on the constitutionality of a Bill as well as hearing ancillary matters such as applications for directions or applications to dismiss constitutional cases brought before the court.¹⁶ The Constitutional Court also has the jurisdiction to make the final decision whether a matter is a constitutional matter or whether an issue is connected with a decision on a constitutional matter.

The Constitutional Court also has exclusive jurisdiction in certain matters. The court has the exclusive jurisdiction to advise on the constitutionality of any proposed legislation where the legislation concerned has been referred to it in terms of the Constitution, jurisdiction to hear and determine disputes relating to election to the office of President and to hear and determine disputes relating to whether or not a person is qualified to hold the office of Vice-President. The court is also adorned

¹⁴ This is consistent with Principle 6.4 of the Bangalore Principles on Judicial Conduct which states that a judge shall keep himself or herself informed about relevant developments of international law, including international conventions and other instruments establishing human rights norms.

¹⁵ See s 167 of the Constitution

¹⁶ Section 11 of the Rules of the Constitutional Court of South Africa allows parties to apply for directions from the court.

with the exclusive jurisdiction to determine whether Parliament or the President has failed to fulfil a constitutional obligation.¹⁷ In relation to declaring an Act of Parliament or conduct of the President or Parliament as constitutional or otherwise, the Constitution states that the Constitutional Court makes the final decision whether an Act of Parliament or conduct of the President or Parliament is constitutional, and must confirm any order of constitutional invalidity made by another court before that order has any force. As such, whilst it is possible for another court to make a determination that an Act of Parliament or conduct of the President or Parliament is unconstitutional; such an order only becomes valid when confirmed by the Constitutional Court. In the absence of Rules of Court, the procedure to be followed in seeking a confirmation from the Constitutional Court is unclear. Part C of Practice Directive No.2 of 2013 states that appeals on constitutional decisions of the Supreme Court, High Court and Magistrates court shall be dealt with in accordance with part IV of the Rules of the Supreme Court, 1964. Although it would appear that the Directive only relates to appeals challenging the constitutional decision of a lower court, the provision that the Constitutional Court has inherent jurisdiction to regulate its own process would seem to suggest that a litigant can apply to the Court seeking the confirmation of a constitutional declaration by a lower court.¹⁸

RULES OF COURT

The Constitution provides that an Act of Parliament may provide for the exercise of jurisdiction by the Constitutional Court and for that purpose may confer the power to make rules of court.¹⁹ As at 1st July 2014, there has been no Act of Parliament conferring the Constitutional Court with the power to make rules of court. In 2013, the Chief Justice issued Practice Directive No. 2 of 2013 to regulate the procedure of the Constitutional Court of Zimbabwe. The directive deals with how applications on issues within the jurisdiction of the Constitutional Court must be brought to the court.²⁰ As this directive is not a substitute for proper rules of court, there is need for the Legislature to move swiftly in enacting an Act of Parliament providing for the exercise of jurisdiction by the Constitutional Court and for that purpose confer the power to make rules of court. As to the substance of the rules, the Constitution provides guidelines as to the principles which should underlie the rules of the court. Section 167 (5) provides that the Rules of the Constitutional Court must allow a

¹⁷ See s 167 (2) of the Constitution

¹⁸ Section 176 of the Constitution provides that the Constitutional Court, the Supreme Court and the High Court have inherent power to protect and regulate their own process and to develop the common law or the customary law, taking into account the interests of justice and the provisions of the Constitution.

¹⁹ See s 167 (4) of the Constitution

²⁰ The Directive sets out how applications for the enforcement of fundamental human rights and freedoms should be brought to the court. It also makes provision for urgent applications and for appeals on constitutional decisions of the Supreme Court, High Court and Magistrates Court.



person, when it is in the interests of justice and with or without leave of the Constitutional Court, to bring a constitutional matter directly to the Constitutional Court, to appeal directly to the Constitutional Court from any other court and to appear as a friend of the court.

CONSTITUTIONAL COURT OF SOUTH AFRICA

Section 167 (3) (a) of the Constitution of South Africa establishes a Constitutional Court as the highest court in all constitutional matters.²¹ The Constitutional Court of South Africa may decide only constitutional matters, and issues connected with decisions on constitutional matters and it makes the final decision whether a matter is a constitutional matter or whether an issue is connected with a decision on a constitutional matter.²² The court has exclusive jurisdiction to decide disputes between organs of state in the national or provincial sphere concerning the constitutional status, powers or functions of any of those organs of state and to decide on the constitutionality of any parliamentary or provincial Bill. The court also has the jurisdiction to deal with applications by members of the National Assembly seeking an order that all or part of an Act of Parliament is unconstitutional,²³ to consider and decide on applications by members of a provincial legislature seeking an order declaring that all or part of a provincial Act is unconstitutional and to decide on the constitutionality of any amendment to the Constitution.²⁴ Only the Constitutional Court has jurisdiction to decide that Parliament or the President has failed to fulfil a constitutional obligation or to certify a provincial constitution in terms of the provisions of the Constitution of South Africa.²⁵

SUPREME COURT

Section 168 of the Constitution establishes the Supreme Court as a superior court of record and consists of the Chief Justice, the Deputy Chief Justice and no fewer than two other judges of the Supreme Court. The Supreme Court is the final court of appeal for Zimbabwe, except in matters over which the Constitutional Court has

²¹ This is similarly worded to s 167 (1) (a) of the Constitution of Zimbabwe which establishes the Constitutional Court as the highest court in all constitutional matters, and its decisions on those matters bind all other courts.

²² These provisions are similar to s 167 (1) (b) and (c) of the Constitution of Zimbabwe

²³ In Zimbabwe, there is no provision for members of Parliament to approach the Constitutional Court to challenge the constitutionality of an Act of Parliament.

²⁴ There is no provision in the Constitution of Zimbabwe specifically granting the Constitutional Court the jurisdiction to determine the constitutionality of an amendment to the Constitution.

²⁵ The nature of Provincial Government in Zimbabwe does not necessitate such provisions. Provincial governments in Zimbabwe do not have legislative authority.

jurisdiction.²⁶ Rules of Court may confer on the registrar of the Supreme Court any of the Court's jurisdiction and powers in civil cases to make orders in uncontested cases, other than orders affecting status or the custody or guardianship of children or to decide preliminary or interlocutory matters, including applications for directions. The Constitution however provides that when the rules give the registrar such powers, the rules must give any person affected by the registrar's order or decision a right to have it reviewed by a judge of the Supreme Court.

SUPREME COURT OF APPEAL – SOUTH AFRICA

Section 168 (1) of the Constitution of South Africa establishes a Supreme Court of Appeal consisting of a President, a Deputy President and the number of judges of appeal determined in terms an Act of Parliament. The Supreme Court of Appeal may decide appeals in any matter. It is the highest court of appeal except in constitutional matters.²⁷

HIGH COURT

Section 170 of the Constitution establishes a High Court as a superior court of record consisting of the Chief Justice, the Deputy Chief Justice, the Judge President of the High Court and such other judges of the High Court as may be appointed from time to time. The Constitution allows an Act of Parliament to provide for the High Court to be divided into specialised divisions, but every such division must be able to exercise the general jurisdiction of the High Court in any matter that is brought before it. The High Court has original jurisdiction over all civil and criminal matters throughout Zimbabwe.²⁸ The fact that the High Court has full original jurisdiction means that its jurisdiction is unlimited, i.e there is no monetary limit to claims that may be brought; and it can hear any civil dispute, whatever the nature of the claim.²⁹

OTHER COURTS

The Constitution establishes a Labour Court which has such jurisdiction over matters of labour and employment as may be conferred upon it by an Act of Parliament.³⁰ Section 173 of the Constitution establishes an Administrative Court is a court of record with jurisdiction over administrative matters as may be conferred upon it by an Act of Parliament. An Act of Parliament may provide for the establishment, composition and jurisdiction of magistrates courts, to adjudicate on civil and criminal cases, customary law courts whose jurisdiction consists primarily in the application of customary law , other courts subordinate to the High Court and

²⁶ See s 169 (1) of the Constitution

²⁷ See s 168 (3) of the Constitution of South Africa

²⁸ See s 171 (1) (a) of the Constitution

²⁹ Madhuku (2010) p 71

³⁰ See s 172 of the Constitution



other tribunals for arbitration, mediation and other forms of alternative dispute resolution.

