

6 Limitations of Rights in Zimbabwe

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1 Introduction

The birthmark of the 2013 Constitution ushered in a positive legal framework, at the very least in the discourse of human rights in Zimbabwe.¹ The Bill of Rights in the 2013 Constitution encompasses a wide range of fundamental human rights ranging from civil and political rights, socio-economic rights, minority rights, developmental rights to group rights amongst others within its ambit.² These variety of rights are justiciable, therefore implying that they inherently attract different approaches in the enjoyment of these rights and freedoms; different approaches in litigation of the rights; and different approaches in their limitation. In summary, recognised grounds of limiting rights in the Bill of Rights are mainly related to limitations acceptable in terms of laws of general application and other special circumstances such as during state of emergency. Although these rights are not absolute, it should not go without mentioning that the few legally recognised channels upon which they can be limited are narrow, stringent and demand a considerable burden of justification, reasonability and rationality to escape legal inquiry, scrutiny and challenge. With this reasoning in mind, the essence of this research is to assess legally recognised avenues in the limitation of rights protected under the Bill of Rights. To this end, this chapter is divided into five segments. In respective format, the first segment deals with the introduction and the historical background of limitation of rights and freedoms; the second segment deals with the limitations of rights under international law; the third segment deals with limitation of rights under Zimbabwean law and; the fourth segment is the conclusion.

2 Historical Background of Limitations of Human Rights and Freedoms

The proliferation of rights is an ancient development that can be traced back to the Stone Age. Inasmuch as rights can be expressed by any recognised means, what matters most is the protection of these rights and freedoms against arbitrary or excessive infringements. The ability to protect these fundamental rights marks the definition of a constitutional democracy.³ The protection of these rights has developed over the years, with the current protection now encoded in various

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¹ This was mainly achieved through the adoption of an expanded Bill of Rights in the Constitution of Zimbabwe (Amendment No.20) Act 2013. The current Bill of Rights is a significant progression from the narrow Bill of rights which was provided for under the 1980 Constitution.

² *Ibid.*

³ D. Ahmed and E. W. Bulmer, 'Limitation Clauses', *International Institute for Democracy and Electoral Assistance*, 1 November 2014, <www.idea.int/publications/catalogue/limitation-clauses>, visited on 12 November 2020.

revolutionary credos both at 'international level'⁴ and municipal level.⁵ The concept of limitation of human rights and freedoms is as old as the concept of human rights itself. The idea of limitations is based on the recognition that most human rights are not absolute but rather reflect a balance between individual and community interests.⁶

In our history, the 1961 Constitution of Southern Rhodesia and the 1979 Constitution of Zimbabwe-Rhodesia recognised the protection of human rights and freedoms. However, the rights were less justiciable.⁷ From 1965 up until 1987 there was prevalent violation of human rights since the nation was under a state of public emergency whereby some rights were suspended.⁸ However, the amendments that came into force after 1980 made human rights and freedoms more justiciable as compared to the previous guarantees of rights in the former constitution.⁹ This positive development in the safeguarding of rights was further redefined by the coming into effect of the current Constitution which entrenches a more justiciable Bill of Rights.

3 Limitation of Human Rights and Freedoms under International Law

International law generally recognises that rights are not absolute in nature; this conclusion can be gleaned from the fact that international law is permissible to the conditional limitation of rights.¹⁰ In terms of the Universal Declaration of Human Rights (UDHR)¹¹ and the International Covenant on Civil and Political Rights

⁴ See the Universal Declaration of Human Rights; the International Covenant on Civil and Political Rights; the United Nations Convention on the Rights of the Child; the African Charter on Human and Peoples' Rights; the European Convention on Human Rights.

⁵ Many constitutions have a bill of rights, for instance the Constitution of the Republic of South Africa, Act 106 of 1996.

⁶ D. McGoldrick, 'The Interface between Public Emergency Powers and International Law', 2:2 Oxford University Press (2004) p. 383; E. I. A. Daes, 'The Individual's Duties to the Community and the Limitations on Human Rights and Freedoms under Article 29 of the Universal Declaration of Human Rights: A Contribution to the Freedom of the Individual under Law: Study, <digitallibrary.un.org/record/52410>, visited on 13 November 2020.

