

## Chapter 6: Alternative Ways of Interpreting The Constitution Of 2013

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The interpretation of constitutional rights also depends on many issues. The main constitutional provisions provide for content and holders of human rights. There are presumptions and limitations and generations of different rights. The Constitution imposes duties on holders of fundamental human rights and freedoms in four ways: protect, promote, fulfil and respect human rights and freedoms.<sup>339</sup> Even members of security institutions are not allowed to violate human rights according to section 206 of the Constitution.

### 206 National security

- (1) The national security objectives of Zimbabwe must reflect the resolve of Zimbabweans to live as equals in liberty, peace and harmony, free from fear, and in prosperity.
- (2) The national security of Zimbabwe must be secured in compliance with this Constitution and the law.
- (3) In particular, the protection of national security must be pursued with the utmost Respect for—
  - (a) the fundamental rights and freedoms and the democratic values and principles enshrined in this Constitution; and
  - (b) the rule of law.

Added to specific duties are presumptive considerations;<sup>340</sup> provision of specific framing<sup>341</sup> and content of rights,<sup>342</sup> general limitations<sup>343</sup> and specific limitations in section 87 of the Constitution. Added to these are challenges linked to the margins of appreciation given to States, the minimum content of various categories of second-generation human rights which limit how right holders can assert or enjoy their right.<sup>344</sup> Judgments of superior courts on ESCR have not interacted a lot with the minimum core content from soft

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<sup>339</sup> Section 44.

<sup>340</sup> Section 47.

<sup>341</sup> For instance, some rights are given to a Zimbabwean citizen and permanent resident, every person, and so forth.

<sup>342</sup> For instance, each right has some content. Other rights such as administrative right can have many rights protected in the same section, see section 68.

<sup>343</sup> Section 86.

<sup>344</sup> See rights such as freedom from arbitrary eviction (74); right to education (75); right to healthcare (76) and right to food and water (77).

sources of international law such as General Comments of the ESCR Committee.<sup>345</sup>

## The Constitution as Starting Point in Constitutional Rights Adjudication

A Constitution is in most countries 'the supreme national law.'<sup>346</sup> Essentially, the evaluation of a national constitution must assess the extent to which it can facilitate the democratization process and will serve as a basis for determining the direction of future constitutional development.<sup>347</sup> Against this setting, this think piece focuses on the various categories of fundamental human rights and freedoms that are listed under the Declaration of Rights or Bill of Rights in the Constitution of Zimbabwe 2013.<sup>348</sup> Most commonly, a right enshrined in a national constitution may also be recognised as an international human right.<sup>349</sup> This book, intended for the understanding of the limitations on fundamental rights and freedoms in Zimbabwe, may not provide excessive detail, the basis for understanding such limitations from the perspective of international law.<sup>350</sup> It suffices to state that Zimbabwean courts can apply provisions of international treaties relating to human rights<sup>351</sup> and customary law principles when interpreting such rights.<sup>352</sup>

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<sup>345</sup> See *Farai Mushoriwa v City of Harare and Anor* HH195-14 and *City of Harare v Mushoriwa* SC 54 of 2018.

<sup>346</sup> Fidelis E. Kanyongolo, 'The Constitution and the Democratization Process in Malawi' in Owen Sichone (ed), *The State and Constitutionalism in Southern Africa (SAPES 1998)*. I note however that it may not always have a special legal status as it is sometimes used as a political roadmap.

<sup>347</sup> *Ibid* 2.

<sup>348</sup> The Constitution of Zimbabwe 2013, Chapter 4, lists various rights from S48 to 84. These rights can be grouped into first generation or civil and political rights such as right to life and freedom from torture; second generation rights or Economic, Social and Cultural rights (Ecosoc) such as right to education, healthcare, food and water and freedom from arbitrary eviction; and third generation rights/ collective rights such as environmental rights. The generations of rights are not listed in order of priority but simply in terms of how the international community came to focus on certain rights and freedoms. The Constitution entrenches a broad category of rights, and this is a remarkable constitutional gain for Zimbabwe.

<sup>349</sup> Siri Gloppen and Mindy J. Roseman, 'Introduction: Can Litigation Bring Justice to Health?' in Alicia E. Yamin and Siri Gloppen (ed), *Litigating Health Rights: Can Courts Bring More Justice to Health?* (HUP 2011)3.

<sup>350</sup> The Constitution of Zimbabwe 2013, S 34, however obligates courts of law to ensure that Zimbabwe domesticates international laws to which she is a state party.