A SUMMARY OF SELECTED CASES OF THE SUPREME COURT AND THE CONSTITUTIONAL COURT OF ZIMBABWE

Reviews by Simbarashe Mubvuma, Tendai Dube and Godknows Nyangwa



Below is a summary and comments on the following cases:

1. *Matukire v Medicines Control Authority of Zimbabwe* 2012 (1) ZLR 29 (S)
2. *Telecel Private (Limited) Zimbabwe v Attorney General* SC22/14
3. *Madanhire and Another v Attorney General* CCZ2/14
4. *Jennifer Williams and Others v The Co-Ministers of Home Affairs and Others* CCZ4/14
5. *Farai Madzimbamuto v Principal Immigration Officer and Others* CCZ5/14



MATUKIRE V MEDICINES CONTROL AUTHORITY OF ZIMBABWE 2012

(1) ZLR 29 (S)

In *Matukire v Medicines Control Authority of Zimbabwe 2012 (1) ZLR 29 (S)*, the Supreme Court of Zimbabwe had occasion to determine very interesting aspects of pharmaceutical practice namely;

1. Whether a pharmacist has a duty to keep the pharmacy superintended by him/her or another licensed pharmacist at all times.
2. Whether a temporary absence from the pharmacy (for 10 minutes) constitutes a violation of section 55 of the Medicines and Allied Substances Control Act [Chapter 15:03].
3. Whether the pharmacist who breaches such a duty would have his/her license cancelled.

The dispute in that matter revolved around the proper interpretation to be accorded to section 55 of the Medicines and Allied Substances Control Act [Chapter 15:03] (“the Act”) which provides that;

“55 Premises and persons to be licensed

- (1) No person shall practice as or carry on the business of a pharmacist on any business unless –
 - (a) *The premises are licensed...*
 - (b) The premises are under the continuous personal supervision of a person who is licensed in terms of this Part for those premises” (emphasis added).

In this matter, a pharmacist left his premises operating without a pharmacist to draw money from an automated teller machine. An inspector from the Medicines Control Authority of Zimbabwe (herein “MCAZ” established in terms of section 3 of the Act which is the regulatory authority of all pharmaceutical drugs and premises which also, *inter alia*, supervises the administration thereof) on a routine inspection found the premises operating without a pharmacist and then collated a report on his observations. When confronted with this charge, the pharmacist’s responses were tabled before the MCAZ’s Licensing and Advertising Committee and a final warning was given.

The pharmacist appealed to the Administrative Court and the Court held that the MCAZ was entitled, in the exercise of its discretion, to give a warning to pharmacists who abandoned open pharmaceutical premises during working hours. On a further appeal to the Supreme Court;

- The Court (Garwe JA) held that a licensed pharmacist should attend to a pharmacy at all material times during the business hours.
- The jurisprudential basis for the decision was the wording of section 55 of the Act itself. The court applied the literal rule by giving effect to the ordinary and grammatical meaning of “*continuous supervision*”. The Court held that such wording meant that the pharmacists should “oversee” and “*superintend*” the premises in an “*unbroken*” or “*uninterrupted*” manner.
- The concept basis for the decision was that medicines can be very dangerous if they fall in the wrong hands or if they are dispensed without proper instruction.

TELECEL ZIMBABWE (PRIVATE) LIMITED v ATTORNEY- GENERAL OF ZIMBABWE N.O. SC 1/2014

INTRODUCTION

In the case of Telecel Zimbabwe (Private) Limited v Attorney-General of Zimbabwe N.O the Supreme Court had an opportunity to decide on whether or not a juristic person can institute a private prosecution as envisaged in Part III of the Criminal Procedure and Evidence Act [*Chapter 9:07*] (the CP&E Act). It also had to decide whether or not the prosecuting authority has discretion to issue a certificate of *nolle prosequi* when it has declined to prosecute. This review summarises the decision of the Supreme Court of Zimbabwe in this judgement.

FACTS OF THE CASE

In 2010 four senior employees of the appellant were charged with a massive fraud of about US\$1,700,000 perpetrated against the appellant. Initially, the Attorney-General was of the view that there was overwhelming evidence against the accused persons and had successfully argued that the accused be denied bail. At a later stage, the charges against the accused were withdrawn before plea following a directive by the respondent that there was insufficient evidence to prosecute. Consequently, the appellant sought a certificate *nolle prosequi* which was withheld and declined by the respondent. The appellant then applied to the High Court on review for that decision to be set aside as being both unlawful and grossly irrational.¹

The High Court held that a private company, as distinct from a private individual, had no *locus standi* to institute a private prosecution. The High Court adopted and applied the position taken by the South African Appellate Division in interpreting the equivalent statutory provisions in South Africa. The High Court accordingly

¹ A certificate *nolle prosequi* is a document issued by the prosecuting authority indicating that they are declining to mount a prosecution. Under the CP&E Act, a private person can only institute a prosecution if the prosecuting authority has certified that they have declined to prosecute.



decided that it was not necessary to determine the further question as to the discretion of the AG to withhold the certificate *nolle prosequi*.

THE QUESTIONS BEFORE THE SUPREME COURT

On appeal to the Supreme Court, the court had to decide the following issues:

1. Whether a private company is entitled to bring a private prosecution?
2. Whether a prosecuting authority has the discretion to issue or withhold a certificate *nolle prosequi* when they decline to prosecute at the public instance?

WHETHER A PRIVATE COMPANY IS ENTITLED TO BRING A PRIVATE PROSECUTION?

The Supreme Court took the opportunity to trace the origins of the law on private prosecutions in Zimbabwe. Having referred to section 13 of the CP & E Act, the court recalled the historical background to private prosecutions generally.² The court observed that although the Roman Dutch Law in force at the Cape on 10th June 1891 preserved a limited right of private prosecution, the authorities reflected that the English common law right of private prosecution was not confined to natural persons but extended as well to juristic and artificial entities.³ The court observed that this English common law right migrated to the Cape Colony through Ordinance No. 40 (1828) and Ordinance No.72 (1830) and remained intact until 10 June 1891, at which stage it became an integral part of our law. The court also noted that the right of private prosecution originates in the reparation of individual injuries and the vindication of individual as opposed to corporate rights.⁴ It also observed that the right was not confined to purely pecuniary loss or the kind of injury that might ordinarily be sustained by corporate entities in the normal course of their business.

The respondent had cited an array of decision from the highest courts in South Africa and from the Federal Supreme Court which purported to hold that a juristic person cannot mount a private prosecution. The court in reaching its conclusion, took an opportunity to canvass the various decisions on the subject.

² Section 13 of the CP & E Act provides that ““In all cases where the Attorney-General declines to prosecute for an alleged offence, any private party, who can show some substantial and peculiar interest in the issue of the trial arising out of some injury which he individually has suffered by the commission of the offence, may prosecute, in any court competent to try the offence, the person alleged to have committed it.”

³ 10th June 1981 was referred to in section 89 of the former Constitution which stated that “Subject to the provisions of any law for the time being in force in Zimbabwe relating to the application of African customary law, the law to be administered by the Supreme Court, the High Court and by any courts in Zimbabwe subordinate to the High Court shall be the law in force in the Colony of the Cape of Good Hope on 10th June, 1891, as modified by subsequent legislation having in Zimbabwe the force of law.”

⁴⁴ SC1/2014 p 5

Salisbury Bottling Co. (Pvt) Ltd & Ors v Central African Bottling Co. (Pvt) Ltd
 1958 (1) SA 750 (FC)

In this case, Respondent, in order to promote the sales of its soft drink, had devised a scheme whereby numbers from 1 to 20 were inserted on the inside of the crown cork of every bottle. Any person who collected a set of the 20 numbers was entitled to a bicycle. The difficulty in obtaining a set of numbers was brought about by limiting the marking of the corks in regard to particular numbers. The appellants, rivals in the soft drink trade, had unsuccessfully applied to the High Court, Southern Rhodesia, for an order interdicting the respondent from continuing with its advertised scheme on the ground that it was a lottery under the Lotteries Prohibition Act, Chapter 38 (S.R.), the basis of the High Court's decision being that the prize was not awarded to the purchaser of the bottles but to the collector of the set of corks, and that the matter was thereby made substantially one of the skill of the collector in bargaining, etc. In an appeal, the Court had regard to the advertisement which suggested to some that a prize was to be won by chance, viz. by merely buying sufficient bottles to drink, though there was evidence that no prize had in fact been won that way, but only by buying in or bargaining for the scarcer numbers.