⁷ H. Chitimira, 'Selected Challenges and Prospects of the Zimbabwe Constitution of 2013 in the Protection of Human Rights and Constitutional Democracy in Zimbabwe', 28 *Stellenbosch Law Review* (2017) p. 354.

⁸ During this period the nation was literally run by states of public emergencies with the government of the day doing all it takes to stifle any dissent and opposition. See generally J. Hatchard, 'Emergency Powers in Zimbabwe: An Overview of Post Independence Development', 18 *Zambia Law Journal* (1986) pp. 35-37.

⁹ Chitimira, *supra* note 7.

¹⁰ International law recognises that rights can be limited subject to reasonable restrictions necessary in a democratic society based on openness, justice, human dignity, equality and freedom. See A. S. Butler, 'Limiting Rights', 33 *Victoria University of Wellington Law Review* (2004) p. 117. See also Article 15(2) of the Convention on the Rights of the Child (CRC) which states that the right of the child to freedom of association and to freedom of peaceful assembly can be limited by the law. Such limitation must however be necessary in a democratic society in the interests of national security or public safety, public order, the protection of health or morals or the protection of the rights and freedoms of others.

¹¹ Article 29(3) of the UDHR.

(ICCPR),¹² human rights and freedoms are subject to both internal¹³ and external limitations.¹⁴ It is therefore apparent from international instruments that establish human rights that there is room for limitations of human rights and freedoms.¹⁵ However not all rights can be limited as there are classified human rights that are now regarded as absolute.¹⁶ The implication is that these absolute rights cannot be limited by any means, not even during a state of public emergency.¹⁷

3.1 Internal Limitations of Rights

In terms of the UDHR and the ICCPR, human rights and freedoms are subject to both internal and external limitations.¹⁸ The UDHR is the first international instrument to incorporate human rights. Because of its history and intended purpose, the UDHR contains what are commonly referred to as first and second generation rights. First generation rights are civil and political rights. It is generally regarded as a declaration

¹² ICCPR was adopted by the General Assembly on the 16th of December 1966 and entered into force on the 23rd of March 1976.

¹³ Article 9 of the UDHR provides that: "No one shall be subjected to arbitrary arrest, detention or exile." See also Article 12 of the UDHR. Article 13(1) of the UDHR provides that: "Everyone has the right to freedom of movement and residence within the borders of each State." The internal limitation here is that the right can only be enjoyed when one is within the borders of his or her state. See also Article 7 of the African Charter on the Rights and Welfare of the Child [ACRWC] which provides that the right to freedom of expression is "subject to such restrictions as are prescribed by laws". Section 10(1) of the ACHPR provides that "every individual shall have the right to free association *provided that he abides by the law*". See also Articles 8, 9(2), 12, 13(1), 11, 12(2) of the ACHPR. See also Article 12 of the ICCPR which provides for the right to freedom of movement states that:

"The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant." See also Articles 5(2), 9, 14, 18, 19, 21, 22 of the ICCPR.

¹⁴ See the right to freedom of expression is limited by Article 20 of the ICCPR which provides that any propaganda and advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law. See Article 29(2) of the UDHR. See also V. Mavi, 'Limitations of and Derogations of Human Rights in International Human Rights Instruments', 38 *Acta Juridica Hungarica* (1997) p. 109.

¹⁵ See Article 29(2) of the Universal Declaration of Rights, 1948 which is an international instrument that heralded the recognition of human rights discipline at international level; See also Articles 12 on the right to privacy, Article 14 on the right to seek and enjoy in other countries asylum from prosecutions, Article 15 on the right to nationality and Article 17 on the right to property of the UDHR.

¹⁶ See the right not to be tortured or subjected to cruel, inhuman and degrading treatment or punishment, the right not to be placed in slavery (Article 8(1) of the ICCPR), the right to human dignity. See Article 4(2) of the ICCPR which provides that this right cannot be limited even during a state of public emergency. See also R. Tripathi, 'Non Derogable Human Rights: A Comparative Study of Indian Constitution and International, Regional Instruments', 2 *Indian Journal of Law and Justice* (2002) pp. 66–78, where the author was discussing about the rationale for the existence of non-derogable rights. According to him the theoretical and philosophical basis of non-derogable rights can be inferred from the natural law theory. See also *Mukoko v. Attorney-General* SC 11-12 where the applicant applied for permanent stay of prosecution on the basis that her right to dignity was violated when she was abducted and tortured by state agents. Permanent stay of prosecution was granted.