<sup>351</sup> The Constitution of 2013, S 327, envisages a situation where Zimbabwe follows the process of dualism when incorporating international treaties into national law. Some laws may be approved by parliament without the need for a parliamentary Act whereas parliament is obliged to promulgate Acts for matters relating to national finances.

<sup>352</sup> The Constitution of 2013, S 326 speaks to the process of monism when dealing with customary international law as it envisages a situation where customary international is part of Zimbabwean law

## Conceptualising Constitutional Ethos Properly

Terminology is not merely semantic, it is also conceptual and practical.<sup>353</sup> A duty is a legal requirement to carry out or refrain from carrying out any act.<sup>354</sup> From the entrenchment of various categories of constitutional or human rights in Zimbabwe, there is need to locate them as part of the tentacles of democracy and principles of good government in Zimbabwe. The adoption of a homegrown Constitution in Zimbabwe came after years of using the ceasefire charter, the Lancaster House Constitution of 1980. There were several amendments to the Lancaster House Constitution since independence, but the document remained essentially a non-Zimbabwean, colonial relic, and a source of much political tension and dissatisfaction.<sup>355</sup> As such, a constitutional conference was seen as a sine qua for meaningful democratic development in a liberalizing postcolonial society like Zimbabwe. Zimbabwe embarked on constitution-making exercises that led to the rejection of a government-led draft under the leadership of the late Chief Justice Godfrey Chidyausiku; the rejection of the Kariba Draft Constitution mainly by political parties and a national referendum during the Government of National Unity (GNU) which led to the adoption of the Constitution in 2013.

Accountability can be associated with representative democracy, since it implies an act of delegating by citizens to a government that must act in representation of their interests. In fact, the classic distinction between vertical and horizontal accountability reminds us that the first type is carried out in relationships that are the result, for example, of an act of authority in relation to citizens who in turn ask for accountability from their governments, or else in hierarchical relationships where a parliament asks a minister for accountability.<sup>356</sup> Horizontal accountability is presented as a two-legged term in this article. Firstly, it is the ability of government institutions to check

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unless it is inconsistent with the Constitution and an Act of Parliament. [Thus, Customary international law, is superior to subordinate legislation]

<sup>353</sup> Megan Daigle and Henri Myrtilinen, *Bringing Diverse Sexual Orientation and Gender Identity (SOGI) into Peacebuilding Policy and Practice* in Caroline Sweetman, *Sexualities, Gender and Development* (Oxfam 2018) 105.

<sup>354</sup> Jonathan Law and Elizabeth A. Martin (eds), *'A Dictionary of Law'* (OUP 2009) 187.

<sup>355</sup> John Makumbe, 'Electoral Procedures and Processes in Zimbabwe' citing Welshman Ncube, 'Minister Remains Unembarrassed by Electoral Shortcomings' *Zimbabwe Independent* (1 May 1996), in Owen Sichone (ed), *The State and Constitutionalism in Southern Africa* (SAPES 1998) 73.

<sup>356</sup> Ixchel P. Duran, 'Accountability from the Perspective of the Forum: Citizens' Perception of Political Accountability in 20 European States', (UAB 2014) 3.

abuses by other branches of government, a system in which government institutions are independent and no agency or branch becomes too powerful compared to the others.<sup>357</sup> Secondly, although institutions such as parliament represent the will of the citizen in maintaining checks and balances on other State institutions, citizens themselves must be accountable to each other. The development of human rights is fundamentally linked to the need for individual persons, communities and the State to respect the rights of different holders of such rights. Zimbabwe's declaration of rights is largely similar to the South African Bill of Rights. The South African Chapter of Rights has a horizontal effect or what the Germans call '*drittwirkung*', i.e. an application of the fundamental rights as between citizens.<sup>358</sup> Effective promotion, protection, respect and fulfilment of human rights demands that civics, academia, monitoring institutions, institutions supporting democracy and State institutions focus on the duties of right holders. Appositely, effective litigation, defending and challenging of human rights abuses depends on the litigant's ability to assess the limitations imposed by a constitution in a democratic society. For citizens to accuse the State as undermining the rule of law, practicing bad governance, or behaving in a totalitarian or autocratic way is not enough. Citizens themselves must also act within the confines of the law; the constitution included.

Human rights are rights and freedoms to which every human being is entitled.<sup>359</sup> It is sometimes suggested that human rights (or some of them) are so fundamental that they form part of natural law, but most of them are best regarded as forming part of treaty law.<sup>360</sup> The United Nations Universal Declaration of Human Rights (1948) spells out most of the main rights that must be protected but it is not binding in international law.<sup>361</sup> Human rights are ordinarily understood to be the rights that one has simply because one is

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<sup>357</sup> Larry Signe, 'Accountability and Demand for Democracy Drive Leadership Changes in Africa' (Brookings, 14 June 2018), < <https://www.brookings.edu/opinions/accountability-and-demand-for-democracy-driveleadership-changes-in-africa/> accessed 26 January 2019.