On appeal, having found that the exercise was indeed a lottery, the court had to consider whether the procedure of private prosecution can provide an effective remedy to a private person in cases in which the breach of a statutory duty is made a criminal offence. In distinguishing this case, the Supreme Court noted that although the Federal Supreme Court canvassed the right of private prosecution under s 19 of [Chapter 28] (the predecessor to s 13 of [Chapter 9:07] as an alternative remedy to the grant of damages or an interdict, the case could be different in one material aspect. Since this earlier case involved two corporate entities, the Supreme Court noted that in that context, the Federal Supreme Court had not drawn any specific distinction as between private individuals and companies. As such, the court had not made any definitive ruling on whether a private company can mount a private prosecution.⁵

Barclays Zimbabwe Nominees (Pvt) Ltd v Black 1990 (4) SA 720 (AD)

In this case, the Attorney-General for the Witwatersrand Local Division declined to prosecute the respondent on certain charges of fraud and perjury and issued a certificate to that effect in terms of s 7(2)(a) of the Criminal Procedure Act 51 of 1977. The appellant, a company incorporated in Zimbabwe, then purported to institute a prosecution against the respondent on such charges in the regional court in terms of s 7(1)(a) of that Act. The respondent gave due notice of his intention to plead, in terms of s 106(1) (h), that the appellant had no title to prosecute. This plea was based on the contention that the appellant, being a company, was not a 'private

⁵ SC1/2014 p7



person' within the meaning of s 7(1) (a). The regional magistrate dismissed the plea without giving any reasons. The trial then proceeded and the respondent was convicted of fraud. He appealed to the Witwatersrand Local Division against his conviction on the ground that the magistrate had wrongly dismissed the plea that the appellant had no title to prosecute, and on the further ground that the evidence in any event failed to establish his guilt. The Court a quo upheld the plea. Smit J also held that, in any event, the guilt of the respondent had not been proved. Schabort J however declined to express a view on the merits of the conviction because the issue had not been canvassed in argument. Leave to appeal was granted by the Court a quo on the question of whether the appellant had, in law, title to prosecute. The court in this case held that a company is not a 'private person' as intended by s 7 of the Criminal Procedure Act 51 of 1977 and therefore does not have locus standi to institute a private prosecution.

The Supreme Court noted that the court in *Barclays Zimbabwe Nominees* held that the phrase "private person" in section 7(1) (a) of the Criminal Procedure Act No. 51 of 1977 (the equivalent of section 13 in the CP&E Act), as read in the context of section 7 and the Act as a whole, should be interpreted as meaning only a natural person. However, the Supreme Court indicated that *Barclays Zimbabwe Nominees could not be used as authority for four main reasons.*

First, the court noted that there was a critical difference between the South African and Zimbabwean provisions on the subject of private prosecutions. The court highlighted that whilst s 7(1) of the South African Act confers the right to prosecute on "any private person either in person or by a legal representative"; s 13 of the CP&E Act provides that "any private party may prosecute.

Second, whilst the right to prosecute under statute is exercisable in terms of s 8(1) of the South African Act by "anybody upon which or person upon whom" such right is expressly conferred; by virtue of s 14(d) of the CP&E Act it is exercisable by "public bodies and persons on whom" it is specially conferred.

Third, there is no equivalent in the CP&E Act of s 10(2) of the South African Act which requires the signature of the indictment, charge sheet or summons by the "prosecutor or his legal representative". Fourth, whilst s 11(1) of the South African Act refers to the failure of "the private prosecutor" to appear on the day set down for trial; s 18(1) of the CP&E Act refers to such failure by "the prosecutor, being a private party".

The court noted that the ultimate and most fundamental distinction between the two statutes is the usage of "private person" in the South African Act as contrasted with the references to "private party" in the CP&E Act. The court stated that in the legal context, the word "party" is defined as "each of two or more persons (or bodies of people) that constitute the two sides in an action at law, a contract, etc." In the view of the Supreme Court, this definition coupled with the differences that highlighted as between the South African and Zimbabwean statutes, tended to diminish the persuasive authority of the Appellate Division's otherwise cogent reasoning in the *Barclays Zimbabwe Nominees* case.

INDICATIONS FROM THE CP & E ACT ON WHETHER IT ONLY RELATES TO NATURAL PERSONS

The court accepted that some of the phraseology employed in section 13 of the Act, in particular, the reference to “some injury which he individually has suffered”, strongly supports the proposition that the right to prosecute conferred by that provision is confined to natural as opposed to artificial persons. On the other hand, the court noted that the references to “public bodies and persons” and “public body or person”, in ss 14 and 16 respectively, suggest otherwise. The court referred to s 3(3) of the Interpretation Act [*Cap 1:01*] which provides that in every enactment “„person” or „party” includes any company incorporated or registered as such under an enactment, any body of persons, corporate or unincorporated or any local or other similar authority. The court also made reference to s 9 of the Interpretation Act which states that unless the context otherwise requires, words importing female persons include male persons and juristic persons and words importing male persons include female persons and juristic persons.

Having referred to the rule of interpretation that the law should not be subject to casual change, the court held that it was clear that the common law right of private prosecution was not confined to natural persons but also extended to juristic and artificial entities. The court therefore held that the governing rule of statutory interpretation dictates that the provisions of Part III of the CP&E Act should be construed, insofar as is consistent with their language and context, so as to preserve the common law components of the right to prosecute rather than to diminish or extinguish them. The court held that it did not perceive in these provisions any clear or positive legislative intention to alter pre-existing rights or to constrict the common law position relative to corporations.

In conclusion, the court held that a liberal and inclusive construction of s 13 of the CP&E Act accords not only with the definition of “person” and “party” in section 2 of that Act but also with the broad definition of those terms in s 3(3) of the Interpretation Act. It also held that such a construction accords with the rule of interpretation prescribed by s 9(1) of the Interpretation Act, *viz.* that words importing male persons include female persons and juristic persons. Moreover, the court noted that this construction is neither inconsistent with the context of s 13 nor does it lead to any absurdity. The court therefore concluded that the view that the right of private prosecution conferred by that provision vests in natural as well as artificial persons, including private corporations.

WHETHER OR NOT THE PROSECUTING AUTHORITY HAS DISCRETION TO ISSUE A CERTIFICATE NOLLE PROSEQUI?

In answering this question, the court first referred to the requirements for the issuance of a certificate *nolle prosequi* as spelt out in s 13 of the CP&E Act.⁶ The

⁶ s 13 of the CP & E Act provides that;
 “The private party concerned must show:



court further noted that notwithstanding the possession of a certificate, the court may, in the exercise of its inherent power to prevent abuse of process, interdict a private prosecution pursuant to such certificate. It emphasised that the court has an inherent power to restrain a private prosecution. The court also referred to the decision of a South African court in *Singh v Minister of Justice and Constitutional Development & Another* (5072/05) [2006] ZAKZHC. In this case it was argued that the National Director of Public Prosecutions (the NDPP) was obliged to issue to the applicant a certificate *nolle prosequi* once there had been a decision that he had declined to prosecute, and that it was not necessary for a private prosecutor to prove some substantial and peculiar interest in the issue of the trial. This argument had been rejected with the court holding that it was necessary for the applicant to provide a factual basis proving that he had some substantial and peculiar interest in the issue of the trial, arising out of some injury which he has individually suffered in consequence of the commission of the alleged offence.

The court proceeded to hold that the language of s 16(1) of the CP&E Act is categorically clear, viz. a private prosecutor must produce “a certificate signed by the Attorney-General that he has seen the statements or affidavits on which the charge is based and declines to prosecute at the public instance”. The court emphasised that the CP & E Act states that “in every case in which the Attorney-General declines to prosecute he shall, at the request of the party intending to prosecute, grant the certificate required”. The court then took an opportunity to have regard to the Attorney-General’s constitutionally guaranteed independence and wide discretion in matters of criminal prosecution. In concluding that the perceived lack of discretion does not impinge on the Attorney-General’s principal discretion to prosecute or not to prosecute at the public instance, the court stated that the exercise of the discretion by the AG vis-à-vis any intended private prosecution involves a two-stage process. The first stage is for the AG to decide whether or not to prosecute at the public instance. If he declines to do so, the next stage comes into play, i.e. to decide whether or not to grant the requisite certificate. In so doing, the AG must take into account all the relevant factors prescribed in s 13 of the Act, to wit, whether the private party in question “can show some substantial and peculiar interest in the issue of the trial arising out of some injury which he individually has suffered by the commission of the offence. If such interest cannot be shown, the Attorney-General is entitled to refuse to issue the necessary certificate. However, where the private party is able to demonstrate the required “substantial and peculiar interest” and attendant criteria, the Attorney-General is then bound to grant the certificate *nolle prosequi*. The court held that at this stage,

-
- (i) some substantial and peculiar interest,
 - (ii) in the issue of the trial,
 - (iii) arising out of some injury,
 - (iv) which he individually has suffered,
 - (v) in consequence of the commission of the offence

his obligation to do so becomes peremptory and s 16(1) can no longer be construed as being merely permissive or directory.