¹⁷ See Article 4(1) of the ICCPR.

¹⁸ UDHR, *supra* note 13.

of rights. At international law member states determine limitations of human rights and freedoms.¹⁹

An internal limitation refers to an adjective which apparently qualifies the scope of a protected right or freedom.²⁰ Internal limitation means that the limitation of a right is found in the provision that provides for the right itself.²¹ An example of an internal limitation of a human right is where the provision which provides for the right contains the word 'arbitrary'. Where a provision states that something must not be done in an arbitrary manner, it simply means that if that conduct is not done arbitrarily or in accordance with due process, the conduct will still be lawful even if it limits the enjoyment of a human right.

Internal limitations are usually characterised by the use of the phrases like 'prescribed by law',²² 'in conformity with law',²³ 'established by law',²⁴ 'in accordance with law',²⁵ 'pursuant to law'²⁶ and 'provided by law'.²⁷ These phrases are commonly referred to as claw-back clauses. Limitations of human rights and freedoms should be prescribed by or in accordance with a law put into place by a state party.²⁸ The phrase 'as prescribed by law' as used in international conventions and treaties means that the limitation of human rights must be in accordance with a national law of general application.²⁹ That national law must be consistent with the international instrument that establishes the right.³⁰ For a law to qualify as a law of general application, it must be clear and accessible to everyone.³¹ The idea that human rights

¹⁹ R. Murray and M. Evans, *The African Commission on Human and Peoples' Rights and International Law* (Cambridge University Press, Cambridge, 2008) p. 123, where the author was commenting on the limitations of human rights and freedoms under the African Charter. The author is of the view that the non-existent of a limitation clause in the African Charter coupled with the principle that a state party determine the law which provides the extent to which human rights can be limited is more harmful than good since the African Commission may not be able to monitor state parties' behavior. The author concluded that the limitations are not defined exactly in the Charter, arguably leaving it purely to the discretion of states and thus, in effect, allowing rights to be denied.

²⁰ Butler, *supra* note 10, p. 120.

²¹ *For instance*, Article 10(2) of the Convention on the Rights of the Child (CRC) provides that: "The right to leave any country shall be subject only to such restrictions as are prescribed by law and which are necessary to protect the national security, public order, public health or morals or the rights and freedoms of others and are consistent with the other rights recognized in the present Convention." See also Article 13(2) of the CRC.

²² Article 18 of the ICCPR; See also Articles 9, 10 and 11 of the European Convention.

²³ Article 21 of the ICCPR.

²⁴ Article 9 and 14 of the ICCPR; See also Article 6 of the European Convention.

²⁵ Article 13 of the ICCPR; Article 2 of the European Convention.

²⁶ Article 5(2) of the ICCPR.

²⁷ Article 12 of the ICCPR.

²⁸ See Article 13(2) of the CRC.

²⁹ See Articles 18(3), 19(3), 20(2), 22(2) of the ICCPR; Article 10(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms; Article 9(2) of the African Charter on Human and Peoples' Rights; and Article 4(1) of the ICERD.

³⁰ This is generally referred as the principle of legality; see also *Malawi African Association and Others v. Mauritania*, African Commission on Human and Peoples' Rights Communication No. 54/91-61/91-98/93-164/97-196/97-210198, para. 102.

³¹ B. Lockwood *et al.*, 'Working Paper for the Committee of Experts on Limitation Provisions', 7 *Human Rights Quarterly* (1985) p. 38. *Keun-Tae Kim v. The Republic of Korea*, Communication No. 574/1994, CCPR/C/64/D/57411994, para. 25.

and freedoms can only be limited by a law of general application does not provide sufficient protection since the legislature has unrestricted power to make laws that can be arbitrary and discriminatory.³² This judiciary has the mandate to determine whether the law is reasonable where an infringement of human rights has been alleged.³³ However, these limitations must be determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and meeting the just requirements of public morality, public order, public health and the general welfare in a democratic society.³⁴