<sup>358</sup> Azhar Cachalia, Halton Cheadle, Dennis Davis et al, Fundamental Rights in the New Constitution', (Juta 1994) 20.

<sup>359</sup> Law and Martin (eds) (n 354) 269.

<sup>360</sup> Ibid.

<sup>361</sup> Ibid.

human.<sup>362</sup> Human rights are also inalienable rights, because being or not being human usually is seen as an unalterable fact of nature, not something that is either earned or can be lost.<sup>366</sup> Human rights are thus “universal” rights in the sense that they are held “universally” by all human beings.<sup>363</sup> Conceptual universality is in effect just another way of saying that human rights are, by definition, equal and inalienable. Human rights are often held to be universal in the sense that most societies and cultures have practiced human rights throughout most of their history.<sup>364</sup> In conventional human rights language, ‘rights’ refer to claims that individuals or groups such as indigenous peoples or minorities hold against States and to the obligations of States to comply.<sup>365</sup> This arrangement, from a vertical accountability perspective, presupposes the existence of States, and the notion that individuals or groups may claim something from a political authority.<sup>366</sup> In traditional societies and from the perspective of horizontal accountability, rights are inconceivable without obligations.<sup>367</sup> All social claims are enmeshed in networks of mutual obligations and all persons are family members or at least thought about and addressed in a kin-based idiom. Human rights are frequently described as inalienable, indivisible and universal rights. The universality of human rights has been understood from both occidental and oriental conceptualisations and the need to incorporate arguments on cultural relativism.<sup>368</sup> The importance of the Bill of Rights is that it applies to all law and binds the legislature, executive, organs of the State and the judiciary.<sup>369</sup> It should also be noted that the concept of human rights concerns the relationship between the individual and the state; it involves the status, claims, and duties of the former in the jurisdiction of the latter.<sup>370</sup> As such, it is a subject as old as politics.<sup>371</sup>

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<sup>362</sup> Jack Donnelly, ‘*The Relative Universality of Human Rights*’ (JHUP 2007) 282.

<sup>363</sup> Ibid 283.

<sup>364</sup> Ibid 284.

<sup>365</sup> Stener Ekern, ‘*Development Aid to Indigenous Peoples is an Exercise in Crossing Boundaries*’ in Hugo Stoke, Astri Suhrke and Arne Tostensen, *Human Rights in Developing Countries* (Kluwer 1997) 8.

<sup>366</sup> Ibid.

<sup>367</sup> Ibid 9.

<sup>368</sup> Donnelly, (n362).

<sup>369</sup> Carole Cooper, *Labour Relations* in Stuart Woolman and Michael Bishop, *Constitutional Law of South Africa* (Juta 2013) 53-2.

<sup>370</sup> Donnelly (n 362) citing Hung-Chao Tai, ‘*Human Rights in Taiwan: Convergence of Two Political Cultures?*’ in James C. Hsiung (ed), *Human Rights in East Asia: A Cultural Perspective* (1985).

<sup>371</sup> Ibid.

## Introducing Analytical Theories and Model Specifications in Adjudication

Litigants and courts should also appreciate that the provisions of the Constitution of Zimbabwe are scrutinised in terms of their frame or phraseology and content, conditional rights, presumptions on the existence of other rights, general limitations and special limitations imposed. In terms of theory preference, normative theory best explains the obligations that flow from the Constitution as the *grundnorm*. The normative theory of law was developed in the early 20<sup>th</sup> Century and set out to build a system of generally valid notions which presuppose the normative contents of the various legal orders.<sup>372</sup> The traditional science of law has never been equipped with any uniform methodology.<sup>373</sup> This explains why the normative theory does not object to or criticises any existing legal methodology, but points to, and complains of, the utter lack of methodology in the traditional science of law.<sup>374</sup> The proponents of this theory include Hans Kelsen who founded and developed the theory together with his Austrian disciples who preferred 'pure theory of law' and called it the 'Vienna School of Jurisprudence' than 'normative theory'.<sup>375</sup> The other is Frantisek Wyr who founded and developed the normative theory in Brno and called it the 'Brno School of Jurisprudence' which died with its founder in 1951.<sup>376</sup> The applicability of the theory to modern constitutional debates is steeped in the realisation that 'the fact that these two schools ceased to exist in the sense of law schools where the theory is systematically developed and cultivated does not affect the existence or importance of the theory'.<sup>377</sup> Fundamentally, the objects of normative cognition are norms.<sup>378</sup> The norm and the obligation are logically united.<sup>379</sup> Essentially, normative legal theories are by their nature *evaluative*.<sup>380</sup> They fit into the category of justificatory theories such as Ronald Dworkin's theories that "fit and justify" existing law.<sup>381</sup>

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<sup>372</sup> George E. Glos, 'The Normative Theory of Law' (WMLR 1969) 151.