MILDRED MAPINGURE V MINISTER OF HOME AFFAIRS AND 2 OTHERS SC22/14

INTRODUCTION

On 4 April 2006 a young woman called Mildred Mapingure was raped by robbers who attacked her residence in the Chegutu area. Immediately after this deplorable act, she lodged a report at the Zimbabwe Republic Police at Chegutu. At the police station, she made a request that arrangements be made for her to seek medical intervention to prevent pregnancy and any possible sexually transmitted infections. She was however kept waiting for the whole day at the police station, apparently waiting for the arrival of the police officer mandated to deal with rape victims. She eventually managed to visit a hospital. She requested the doctor at the hospital to ensure that she did not fall pregnant or contract any sexually transmitted infections. The doctor then informed her that the pregnancy could only be terminated in the presence of the police who would prepare a report. The doctor also informed her that the desired termination had to be carried out within 72 hours of the unlawful intercourse. An instruction was then given to Ms Mapingure to come back to the hospital the following day with a police officer.

At 7.00hrs on the 5th of April, the following day, Mildred Mapingure went back to Chegutu Police Station where she was referred to the Criminal Investigation Department (C.I.D). At the C.I.D, she was attended to by an investigating officer who, again, advised her that the officer responsible for rape victims was the only one who could take her to the doctor. The officer in question was not at the station at the time. Conscious of the need to act within the 72 hours as advised by the doctor, she went back to the hospital and informed the doctor that the police were not cooperating. She emphasized her fear of falling pregnant. The doctor remained adamant that he could not assist as the police had to first conduct their investigations. It was only on 7 April 2006 when Ms Mapingure met the appropriate officer at the station. On this day, the doctor advised that it was too late to terminate the pregnancy. The pregnancy was formally confirmed on 5 May 2006. She also approached the public prosecutor at Chegutu where she was told to “wait until the rape trial was done”. When a certificate of termination was finally granted on 30 September 2006, the matron tasked with carrying out the termination refused to carry out the procedure and stating that it was too late to do so. Ms Mapingure therefore kept the pregnancy to full term. In December 2006, she gave birth to a baby girl and named her Vimbainashe (Shona name meaning Trust in God). The following is a summary of the High Court and Supreme Court decisions in the case between Mildred Mapingure and the Minister of Home Affairs and 2 others.



THE DECISION OF THE HIGH COURT

For her suffering and for all the complications involved in her failure to have the pregnancy terminated, Ms Mapingure sued the Minister of Home Affairs, Minister of Health and Child Welfare and the Minister of Justice, Legal and Parliamentary Affairs in the High Court. She based her claim on the allegation that the defendants were negligent in their failure to prevent the pregnancy or to expedite its termination. In her claim against the defendants she sought the following;

- a) Payment in the sum of ten thousand dollars (US\$10 000) for physical and mental anguish, pain and stress suffered and;
- b) Payment of forty thousand and nine hundred and four dollars (US\$41 904) as maintenance for her child since her birth in December 2006 until the child reaches 18 years or becomes self -supporting and;
- c) Interest on the total amount of the claim from the date of judgment to the date of full payment and;
- d) Costs of the suit

THE LAW ON TERMINATION OF PREGNANCY

All three defendants failed to file their pleas and were barred in the proceedings before the High Court. The plaintiff then applied for judgment in default. In December 2012, the High Court delivered judgment in this case. In dismissing the claim, the High Court concluded that any termination of pregnancy has to be carried out in line with the requirements of section 4 of the Termination of Pregnancy Act [*Chapter 15 :10*]. Section 4 (c) of this Act provides that a pregnancy may be terminated where there is [a] reasonable possibility that the foetus is conceived as a result of unlawful intercourse. Section 5 (4) goes on to provide that a pregnancy can only be terminated on this ground by a medical practitioner upon the production of a certificate issued by a Magistrate of a court in the jurisdiction of which the pregnancy is terminated. Section 5 (b) also provides that the woman alleging the unlawful intercourse must depose to an affidavit or a statement on oath to the magistrate that the pregnancy could be a result of unlawful intercourse.

LIABILITY OF THE MINISTER OF HOME AFFAIRS

In reaching its conclusion, the High Court reasoned that the Minister of Home Affairs was not liable or even negligent for two reasons. First, that the Termination of Pregnancy Act did not make any specific reference to the role of police officers in termination of procedures such that there was no duty to act on the part of the police officers. Second, that the Act provides that “the women concerned has to allege in an affidavit” which must be presented to a Magistrate and that Ms Mapingure did not present such affidavit or statement before a Magistrate. In response to the argument that Ms Mapingure was unaware of all these procedures such that it fell upon the police to advise her as to the correct procedure, the court stated that the role of the police could not be extended to that of “legal advisors”.

LIABILITY OF THE MINISTER OF HEALTH AND CHILD WELFARE

In concluding that the Minister of Health and Child Welfare could not be held as having been negligent, the court reasoned that no one would have expected the doctor to act in violation of the law. The court further stated that when the certificate to terminate was finally acquired, the matron tasked with carrying out the procedure was not expected to act against her conviction that it was no longer safe to do so.

LIABILITY OF THE MINISTER OF JUSTICE, LEGAL AND PARLIAMENTARY AFFAIRS

The court also concluded that the Minister of Justice, Legal and Parliamentary Affairs could not be held liable for the alleged negligence of the public prosecutor in failing to act in assistance of Ms Mapingure. The court stated that this was so since it was the woman raped who had the obligation to initiate the process of termination by presenting an affidavit before a magistrate. According to the court, the public prosecutor had no role to play in termination proceedings and could not be expected to take the role of legal advisor in this case. His role was to prosecute those accused of rape. The court however neglected to deal with the issue that the public prosecutor had incorrectly informed Ms Mapingure that she had to wait until the rape trial was concluded for her to terminate the pregnancy.

HIGH COURT ORDER

In the end, the court dismissed claims (a) – (c) and did not make an order as to costs.

THE DECISION OF THE SUPREME COURT

Ms. Mapingure (appellant) appealed against the decision of the High Court to the Supreme Court. In the Supreme Court, it was argued, first, that the High Court was incorrect to apply the Termination of Pregnancy Act in relation to the failure to prevent her pregnancy immediately after she was raped. Second, in holding that the negligence of the police in relation to the prevention and termination of the appellant's pregnancy was not material. Third, the judgement of the High Court was also attacked by the appellant as being incorrect in finding that the duties of the officials in question did not include the giving of proper guidance on the procedure to be followed as well as the finding that the appellant had not complied with the relevant provisions of the Act. Fourth, the appellant also urged the Supreme Court to rule that the High Court was incorrect in not holding that the police and the prosecutors were enjoined by the Act to submit the requisite documents to the magistrate and finally, the holding that the liability of the respondents did not extend to extra-statutory duties founded on the public's expectation of their official standing.



THE ISSUES

For the Supreme Court, the issues arising for determination from these wide-ranging grounds of appeal were twofold. The first was whether or not the respondent's employees were negligent in the manner in which they dealt with the appellant's predicament. The second, assuming an affirmative answer to the first, was whether the appellant suffered any actionable harm as a result of such negligence and, if so, whether the respondents were liable to the appellant in damages for pain and suffering and for the maintenance of her child. In dealing with the appeal, the Supreme Court took the chance to explain the law on medical negligence, the law relating to the liability of the police and the international legal framework on the rights of women.

DUTIES OF THE POLICE TO ASSIST IN THE TIMEOUS PREVENTION OF THE PREGNANCY

Having extensively cited authority on the duties of the police, the court stated that the police failed in their duty to assist the appellant timeously in having her pregnancy prevented by the doctor immediately after she had been raped. In the view of the court, the provisions of the Termination Of Pregnancy Act requiring a magisterial certificate did not apply in cases where immediate prevention was sought. The court also concluded that the doctor himself failed to carry out his professional duty to avert the pregnancy when it could have been reasonably prevented. By virtue of the unlawful omissions which took place within the course and scope of their employment with the first and second respondents respectively (the police and the doctor); the court ruled that the first and second respondents must be held vicariously liable to compensate the appellant in respect of the harm occasioned through the failure to prevent her pregnancy.