Internal limitations are easily identifiable in socio-economic rights. The enjoyment of these rights is subject to the availability of resources and the state is only supposed to take reasonable steps with a view of progressively achieving the full realisation of the rights.³⁵ Besides the limitation of human rights being placed on the hinges of available resources, the International Covenant on Economic, Social and Cultural Rights (ICESCR) places a margin of leverage on member states to enact laws that determine the extent to which the rights can be afforded. The limitations should however be compatible with the nature of the rights and solely for the purpose of promoting the general welfare in a democratic society and in the interests of national security³⁶ or public order or for the protection of the rights and freedoms of others.³⁷ The implication of this measure is to guard against state parties enacting laws that determine how human rights can be limited without international oversight.³⁸ Therefore, the limitation must be aligned to the internationally recognised grounds of proportionality,³⁹ rationality and reasonableness.⁴⁰ It has been argued that proportionality includes aspects of suitability, subsidiarity and rationality in the narrow sense.⁴¹ In international law, human rights and freedoms may be limited where it is 'necessary in a democratic society'.⁴² The phrase is however not defined

³² *Ibid.*

³³ Lockwood *et al.*, *supra* note 31, p. 801.

³⁴ Article 29(2) of the Universal Declaration of Human Rights. See also Article 10(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

³⁵ Article 2(1) of the International Covenant on Economic, Social and Cultural Rights.

³⁶ *Kenneth Good v. The Republic of Botswana*, African Commission on Human and Peoples' Rights, Communication No. 313105, para. 188.

³⁷ *Keun-Tae Kim case*, *supra* note 31. See also Article 27(2) of the African Charter which provides that rights and freedom shall be exercised in respect of the rights of others, collective security, morality and common interest.

³⁸ O. M. Garibaldi, 'General Limitations on Human Rights: The Principle of Legality', 17 *Harvard International Law Journal* (1976) p. 503; see also Lockwood *et al.*, *supra* note 31, p. 44.

³⁹ In *Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v. Nigeria*, African Commission on Human and Peoples' Rights, Comm Nos. 140/94, 141/94, 145/95 (1999) the African Commission it was held that a limitation may not erode a right such that the right itself becomes illusory.

⁴⁰ I. Maja, 'Limitation of Human Rights in International Law and the Zimbabwean Constitution', *Zimbabwe Electronic Law Journal* (2016) pp. 4–6.

⁴¹ *Ibid.*

⁴² This can be traced to Article 29 of the Universal Declaration of Human Rights. It should be noted that in the ICCPR the phrase is absent from the articles guaranteeing freedom of movement, religion and expression. However, it is found in Articles 14, 21 and 22 of the ICCPR which provides for the rights to a public trial, peaceful assembly and freedom of association respectively. See also A. Kiss, 'Permissible Limitations on Rights', in L. Henkin, *The International Bill of Rights: The Covenant on Civil and Political*

in international human rights instruments probably because what constitutes democracy differs across state parties and it changes from time to time.⁴³ Every limitation of human rights and freedoms must be subject to challenge.⁴⁴ To say that the limitation is 'necessary' means that it must be based on one of the grounds justifying limitations recognised by the relevant provision, responds to a pressing public or social need, pursues a legitimate aim⁴⁵ and must be proportionate to the aim that is sought to be achieved.⁴⁶

3.2 External Limitations

Rights in general can be susceptible to external limitations. At international law, this implies that rights may be limited or restricted by means of provisions that fall outside of the 'right enabling clause'. The external limitations are usually sheltered under the roof of a general limitation clause⁴⁷ or a state of public emergency clause. However, in most instances human rights conventions and other rights enabling instruments at international law usually accommodate a great deal of flexibility and leverage on state parties to enact laws to determine the scope, content and limit of human rights subject to laws of general application. To this end, the exercise of rights in general should be regulated by state parties in accordance with laws of general application. Consequently, any limitation of rights should be in conformity to principles related to reasonableness, rationality, fairness, equality and '*necessity in a democratic society*'.⁴⁸ Human rights and freedoms can also be limited during a state of public emergency albeit to the extent strictly required by the exigencies of the situation.⁴⁹ During a state of public emergence, state parties can pass laws that may derogate rights enshrined in international instruments.⁵⁰ Article 4 of the ICCPR provides some requirements which must be satisfied for limitations of human rights and freedom

Rights (Columbia University Press, New York 1981) p. 490, for a discussion on the reasons and effect of such omission. The phrase 'necessary in a democratic society' appears in each limitation clause in the European Convention and this therefore makes every limitation qualified.