<sup>373</sup> Ibid.

<sup>374</sup> Ibid.

<sup>375</sup> Ibid 152 footnote 2.

<sup>376</sup> Ibid footnote 3.

<sup>377</sup> Ibid.

<sup>378</sup> Ibid 158.

<sup>379</sup> Ibid 159.

<sup>380</sup> Legal Theory Lexicon, 'Positive and Normative Legal Theory.'

< [https://lsolum.typepad.com/legal\\_theory\\_lexicon/2003/12/legal\\_theory\\_le.html](https://lsolum.typepad.com/legal_theory_lexicon/2003/12/legal_theory_le.html) > accessed 26 January 2019.

<sup>381</sup> Ibid.

Building a model of legal analysis may seem herculean but it is not impossible. The development of constitutional rights jurisprudence depends on the society's focus on sovereignty-consensus models which look at individual right holders as sovereign equals with other sovereigns envisaged by the Constitution. The people of Zimbabwe are sovereigns under the '*We the People of Zimbabwe*' clause and are the ultimate repositories of State power which they vest in various members of the executive, legislature or judiciary.<sup>382</sup> The individual right holders must exercise their rights in a way that respects the sovereignty of the Constitution which is the supreme law of the land as envisaged in the Constitution.<sup>383</sup> The State called Zimbabwe is also a sovereign, unitary and democratic republic.<sup>384</sup> To create conditions in which citizens can enjoy rights and freedoms they hold, it is argued that they must respect the constitutional obligations imposed upon them and use their compliance with the constitution or commitment to respecting horizontality of the constitution as effective vehicles for combating impunity and complicity in human rights violations in Zimbabwe.

## Key Issues in The Constitutional Rights Provisions

### *Duties of state, state institutions and natural or juristic persons*

Constitutional rights are not uniformly framed. They are framed firstly in terms of duties and responsibilities to protect, promote, respect and fulfil rights.<sup>385</sup> The duties are elaborated in various human rights Committee reports, guidelines, preliminary/concluding observations, session reports, general comments.<sup>386</sup> Other key documents that can also be used to determine the obligations from an international law perspective include reservations, declarations, objections relating to human rights treaties, the *travaux préparatoires*, manuals on human rights reporting, state reports and shadow reports from civil society. The implementation checklists may also be important to determine the status of compliance. For instance, progressive

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<sup>382</sup> This position is captured in the preamble to the Constitution. The other preamble in the Constitution speaks to devolution and is found in the Constitution of Zimbabwe 2013, Chapter 14.

<sup>383</sup> Constitution of Zimbabwe, S 2.

<sup>384</sup> Constitution of Zimbabwe, S 1.

<sup>385</sup> Section 44 of the Constitution.

<sup>386</sup> See for instance UNICEF, Implementation Handbook for the Convention on the Rights of the Child (2007, UNICEF) xx.

judgments on children or women married before the age of 18 years could have been made before the *Mudzuru* case by drawing the Courts to the Committee on the Rights of the Child's Guidelines for Periodic Reports 1996 wherein states were requested to provide relevant information with respect to Article 1 of the CRC on the following:

- Any differences between national legislation and the Convention on the definition of the child (*the Marriages Act and Customary Marriages Act were different*).

The minimum legal age defined by the national legislation for the following:

- Legal and medical counseling without parental consent (current debate on primary school children carrying condoms to school);
- Medical treatment or surgery without parental consent (*refusal by parents to sign indemnity forms or to have children reveal sexual transmitted infections*);
- End of compulsory education;
- Admission to employment or work, including hazardous work, part-time and full-time work (Zimbabwean children can have IDs and drivers' license at 16 years. Rarely do they work and get remunerated unless it is in menial jobs).
- Marriage;
- Sexual consent;
- Voluntary enlistment in the armed forces;
- Conscription into the armed forces;
- Participation in hostilities;
- Criminal responsibility;
- Deprivation of liberty, including by arrest, detention and imprisonment, inter alia in the areas of administration of justice, asylum seeking and placement of children in welfare and health institutions;
- Capital punishment and life imprisonment;
- Giving testimony in court and civil and criminal cases
- Lodging complaints and seeking redress before a court or other relevant authority without parental consent;