OBLIGATION TO APPROACH THE MAGISTRATE FOR A CERTIFICATE OF TERMINATION

The court also took the opportunity to decide on the issue relating to whether it was the police or the victim who had the obligation to approach the magistrate seeking a certificate of termination. This was after the legal practitioner for the appellant had argued that it was in fact the police who should have presented the documents before a magistrate. On this particular point, the court stated that section 5 (4) (b) of the Termination of Pregnancy Act requires a victim of the alleged rape to depose to an affidavit or make a statement under oath to the magistrate alleging that the conception was a result of unlawful intercourse. The court accordingly ruled that it is the responsibility of the victim of the alleged rape to institute proceedings for the issuance of a magisterial certificate allowing the termination of her pregnancy in terms of s 5 (4).

ROLES OF THE POLICE, THE PROSECUTOR, MAGISTRATE AND THE DOCTOR IN THE TERMINATION PROCESS

Despite ruling against the appellant on the specific point relating to the obligation to initiate proceedings for the issue of a termination certificate, the court clarified the roles of all the other participants in the overall process of termination of pregnancy. It stated that the role of the police and the prosecutor, upon request by the victim or in response to a directive by the magistrate, is to compile the relevant report and documentation pertaining to the rape for submission to the magistrate. The role of the magistrate is to issue the requisite certificate upon being duly satisfied in terms of s 5 (4), while that of the superintendent of the designated institution is to authorise its medical practitioner, upon production of the certificate, to terminate the unwanted pregnancy. It may also be necessary, where appropriate, for these functionaries to give accurate information and advice, within the purview of their respective functions, to enable the victim to terminate her pregnancy.

LEGAL ADVICE FROM THE PROSECUTOR OR THE MAGISTRATE

On the issue of whether the prosecutor or the magistrate could be expected to give legal advice on the procedural aspects of terminating a pregnancy, the court stated that it was not within the scope of prosecutorial or magisterial functions to give legal advice on the procedural steps required to terminate a pregnancy. It was stated that to accept that position would be “tantamount to opening the floodgates to a veritable deluge of claims founded on the perceived failure to act reasonably in relation to matters clearly beyond the bounds of their official competence.” Moreover, the court was inclined to believe that the convictions of the community and considerations of public policy would militate unequivocally against the imputation of liability in the present context. Accordingly, the court concluded that the duty of the prosecutors and magistrate to act reasonably in the performance of their functions did not extend to the giving of legal advice, whether accurate or otherwise, to the appellant. It was for her to have sought that advice personally, preferably from a lawyer in private or paralegal practice, as soon as possible after she became aware of her pregnancy in May 2006. This led the court to rule that it was the appellant’s own failure to institute the necessary application that resulted in the inability to have her pregnancy timeously terminated. Consequently, her claim founded on the failure to terminate her pregnancy failed as against all three respondents.

DAMAGES FOR PAIN AND SUFFERING AND MAINTENANCE

Having concluded that the police and the doctor were negligent in that they failed in their duty of care towards the appellant in having her pregnancy prevented, the court found the first and second respondents vicariously liable in damages for any harm sustained by the appellant. The appellant could therefore sue under the law of delict for damages for pain and suffering for failure to prevent her pregnancy. The court held that although the present claim was without precedent in this jurisdiction, its



novelty did not involve any impermissible extension of Aquilian liability. The court held that an unwanted pregnancy can, depending on the circumstances of its occurrence, constitute harm for which damages can be ordered by a court of law. The court ordered that the issue of the amount of damages be remitted to the High Court for the grant of default judgment, in such amount as the court may assess and determine after due inquiry. In relation to the maintenance claim, the court concluded that the claim is ordinarily based on a relationship between the parties of such kind as to create a legal duty of support between them, *i.e.* husband and wife, parent and child, grandparent and grandchild, and immediate collaterals. The liability of a third party (in this case the state) outside any such familial relationship is traditionally confined to one who deprives a dependant of support by wrongfully causing the death or incapacitation of the person supporting the claimant. As such, the court upheld the dismissal of the appellant's claim for damages for the maintenance of her minor child by the High Court.

SUPREME COURT ORDER

1. The appeal was partially allowed to the extent that the dismissal of the appellant's claim for damages for pain and suffering, arising from the failure to prevent her pregnancy.
2. The claim for damages for pain and suffering was remitted to the High Court for the grant of default judgment, in such amount as the court may assess and determine after due inquiry, together with the question of costs

NEVANJI MADANHIRE AND ANOTHER V ATTORNEY-GENERAL CC22/14

INTRODUCTION

On 12 June 2014 the Constitutional Court of Zimbabwe delivered judgement in the case of Nevanji Madanhire and Another V Attorney General. The applicants in this case were jointly charged with the crime of criminal defamation as defined in s 96 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. The first applicant is the editor of *The Standard* newspaper, while the second applicant is employed by the same newspaper as a reporter. On 6 November 2011, they published an article concerning a prominent business man and politician who was the Chairperson of a medical aid society. The article stated that the Society was unable to pay its members and staff as well as its creditors and that it was on the brink of collapse as its expenditure outstripped its income. The applicants were subsequently arrested and charged under s 96 of the Criminal Law Code. It was alleged that they published the foregoing statements knowing that they were false and intending to cause serious harm to the reputations of complainant and the society. Pursuant to an application under s 24(2) of the former Constitution, the Magistrates Court sitting at Harare has referred the matter to the Court for the determination of certain constitutional questions. The original application to the

Court was for the offence of criminal defamation as defined in s 96 of the Criminal Law Code to be declared unconstitutional and struck down as being null and void.⁷ However, after it was observed by the Court that the application in its original form did not address the relevant provisions of the new Constitution, the application was confined to the consistency of the offence with the former Constitution.⁸ The applicants now sought the perpetual stay of prosecution of the applicants in respect of the offence of criminal defamation allegedly committed under the aegis of the former Constitution.⁹

QUESTIONS BEFORE THE COURT

1. Whether or not the requirement of serious harm in the crime of defamation is vague so as to render the offence inconsistent with the rights enshrined in ss 18(1) and 18(9) of the former Constitution?
2. Whether or not the offence of criminal defamation is inconsistent with the right to freedom of expression in s 20 of the former Constitution?
3. Whether or not a declaration that criminal defamation was inconsistent with the former Constitution would have an effect on its position under the new Constitution?

WHETHER OR NOT THE REQUIREMENT OF SERIOUS HARM IN THE CRIME OF DEFAMATION IS VAGUE SO AS TO RENDER THE OFFENCE INCONSISTENT WITH THE RIGHTS ENSHRINED IN SS 18(1) AND 18(9) OF THE FORMER CONSTITUTION?

The applicants had argued that the requirement of serious harm in the crime of defamation is vague in that the word —serious is a comparative adjective which is almost impossible of a benchmark or judicial definition. They argued that the requirement is unduly subjective and its application will depend on the idiosyncratic views of the parties involved, the investigating officer, the prosecutor and, ultimately, the presiding judicial officer. For these reasons, they argued that the offence violates not only the right to protection of the law secured by s 18(1) of the former Constitution but also the right to a fair trial guaranteed by s 18(9).

In considering these submissions, the court described them as “flimsy and highly unpersuasive”. In the view of the court, the use of adjectives to define the constituent elements of criminal offences is commonplace and can hardly be regarded as being remarkable.¹⁰ Citing examples within the criminal law, the court remarked that the interpretation and application of any such defining epithet forms part of the daily diet of judicial officers in the lower courts. It therefore concluded that the offence of criminal defamation is clearly formulated with sufficient

⁷ Const. Application No. CCZ 78/12

⁸ CCZ2/14 p 2

⁹ *ibid*

¹⁰ *ibid* p 6



precision in s 96 of the Criminal Law Code so as not to create any ambiguity or vagueness as to the conduct that is proscribed as being punishable. Reference was also made to the specific factors that may entail harm of a serious nature as articulated in s 96(2).¹¹ In concluding, the court held that the challenge against the constitutionality of criminal defamation vis-à-vis the rights enshrined in ss 18(1) and 18(9) of the former Constitution was devoid of merit and could not be upheld.

WHETHER OR NOT THE OFFENCE OF CRIMINAL DEFAMATION IS INCONSISTENT
WITH THE RIGHT TO FREEDOM OF EXPRESSION IN S 20 OF THE FORMER
CONSTITUTION?