- Participating in administrative and judicial proceedings affecting the child;
- Giving consent to change of identity, including change of name, modification of family relations, adoption and guardianship;
- Having access to information concerning the biological family;
- Legal capacity to inherit, to conduct property transactions;
- To create and join associations;
- Choosing a religion or attending religious school teaching;
- Consumption of alcohol and other controlled substances;
- How the minimum age for employment relates to the age of completion of compulsory schooling, how it affects the right of the child to education and how relevant international instruments are taken into account;
- In cases where there is a difference in the legislation between girls and boys, including in relation to marriage and sexual consent, the extent to which article 2 of the Convention has been given consideration;
- In cases where the criterion of puberty is used under criminal law, the extent to which this provision is differently applied to girls and boys, and whether the principles and provisions of the Convention are taken into consideration.

Further guidance could also have been sought from the African Charter on the Rights and Welfare of the Child which departs from the CRC by making children duty holders and rights holders at the same time. The CRC does not make children duty holders.

### **The Frame and Content of Constitutional Rights Provisions**

Some constitutional rights and freedoms are given to all persons, every person, every Zimbabwean or permanent resident or every Zimbabwean citizen. Essentially, right holders are expected to determine if they fall under the category of the holders of the right which they seek to assert. Framing rights differently is fundamentally important as it determines how courts of law can either refuse or agree to grant rights holders certain remedies in the event of an allegation of a constitutional breach. Some rights are framed as relative rights.

#### 59 Freedom to demonstrate and petition

Every person has the right to demonstrate and to present petitions, but these rights must be exercised peacefully.

The content of the freedom to demonstrate and petition is not absolute but conditionally depends on peaceful enjoyment of this freedom. The conditions of peace are also given content in the MOPA. The content of other rights is such that they are enjoyed by the present and future generations.<sup>387</sup> Other rights are enjoyed by *everyone, all persons, no persons, or Zimbabwean citizens and permanent residents*.

### Jurisdiction of the Court and Legal Standing

We saw in the *Ndewere* case that courts utilise the distinction between inherent and competent jurisdiction to interpret cases involving members of the three arms of government. Citizens who claim redress for certain breaches on their own behalf or on behalf of others must ensure that they fit in the category of people who are described under the standing provisions in the constitution.<sup>388</sup> This is important so that the court approached to determine the alleged constitutional violation can assume jurisdiction over the matter. Where the courts feels that it lacks jurisdiction it treats the matter as non-justiciable and may not grant remedies envisaged under the standing provision which include compensation and declaration of rights.<sup>389</sup> Zimbabwean courts are still to determine on the remedy of compensation for constitutional violations. Importantly though, the Constitution of Zimbabwe 2013 liberalized legal standing and those who can approach a court of law include those acting on their own behalf, for others and those acting in the public interest. Litigants are still obligated to demonstrate that they fit in the category of such persons described above.<sup>390</sup> Like the South African position, Zimbabwe's constitution

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<sup>387</sup> Constitution of Zimbabwe, sect 73 shows that environmental rights are enjoyed by the present and future generations and those exercising them must also ensure the spirit of the constitution is promoted.

<sup>388</sup> Constitution of Zimbabwe, sec 85.

<sup>389</sup> Ibid.

<sup>390</sup> In *Loveness Mudzuru and Another v Minister of Justice* CC 12 of 2015, two young women challenged the provisions of the Marriage Act which set the minimum age of marriage as 16 years. The nub of their argument was that it is at variance with the Constitution of Zimbabwe, sec 78 that describes a child as someone below 18 years. The State, as the respondent raised the argument that the applicants did not meet the standing requirements since they were not directly affected. The court held that they did satisfy the requirements since they were acting on behalf of all affected young women. It made sense since the women were also raising the point that they were also married off at tender ages. Essentially, it is the litigant's duty to satisfy the court that indeed they have the requisite standing to seek redress in the event of a constitutional breach to their or other people's rights.

brought important and substantial changes to the common law of standing in that associations can act in the interests of their members. The common law has traditionally been hostile to representative actions in circumstances where an association has no direct substantial interest in the subject matter of the dispute but seeks to act on behalf of its members.<sup>391</sup> Fundamentally, the liberalization of standing removed the dirty hands principle. The fact that a person seeking a constitutional remedy has contravened a law does not bar the person from being heard or from seeking such remedy.<sup>392</sup>

### Conditional Rights

Human rights may be enjoyed absolutely or conditionally. 'Absolute' is used to describe what is complete, unconditional; not relative or qualified.<sup>393</sup> Constitutional rights and freedoms are not absolute. They have boundaries set by the rights of others and by important social concerns such as public order, safety, health and democratic values.<sup>394</sup> The constitution places a conditional duty on holders of the freedom to demonstrate and petition government to do so peacefully.<sup>395</sup> Those who do not exercise their rights in a peaceful manner used to be arrested in terms of the now repealed Public Order and Security Act (POSA) and the Criminal Law (Codification and Reform) Act. POSA dealt with the obligations for certain categories of petitioners or demonstrators to notify the Zimbabwe Republic Police of the intended petition or demonstration. While the police are part of the security institutions which are obliged not to violate human rights and freedoms,<sup>396</sup> they are empowered to investigate crimes and arrest suspects.<sup>397</sup> In a case note on *DARE & Others v The Commissioner of Police & Others*<sup>398</sup>, it was argued that the right to protest is linked to freedom of assembly.<sup>399</sup> This right is protected under Article 21 of the International Covenant on Civil and Political Rights, and it was emphasised

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<sup>391</sup> Cachalia, Cheadle, and Davis et al (n 358) 23.

<sup>392</sup> In contradistinction, the dirty hands principle was invoked in the *Associated Newspapers of Zimbabwe & Author v Minister of Information* HH ANZ case in early 2000s when the Daily News, a private media newspaper was closed on the basis that the publishers had refused to apply for registration.

<sup>393</sup> Law and Martin (eds) (n 354) 2.

<sup>394</sup> Iain Currie and Johane de Waat, *The Bill of Rights Handbook* (Juta 2014).

<sup>395</sup> Section 59 of the Constitution.

<sup>396</sup> Constitution of Zimbabwe, sec 208.

<sup>397</sup> Constitution of Zimbabwe, sec 219.

<sup>398</sup> HH 554-2016

<sup>399</sup> G. Feltoe, G. Linington and F. Mahere, 'Worlds Apart: Conflicting Narratives on the Right to Protest' ZELJ (2016). The authors cited the case of *Nyambirai v NSSA & Anor* 1995 (2) ZLR (S) @ 13 C-F.

under General Comment 31 that restrictions imposed on this right must never impair the essence of the right.<sup>400</sup> When the court in the *Dare* case failed to protect the right to protest, it was argued that the decision amounted to a negation of a right rather than a mere limitation.<sup>401</sup>

### Presumption on the Existence of other Rights

A presumption is a supposition that the law allows or requires to be made.<sup>402</sup> Most relate to the interpretation of written documents, particularly statutes. Because a constitution is an extraordinary statute, the presumption that the enjoyment of rights under the Declaration of rights does not preclude the existence of other rights is considered in this article to be one of the key issues considered when interpreting the constitution.<sup>403</sup> As such, right holders are supposedly expected to assert their right as a matter of constitutional principle but in doing so must not violate the rights of other people.<sup>404</sup>

### Listed Grounds

When dealing with discrimination, right holders are also expected to check whether the listed grounds of non-discrimination are provided in exhaustive or non-exhaustive form. Discrimination is when a person is treated less favourably than others on grounds unrelated to merit, usually because he or she belongs to a particular group or category.<sup>405</sup> For Zimbabwe, whose constitution was largely borrowed from the South African constitution, certain provisions relating to sex and sexuality were not adopted. For instance, sexual orientation is not provided as a ground for discrimination in the constitution of Zimbabwe because issues relating to Lesbian Gender Bisexual Transgender or Intersexual Queer and Asexual (LGBTIQA) were considered sticky points during the constitution-making process.

Lesbians, bisexuals, and transsexuals and gays practice homosexuality as a matter of choice. Some categories of intersexual people, also known as

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<sup>400</sup> Ibid.

<sup>401</sup> Ibid.

<sup>402</sup> Law and Martin (eds) (n 354) 420.

<sup>403</sup> Constitution of Zimbabwe 2013, sec 47.

<sup>404</sup> Ibid.

<sup>405</sup> Law and Martin (eds) (n 374) 174.