In considering this point, the Court began by stating that there can be no doubt that the freedom of expression, coupled with the corollary right to receive and impart information, is a core value of any democratic society deserving of the utmost legal protection.¹² Referring to international law, the court remarked that freedom of expression is prominently recognised and entrenched in virtually every international and regional human rights instrument.¹³ It observed that the offence of criminal defamation operates to encumber and restrict the freedom of expression enshrined in s 20(1) of the former Constitution. On the other hand, the court stated that the offence of criminal defamation falls into the category of permissible derogations contemplated in s 20(2)(b)(i), as being a provision designed to protect the reputations, rights and freedoms of other persons. The court therefore construed the question before it as being whether or not it is a limitation that is reasonably justifiable in a democratic society.

In answering this question, the court noted that the test as to what is democratically reasonable and justifiable is not susceptible to precise legal formulation. It observed that the test may well vary from one society to another depending upon its peculiar political organisation and socio-economic underpinnings. Citing the decision of the Supreme Court in *In re Munhumeso & Others*,¹⁴ the court concluded that the objective behind s 96 of the Criminal Law Code, viz. to protect the reputations, rights and freedoms of other persons, is sufficiently important to warrant the limitation of freedom of expression, and the detailed provisions of s 96 are clearly rationally connected to that objective. On the other hand, the court acknowledged

¹¹ These include the extent to which the accused has persisted with the defamatory allegations, the extravagance of the allegations, the nature and extent of the publication, and whether and to what extent the interests of the State or any community have been detrimentally affected.

¹² *ibid* p 7

¹³ The court referred to UN Resolution 59(I) of 14 December 1946 and Human Rights Committee General Comment No. 34

¹⁴ This case stated the test as follows; —What is reasonably justifiable in a democratic society is an illusive concept – one which cannot be precisely defined by the courts. There is no legal yardstick save that the quality of reasonableness of the provision under challenge is to be judged according to whether it arbitrarily or excessively invades the enjoyment of a constitutionally guaranteed right.¶

that the proportionality of the means deployed in this instance was in contention.

In addressing the issue of the proportionality of employing criminal defamation as a means to protect reputations, the court stated that, what is distinctive about criminal defamation, though not confined to that offence, is the stifling or chilling effect of its very existence on the right to speak and the right to know. The court observed that this was a deleterious consequence of its retention in the Criminal Law Code, particularly in the present context of newspaper reportage. It noted that newspapers play a vital role in disseminating information in every society and that part and parcel of that role is to unearth corrupt or fraudulent activities, executive and corporate excesses, and other wrongdoings that impinge upon the rights and interests of ordinary citizens.¹⁵ The court added that the chilling effect of criminalising defamation is further exacerbated by the maximum punishment of two years imprisonment imposable for any contravention of s 96 of the Criminal Law Code. It viewed the penalty as clearly excessive and patently disproportionate for the purpose of suppressing objectionable or opprobrious statements.

Citing the decision of the South African Supreme Court of Appeal in *Hoho v The State* [2008] ZASCA,¹⁶ the court although false information will not benefit a society, democratic or otherwise, the right to freedom of expression is not restricted to correct or truthful information because errors are bound to be made from time to time and to suppress the publication of erroneous statements on pain of penalty would of necessity have a stifling effect on the free flow of information. The court also noted that another very compelling reason for eschewing resort to criminal defamation is the availability of an alternative civil remedy under the *actio injuriandum* in the form of damages for defamation.

In addressing an argument proffered for the retention of criminal defamation is that injury to one's reputation may have more serious and lasting effects than a physical assault and that, as is the case with assault, the court noted that what this argument disregards is that an act of assault or malicious damage to property, unlike defamation, impinges upon the very fabric of society, *i.e.* by threatening the manner in which citizens are expected to interact in their daily lives without fear of physical violence.

¹⁵ *ibid* p 11

¹⁶ In *Hoho's* case, the Supreme Court of Appeal dealt with the constitutionality of a conviction for criminal defamation. The court deemed civil and criminal liability for defamation to be equivalent in the extent of their limitation, as the onerous consequences of criminal liability are counterbalanced by an onerous burden of proof. It was accordingly held, at para. 36, that criminal defamation was not abrogated by disuse and was perfectly consonant with the new South African Constitution



WHETHER OR NOT THE FINAL RULING OF THE COURT WOULD HAVE AN EFFECT ON
THE POSITION OF CRIMINAL DEFAMATION UNDER THE NEW CONSTITUTION?

In answering this question, the court stated that it needed not consider for present purposes is the validity of that offence within the framework of the new Constitution. It noted that the issue would only be considered as and when an appropriate case is brought for determination before the Court. The court observed in passing that the freedom of expression and freedom of the media as secured by s 61 of that Constitution are framed differently in several material respects. It observed that subs (5)(c) expressly excludes malicious injury to a person's reputation or dignity from the ambit of the freedom of expression and freedom of the media guaranteed by subs (1) and (2). Also relevant is s 51 which declares that every person has inherent dignity and the right to have that dignity respected and protected. In the view of the court, upon regard to these provisions, it is arguable that the freedom of expression conferred by s 61 is to be more narrowly construed as being subordinate to the value of human dignity. It might also be argued that the offence of criminal defamation is a justifiable limitation on the freedom of expression as envisaged by s 86 of the new Constitution.

The view of the court in this regard is open to some debate. The reasoning of the court neglects a very important point relating to the effect of a declaration of unconstitutionality. Section 3 of the former Constitution stated that the "*constitution is the supreme law of Zimbabwe and if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void.*" As such, if a provision is adjudged to be inconsistent with the provision of the Constitution, the effect is that such provision is void not from the date the declaration of unconstitutionality is made, but from the very date of its enactment. In the Irish case of *Murphy v The Attorney General*, the Supreme Court of Ireland stated that:

"The Constitution, therefore, as part of its in-built checks and balances, has made it abundantly clear that the delegated power of legislation is a power which, regardless of any interim presumption of constitutionality that it may attach to its enactments cannot be exercised save within the constitutionally designated limitations of that power; and once it has lost the presumption of constitutionality as a result of a judicial condemnation on the ground of unconstitutionality, it must be held to be 'be invalid' - not, be it observed have 'become invalid'. It is to be deemed null and void from the moment of its purported enactment..."

If the above is correct, the reasoning of the court is faulty in that once it is accepted that the offence of criminal defamation is unconstitutional, it is considered void as at 2004 when the Criminal Law (Codification and Reform) Act was enacted. As such, the provision will not qualify as "existing law" under the Sixth Schedule of the new Constitution. It would therefore be unnecessary to hear another case on criminal defamation under the new Constitution so as to render it unconstitutional.

THE ORDER OF THE COURT

The court concluded that the applicants had succeeded in demonstrating that the offence of criminal defamation is not reasonably justifiable in a democratic society on any of the grounds mentioned in s 20(2) of the Constitution. However, before the declaratory relief that they sought could be granted, the court held that it is necessary to apply the rule *nisi* requirements of s 24(5) of that Constitution.¹⁷ The court therefore called upon the Minister of Justice, Legal and Parliamentary Affairs is hereby called upon, if he so wishes, to show cause why s 96 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] should not be declared to be in contravention of s 20(1) of the former Constitution. It directed the Registrar to set the matter down for hearing on the earliest available date.

JENNIFER WILLIAMS AND OTHERS V THE CO-MINISTERS OF HOME AFFAIRS AND OTHERS CC24/14

BACKGROUND

On 15 April 2010, Jennifer Williams, the Director of Women of Zimbabwe Arise (WOZA) was arrested together with four other WOZA members during the course of a demonstration. The demonstration had been against alleged appalling service provision from the Zimbabwe Electricity Supply Authority (ZESA). The four were detained at the Harare Central Police Station for four days. In 2011, the four lodged a constitutional application to the Supreme Court seeking that a declaration be made to the effect that there had been violations of their constitutional rights to protection against discrimination as well as to protection against inhuman or degrading treatment. The application was brought against the then Co-Ministers of Home Affairs, the Commissioner General of Police and the Attorney General.

CONSTITUTIONAL APPLICATION

The applicants argued that the circumstances in which they had been detained deprived them of protection of the law guaranteed in s 18 of the former Constitution, constituted inhuman and degrading treatment, and amounted to a violation of their right enshrined in s 23 of the former Constitution to be protected from discrimination on the basis of sex. They urged the court to declare that the rights enshrined in those sections of the Constitution had been violated.