<sup>432</sup> Constitution of Zimbabwe, sec 78.

hermaphrodites, are unfairly classified under homosexuals as they do not choose to be born with two organs or some medical intersexual aspects. Zimbabwe has cases of children born with penile and vaginal atresia where the genital area is closed. Families can thus come into the open and seek protection, including amending Zimbabwe's two sex default references. Transgenders are different although they argue that they are trapped in the wrong body. We have all grown up with male persons who have feminine traits and vice versa. Queer people are considered strange by society and do not necessarily practice homosexuality. In Zimbabwe, queer people are called outcasts or spiritually indwelt (*vane chinzvi*) or those with spiritual husbands or spiritual wives. Asexual people prefer to enjoy sex on their own. Metrosexuals fancy colourful things. Social media is awash with socialites giving each other homosexual labels. Zimbabwe criminalizes sodomy and what this means is that gays can still be arrested in terms of sodomy laws. It seems there is no law that criminalizes lesbianism and other key populations on sexuality. The Constitution takes away marriage rights from persons of the same sex but does not prohibit sexual intercourse between them.<sup>432</sup> Those who indulge sexually cannot consummate their marriage under the Constitution or the Marriages Act (Chapter 5: 17). The COPAC drafts and preparatory documents can also be used by courts to resolve complex cases as was done by Justice Hlatshwayo in the *Mudzuru* case. COPAC treated homosexuality as a sticky issue. The Constitution provides that:

**78 Marriage rights**

- (1) Every person who has attained the age of eighteen years has the right to found a family.
- (2) No person may be compelled to enter into marriage against their will.
- (3) Persons of the same sex are prohibited from marrying each other.

COPAC impasse was based on the COPAC report which stated that:

The debate was based on the feeling that the constitution is there to protect minority rights while others felt that people spoke strongly against the issue during the outreach programmes that they argued was a clear indication they wanted it forbidden in this country...Mugabe considered homosexuals as worse than 'pigs and dogs.'

Source The Standard, Homosexuality issue referred to Mugabe, Tsvangirayi, The Standard, Nov. 20, 2011.

Presidential statements such as Mugabe's anti-homosexuality remarks at home and before international platforms normally serve as policy statements that

influence the legislative agenda. Gays who indulge with each other sexually can still be penalized under sodomy laws because those laws have not yet been declared unconstitutional and only men are criminalized under Zimbabwe's sodomy laws. Right holders need to distinguish between discrimination and differential treatment when dealing with the non-discrimination clause in the constitution.<sup>406</sup> In *Harksen v Lane*,<sup>407</sup> a case dealing with the interpretation of certain provisions of the Insolvency Act in South Africa, the applicant argued that sections 21, 64 and 65 of the Act were inconsistent with certain provisions of the bill of rights to the extent that they impact on the property and affairs of a solvent spouse upon the sequestration of the estate of an insolvent spouse.<sup>408</sup> The case is important in showing that grounds not listed but analogous to the listed provisions may be used to determine what constitutes discrimination in a particular case. The question whether differential treatment is based on listed or unlisted ground is answered objectively.<sup>409</sup> If an inquiry shows that the differentiation is based on unspecified ground, then the court determines if it is unfair.<sup>410</sup> In the case of determination on the specified ground the unfairness of the discrimination is presumed, but the contrary may still be made. The importance of this case is that the constitution prohibits unfair discrimination, not discrimination per se.<sup>411</sup>

### Margin of Appreciation, Constitutional Tests and Proportionality

Generally, States are allowed to balance between national interests and individual rights. International law allows States to limit certain rights using tests such as progressive realisation of human rights or the availability of resources. This is linked to the proportionality principle which deals which ends and means based on factors such as legality, legitimacy (respect for rights and reputation of other), public morals, public order and welfare of society. Ultimately such tests must however allow the State to demonstrate the commitment to fulfilling the minimum threshold of certain rights.

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<sup>406</sup> Constitution of Zimbabwe sec 56.

<sup>407</sup> CCT 9/97

<sup>408</sup> Ibid at 4.

<sup>409</sup> Ibid at 32.

<sup>410</sup> Ibid.

<sup>411</sup> Constitution of Zimbabwe, (n 406).

## General Limitations

The Constitution imposes several limitations of a general nature on how rights may be interpreted using certain circumstances.<sup>412</sup> It contemplates a situation where no law of a general nature may limit rights relating to human dignity. The use of the discretionary word ‘may’ may be problematic, but courts have generally been prepared to protect those rights as non-derogable rights. In a democratic society, courts in Zimbabwe considered questions such as: is the legislative objective sufficiently important to justify limiting a fundamental right; are the measures designed to meet the legislative object rationally connected to it; are the means used to impair the right or freedom no more than is necessary to accomplish the objective.<sup>413</sup> Essentially the power to limit a right does not go beyond the power to restrict a right.<sup>414</sup> Zimbabwe’s constitution empowers courts to use foreign law and lessons can be drawn from the Canadian Charter which lists reasonableness as one of its threshold values on weight and means.<sup>415</sup> Essentially the interest underlying the limitation must be of sufficient importance to outweigh the constitutionally protected right and the means must be proportional to the object of the limitation.<sup>416</sup> Proportionality requires the following of the limitation: that it be ‘rationally connected to its objective; that it impairs the right or freedom .

‘As little as possible’ and that there is ‘proportionality between its effect and its objectives’.<sup>417</sup> In some cases, a value-based analysis is adopted where a court is guided by the values and principles essential to a free and democratic society. Other considerations include the need for the limitation not to negate the essential content of the right which speaks to the legitimate circumscription of rights not their evisceration,<sup>418</sup> to be necessary (inviting the strict scrutiny test).<sup>419</sup>

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<sup>412</sup> Section 86.

<sup>413</sup> G. Feltoe, G. Linington and F. Mahere, ‘Worlds Apart: Conflicting Narratives on the Right to Protest’ (ZELJ 2016). The authors cited the case of *Nyambirai v NSSA & Anor* 1995 (2) ZLR (S) @ 13 C-F.

<sup>414</sup> *Ibid.*

<sup>415</sup> This was decided in the case of *R v Oakes* 26 DLR (4<sup>th</sup>) 200.

<sup>416</sup> Azhar Cachalia, Halton Cheadle, Dennis Davis et al (n 358) 111.

<sup>417</sup> *Ibid* citing the case of *Oakes* at 227

<sup>418</sup> *Ibid* citing Attorney General, *Quebec v Quebec Association of Protestant School Boards* 10 DLR (4<sup>th</sup>) 321.

<sup>419</sup> *Ibid* at 115.

## Special Limitations

The constitution imposes special limitations in times of a State of emergency.<sup>420</sup> Essentially, rights are summarily taken away and holders are expected to take note of the said declaration. They can off course assert their rights if the period of emergency ends or is arbitrarily declared. For South Africa, a state of emergency sometimes referred to as a state of exception or a state of siege provides for the suspension of some of the fundamental rights contained in chapter 3 of the South African Constitution.<sup>421</sup> In a state of emergency, the very life of the nation is threatened by some threat of natural or human origin and for these reasons public international law makes provision for more drastic or abridgments of fundamental rights.<sup>422</sup> The reason for specifically setting out the nature and extent of the exercise of emergency powers in a constitution is precisely to protect fundamental rights.<sup>423</sup> By specifying these limits in the constitution, itself, the limits are protected from statutory inroads.<sup>424</sup> In South Africa, the constitution incorporated the equivalent of Syracuse Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, 1984 which include: declaration of a state of emergency in a proper procedural manner; parliamentary oversight on the declaration of the State of emergency, judicial supervision and non-derogable rights.<sup>425</sup> The rights which are non-derogable may be core rights or even superior rights.

## Specific Right Holders

The Constitution lists six categories of special right holders: women, children, the elderly, persons with disabilities, veterans of the liberation struggle and juristic persons. Their rights are interpreted in the same way with other rights in the constitution and right holders are expected to uphold the duties expected of them. Some of the rights depend on the availability of State resources and holders must factor this consideration when seeking remedies related to constitutional breaches on the part of the State. While women and children have benefited, persons with disabilities and veterans of the liberation struggle are still to benefit from these elaborated rights.

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<sup>420</sup> Constitution of Zimbabwe, sec 87.

<sup>421</sup> Azhar Cachalia, Halton Cheadle, Dennis Davis et al (n 358) 117.

<sup>422</sup> Ibid.

<sup>423</sup> Ibid.

<sup>424</sup> Ibid 117-118.

<sup>425</sup> Ibid. Zimbabwe includes non-derogable provisions on general limitation under sec 86.



## Conclusion

Constitutional rights are very important. The Constitution of Zimbabwe has a declaration of rights which protects many rights under the three generations of human rights. In the wake of the discussion above, with constitutional literacy and awareness prioritised, right holders can immensely contribute to rights constitutionalism if they observe the constitutional duties imposed upon them. This article showed that some of the challenges faced by human right holders have been occasioned by their failure to uphold constitutional duties related to their rights or the rights of other citizens. The rationale for a rights-duty dichotomy is that the constitution limits absolute enjoyment of certain human rights. This should be emphasised in exercises on constitutional literacy and awareness. There is a need to sensitize communities and individual right holders that the need for citizens to uphold constitutional duties imposed on them can meaningfully contribute to nation building, peace and security and good governance. Moreover, observing constitutional duties embeds the rule of law and enables citizens to demand that the State must not be complicit in human right violations. In this way citizens can greatly participate in combating impunity and in ensuring that the State observes constitutional principles which speak against rule by law or other repressive inclinations. All this can greatly lead Zimbabweans to strive to foster a sustainable culture of human rights which promotes good life, personal security, security of property and nation building.