¹⁷ The provision states that; —If in any proceedings it is alleged that anything contained in or done under the authority of any law is in contravention of section 16, 17, 19, 20, 21 or 22 and the court decides, as a result of hearing the parties, that the complainant has shown that the court should not accept that the provision of the law concerned is reasonably justifiable in a democratic society on such of the grounds mentioned in section 16(7), 17(2), 19(5), 20(2) and (4), 21(3) or 22(3)(a) to (e), as the case may be, as are relied upon by the other party without proof to its satisfaction, it shall issue a rule *nisi* calling upon the responsible Minister to show cause why that provision should not be declared to be in contravention of the section concerned.”



The applicants referred to several factual issues in seeking to prove that there had been a violation of their constitutional rights. They complained that the police had ordered them to remove their shoes, jackets and brassieres causing them to remain with a single top and bottom, that they had been force marching barefoot on a dirty floor and had subjected them to the choking smell of human excreta and flowing urine in the police holding cells. They also complained that the toilets had no running water and were full of human excreta, that there was no toilet paper despite being refused permission to carry their own and that the toilet bowl was not partitioned from the rest of the cell such that it was not possible to relieve oneself in privacy. It was also alleged that during the night they had requested blankets for warmth and had been given three dirty blankets for use by all sixteen detainees in the cell whose holding capacity should be limited to six detainees. In view of this, the applicants claimed that their constitutional right to protection from torture or inhuman and degrading treatment or punishment was violated by the respondents. Further, the applicants complained that no sanitary provisions were made for menstruating women. This would include such material as washing and disposal facilities and provision of sanitary towels. It was argued that the failure to provide for the peculiar needs of women amounted to discrimination against women in violation of s 23 of the former Constitution.

In opposition, the respondents denied that the cells were in an appalling state as alleged by the applicants. They also claimed that it was procedural for detainees to be made to remove their clothes and shoes so as to ensure that they only retained necessary wearing apparel when admitted into the cells. In their response, they also maintained that there is always running water at the police station and denied that there was human excreta flowing into the cells from the toilet and that toilet paper is not kept in the cells but is issued upon request by a detainee. While it was admitted that no sanitary provisions are made for menstruating women, they stated that women are permitted to bring their own sanitary requirements.

DECISION OF THE CONSTITUTIONAL COURT

In deciding whether the applicants were treated in a discriminatory manner by being ordered to remove their brassieres, the court stated that such class of clothing constituted necessary wearing apparel which cannot be removed from a person when in detention. The court further stated that the blanket application of the requirement that each detainee is allowed one layer of clothing and one undergarment ignores the fact that the applicants being women have by reason of their sex, personal needs which differ from those of men and as such resulted in discrimination against the applicants, who by virtue of their biological make-up, have the need for two undergarments.

On the issue relating to the deplorable conditions of the holding cells, the court found that the applicants were detained in conditions that constitute inhuman and degrading treatment. The court also added that the requirement for detainees to walk without shoes in these unsanitary conditions amounts to inhuman and degrading

treatment. It was therefore concluded that detention for four or five nights in the conditions described by the applicants constitutes a gross violation of the applicants' right not to be subjected to inhuman and degrading treatment.

On the question of whether the failure to provide sanitary provisions for menstruating women, the court concluded that while the idea would appear to be abhorrent that sanitary provisions are not afforded to women in custody, the applicants had not alleged that they were menstruating and were refused sanitary provisions by the Police. The court ruled that section s 24 (1) of the Constitution did not require the applicants to be torchbearers for women in general.¹⁸

Having made the findings stated above, the court then ordered the respondents to take all necessary steps and measures within their power to ensure that at Harare Central Police Station:

- a) The holding cells shall have clean and salubrious flushing toilets with toilet paper and a washing bowl.
- b) The flushing toilets shall be cordoned off from the main cell to ensure privacy.
- c) A good standard of hygiene shall be maintained in the holding cells
- d) Every person detained in police custody overnight shall be furnished with a clean mattress and adequate blankets
- e) Adequate bathing facilities shall be provided for all persons detained in custody overnight
- f) Every person detained shall have access at all times to wholesome drinking water
- g) Women detained in police custody shall be allowed to keep their undergarments including brassieres, and to wear suitable footwear.

FARAI DANIEL MADZIMBAMUTO V THE REGISTRAR GENERAL AND 3 OTHERS CC5/14

INTRODUCTION

On 12 February 2014 the full bench of the Constitutional Court heard argument in an application by Farai Madzimbamuto, a citizen of Zimbabwe by birth who sought an order compelling the Principal Director of Immigration to endorse his South African passport with an unrestricted and indefinite residence permit. The applicant was born in Zimbabwe. One of his parents is Zimbabwean by birth while the other is South African by birth. In 2003, the applicant had left for the United Kingdom on a Zimbabwean passport. When his passport expired, he sought a renewal of this

¹⁸ This is a curious position especially in light of the fact that the state should guarantee the rights of every person including those in custody



passport first at the embassy in London and then at the offices of the Registrar General in Harare. He however failed to obtain a Zimbabwean passport. When he returned to the United Kingdom, he was able to acquire a South African passport by virtue of the fact that his mother was born in South Africa. In 2012, the applicant returned to Zimbabwe with the intention to reside permanently. His South African passport was endorsed by the Immigration officials with a two year residence permit.

When the new Constitution came into force on 22 May 2013, the applicant made an application to the Immigration Department seeking his acceptance as a citizen of Zimbabwe by birth. He sought the endorsement of a permanent residence permit on his South African passport. This request was refused by the Immigration Department with the advice that he had to first acquire a Zimbabwean passport. When he acquired the Zimbabwean passport, he wrote to the Immigration Department to that effect. At the date of hearing argument, the department had not favoured him with a response. The following is a summary of the judgement of the court in this case.

QUESTION BEFORE THE COURT

Whether or not refusal of a permanent residence permit to a citizen of Zimbabwe by birth that holds a foreign passport is a violation of the right to freedom of movement in s 66 of the Constitution?

THE REASONING OF THE COURT

The Immigration Department sought to resist the order sought by the applicant on the basis that to the extent that the applicant holds a South African passport, he is an alien whose status is governed by the Immigration Regulations of 1998. It was argued that the status of the applicant was governed by s 17 of the Regulations which disqualified the applicant from being issued with an unrestricted residence permit.¹⁹ The Immigration Department had argued that it was acting in terms of the

¹⁹ Section 17 of the Regulations provides that A residence permit may be issued for an indefinite period or for such definite period as may be specified in the permit; Provided that a residence permit may not be issued for an indefinite period unless the person to whom it has been issued-

(a) has been resident in Zimbabwe for not less than five years; or

(b) will have been resident in Zimbabwe for not less than five years on the date of expiry of the permit

currently held by him, where he applies for the residence permit within six months before such date of

expiry; or

(c) has transferred US\$1,000,000 or more into Zimbabwe for purposes of an investment project approved

by the Zimbabwe Investment Centre established by section 3 of the Zimbabwe Investment Centre Act [*Chapter 24:16*]; or

(d) has invested US\$300,000 or more and will have been resident in Zimbabwe for not less than three years on the date of expiry of the residence permit currently held by him, where he applies for such residence permit six months before such date of expiry; or

Regulations. It however acknowledged that the applicant was entitled to dual citizenship under the Constitution but still argued that if the applicant wished to travel on a South African passport, he had to apply for a temporary residence permit like all other holders of foreign passports.

In rejecting these arguments and passing judgement in favour of the applicant, the court referred to s 36 of the Constitution which relates to citizenship by birth. It also referred to s 42 which sets out the powers of Parliament in regard to citizenship. The court stated that the powers given to Parliament in respect of revocation of Zimbabwean citizenship and the prohibition of dual citizenship related only to citizens of Zimbabwe other than by birth.²⁰ The court recalled its judgement in *Mawere v Registrar General CCZ30/14* and reiterated that a citizen by birth cannot lose his/her citizenship on acquiring foreign citizenship.

The applicant had argued that the limited residence permit is an infringement of his right under s 66 of the Constitution to immunity from expulsion from Zimbabwe. In addressing this contention and in light of the stance taken by the Immigration Department that the applicant was to be treated as an alien under the regulations, the court held that there is a real danger of expulsion of the applicant in the event that the applicant is found in Zimbabwe on an expired residence permit. Citing the case of *Rattigan and Ors v Chief Immigration Officer and Ors*, the court recalled that what is to be avoided when interpreting a fundamental right is imparting a narrow, artificial, rigid and pedantic interpretation; to be preferred is one which serves the interest of the Constitution and best carries out its objects and promotes its purpose.²¹

In ruling that the refusal of a permanent residence permit violates the right to freedom of movement, the court rejected the argument that the department was bound strictly by the regulations. In the view of the court, the regulations could not be used to deny a citizen what he is granted by the Constitution. The court stated that it is for the regulations to be brought in line with the Constitution and not for the Constitution to be brought in line with the regulations. In the end, the court declared that the applicant is a citizen of Zimbabwe by birth entitled to dual citizenship and ordered the Immigration Department to endorse the applicant's South African passport with an unrestricted and unconditional residence permit.

(e) has invested US\$100,000 or more in capital equipment in a joint venture with a *bona fide* Zimbabwean partner and is a professional or technical person who will have been resident in Zimbabwe for not less than three years on the date of expiry of the residence permit currently held by him, where he applies for such residence permit six months before such date of expiry.

²⁰ CCZ 5/14 p 4

²¹ 1994 (2) ZLR 54 (S) p 57 F-H



RECOGNITION UNDER THE COMMON LAW OR REGISTRATION IN TERMS OF THE ACT?

AVOIDING THE CONFUSION BY THE LEGISLATURE WITH REGARDS TO THE
LAW OF ENFORCEMENT OF FOREIGN CIVIL JUDGEMENTS

Godknows Nyangwa *



ABSTRACT

In southern Africa, the late 20th Century witnessed a growth in the need for states to adopt a legal order that fosters international trade and commercial efficacy especially with regards to giving effect to foreign civil judgments. Accordingly in 1995, the Civil Matters (Mutual Assistance) Act [Chapter 8:02] came into force in Zimbabwe. According to the long title, the Act was enacted inter alia, “to provide for the enforcement in Zimbabwe of civil judgments given in foreign countries and territories”. There is a peremptory requirement that such judgments should emanate from one of the designated countries as specified in the Civil Matters (Mutual Assistance) (Designated Countries) Order, Regulations of 1998 published in Statutory Instrument Number 9 of 1999. There has been confusion regarding the fate of civil judgments originating from countries other those designated in the foregoing regulations. The litigants in such situations are not left without recourse as they can rely of the default common law position regarding foreign judgments. An application can be made under the common law to a proper court for the “recognition” (and not “registration”) of the foreign judgment.

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INTRODUCTION

In southern Africa, the late 20th Century witnessed a growth in the need for states to adopt a legal order that fosters international trade and commercial efficacy especially with regards to giving effect to foreign civil judgments. Glaring examples are the South African *Foreign Civil Judgments Act* of 1988 and the *Judgments (International Enforcement) Act* of Botswana enacted in 1981.

The practical considerations may as well have a semblance of jurisprudential support as per Edwards¹ wherein it is stated that, ‘*enlightened social values and the facilitation of international relations [call for the recognition and enforcement of foreign judgments]...A place must be found to do justice and foster the free flow of commerce and community interrelationships in a shrinking world*’. It has also been suggested that as a corollary of the sovereignty and equality of states, the judgments of one sovereign state should be effective within the territory of another sovereign state.²

CIVIL MATTERS (MUTUAL ASSISTANCE) ACT [CHAPTER 8:02]

Accordingly in 1995, the *Civil Matters (Mutual Assistance) Act* [Chapter 8:02] came into force in Zimbabwe. According to the long title, the Act was enacted *inter alia*, “*to provide for the enforcement in Zimbabwe of civil judgments given in foreign countries and territories*”. However, such foreign judgments can only be enforced after the process of ‘registration’ as provided for in terms of the Act. Further, there is a peremptory requirement that such judgments should emanate from one of the designated countries as specified in the *Civil Matters (Mutual Assistance) (Designated Countries) Order, Regulations* of 1998 published in Statutory Instrument No. 9 of 1999. The countries are *Australia, Bulgaria, Germany, Portugal, South Africa, Italy, Zambia and Slovak Republic*.

RECOGNITION UNDER THE COMMON LAW

There has been confusion regarding the fate of civil judgments originating from countries other those designated in the foregoing regulations. Accordingly, a practice has evolved in our courts in terms which applications are being made for ‘*registration*’ of judgments say from the High Court of *Nigeria* or *Malawi*. Such applications will not be accepted in our courts as they are not provided for in terms of the Act.

¹ See; AB Edwards, *Title on ‘Conflict of Laws’* in vol ii (first reissue) of WA Joubert *The Law of South Africa*, Durban, Butterworths, 1993 as cited in Forsyth, *Private International Law – Modern Roman Dutch Law Including the Jurisdiction of the Supreme Court*, 3rd Edition pp 362

² See; Forsyth, *supra*.

However, the litigants in such situations are not left without recourse as they can rely on the default common law position regarding foreign judgments. Accordingly, an application will be made to a proper court (be it the High Court or Magistrates Court, depending on the civil monetary jurisdiction) but such application will be for the “*recognition*” (and not “*registration*”) of the foreign judgment.

A reading of the Civil Matters (Mutual Assistance) Act [Chapter 8:02] suggests that the option of proceeding under the common law remains open to litigants in order to effect the recognition of a foreign judgment. This is because of the savings provision in section 25 of the Act which stipulates that, “*This Act shall be regarded as additional to, and not as limiting the provisions of any other law relating to the recognition and enforcement of foreign judgments, the service of process or the taking of evidence, whether on commission or otherwise*”(emphasis added).

Further, in terms of the common law, statute law is only presumed to alter the common law to a minimal extent. Beadle CJ in *Van Heerden & Others No v Queens Hotel (Pty) Ltd 1973 (2) SA 14 (RA)* enunciated the principle in the following terms:

“I cannot see how statutory rights can be regarded as more sacrosanct than a ‘common law’ right ... as the rights of man are founded on the ‘common law’ and as the ‘common law’ is less subject to change than statutory law, which may vary from year to year according to the whim of a particular legislature, common law rights must be more jealously guarded than statutory ones.”

REQUIREMENTS TO BE SATISFIED FOR RECOGNITION UNDER THE COMMON LAW

An application brought under the common law should however satisfy the following requirements for the ‘*recognition*’ (and not ‘*registration*’) and enforcement of foreign judgments as summarized by Patel J (as he then was) in *Tii So Holdings (Private) Limited v ZISCO Limited HH 95/2010*³ as follows:

- (i) *the foreign court in question should have possessed the requisite international jurisdiction or competence according to Zimbabwean law;*
- (ii) *the judgment concerned was final and has the effect of res judicata according to the law of the forum in which it was pronounced (i.e. not appealed against etc.);*
- (iii) *the judgment must not have been obtained by fraudulent means;*

³ *Venetian Blinds Specialists Limited v Apex Holdings (Private) Limited 2010 (1) ZLR 45 (H)*



- (iv) *it must not entail the enforcement of a penal or revenue law of the foreign State;*
- (v) *it must not be contrary to public policy in this country; and*
- (vi) *the foreign court must have observed the minimum procedural standards of justice in arriving at the judgment.*

What must be emphasized is that while in terms of the common law, the application is for “*recognition*” of a foreign judgment, in terms of statute; such application is for “*registration*” thereof. The effect of both is however the same.

The statutory provisions relating to the registration and enforcement of foreign judgments in terms of the *Civil Matters (Mutual Assistance) Act [Chapter 8:02]* were therefore simply devised to obviate the trouble, expense and delay which characterizes the common law process regarding the recognition of a foreign judgment.⁴

CONCLUSION

At the end of the day, whichever route one takes be it the common law route for *recognition* or the statutory avenue of *registration*, the objective is the same i.e. to achieve *enforcement* of foreign judgments.

In terms of the common law, “*recognition*” of a foreign judgment implies that the local court declares that the foreign judgment has the legal effect which the foreign court intended it have. Recognition is therefore a *conditio sine qua non* for enforcement of a foreign judgment if one follows the common law avenue.⁵

It was also observed that the, “*recognition of a foreign judgment requires no less than its enforcement. No enforcement is possible without an authoritative act of a domestic court allowing the execution of the judgment*”⁶

However, if one follows the statutory avenue, ‘registration’ (in terms of the Act) is a prerequisite for enforcement. Further, a litigant can only have the leeway of adopting the ‘registration’ route if the civil judgment emanated from one of the designated countries.

⁴ See; C. Forsyth, *Private International Law*, 1996, p378 (in reference to similar South African legislation)

⁵ See; H. Silberberg, ‘*The Recognition and Enforcement of Foreign Judgments in South Africa*’, 1977.

⁶ C. Forsyth supra at 363, E. Spiro, “*The Incidence of Jurisdiction in the Recognition and Enforcement of Foreign Judgments*”, 1978 *Acta Juridica* 59.

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