⁴³ Lockwood, *supra* note 31, p. 56.

⁴⁴ S. Joseph, 'A Rights Analysis of the Covenant on Civil and Political Rights', 5 *Journal of International Legal Studies* (2005) p. 70; see also *Mike Campbell v. The Republic of Zimbabwe* SADC (T) No. 2/2007; *Anudo Ochieng Anudo v. United Republic of Tanzania* Application No. 012/2015, para. 101; see also Articles 9(4), 13, 14 of the ICCPR; Article 37(d) of the CRC. Article 8 of the UDHR provides that: "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law." See also Article 13 of the ICCPR.

⁴⁵ *Ibid.*

⁴⁶ *Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda case*, *supra* 39, para. 42, it was stated that the justification of limitations must be strictly proportionate with and absolutely necessary for the advantages which follow.

⁴⁷ For example see Article 29 of the UDHR. See also Article 27(2) of the ACHPR which states that the rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest. Communications 105/93, 128/94, 152/96 (joined), *Media Rights Agenda and others v. Nigeria* (2000) AHRLR 200 (ACHPR 1998) (12th Annual Activity Report), paras. 68 and 77 established that the only legitimate limitation to rights in the ACHPR is Article 27(2) of the ACHPR;

⁴⁸ See Articles 14, 21 and 22 of the ICCPR which provides for the rights to a public trial, peaceful assembly and freedom of association respectively.

⁴⁹ See Article 4 of the ICCPR. See also Joseph, *supra* note 44, p. 81.

⁵⁰ *Ibid.*, p. 82.

during state of public emergency to be legal. Derogations of human rights during state of public emergency must be proportional to what is meant to be achieved.⁵¹ Although these are some of the legally recognised ways of infringing on rights, this does not translate into implying that all rights can be limited. The reason being that in international law there are some civil and political rights that cannot be limited or derogated under any circumstances.⁵² Prime examples are the right to life, right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment, right not to be held in slavery, the right to freedom of thought, conscience and religion' cannot be limited even during a state of public emergency.

4 Limitation of Rights: The Zimbabwean Context

The word 'limitation' as used in the field of human rights entails a restriction or restrictions that are imposed on the enjoyment of certain rights and freedoms. The drafters of the 2013 Zimbabwean Constitution⁵³ had it on the back of their minds that to keep in touch with these democratic principles and values it is necessary for certain rights to be limited, at least under extreme and limited permissible circumstances. As already highlighted, rights in general are not absolute.⁵⁴ Human rights and freedoms limitations are necessary since they are meant to balance the enjoyment of rights and freedoms by other citizens,⁵⁵ for public order, safety, health, morality and also for democratic values.⁵⁶ Limitations on the enjoyment of human rights and freedoms can only be lawful if it is in accordance with the Constitution. 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.⁵⁷ Therefore, any infringement or supposed limitation of rights if not consistent with the Constitution of Zimbabwe will be deemed unconstitutional.⁵⁸ Suffice to say that the current Constitution recognises the limitation of rights and freedoms through internal and external means. The Constitution makes provision for the limitations of rights externally through the general limitation clause and also during a state of public emergency.⁵⁹

⁵¹ *Ibid.*

⁵² Article 4(2) of the ICCPR provides that the right not to be put under slavery cannot be derogated even during state of public emergency; see also Joseph, *supra* note 44, p. 78

⁵³ Constitution of Zimbabwe Amendment (No.20) Act, 2013.

⁵⁴ I. Currie and J. de Waal, *The Bill of Rights Handbook*, 6th edition (Juta Law Publication, South Africa, 2013) p. 150.

⁵⁵ See section 86(1) of the Constitution.

⁵⁶ Currie and de Waal, *supra* note 54.

⁵⁷ See section 2(1) of the Constitution.

⁵⁸ *Chimakure and Others v. Attorney-General* 2013 (2) ZLR 466 (S) at 495G-H. See also *S v. Sibanda* 1989 (2) ZLR 69 (S) where the conduct of the police in denying the appellant his right to a legal practitioner was held to be unconstitutional and the prosecution which was carried out in the absence of legal representation set aside.

⁵⁹ Section 87(1) of the Constitution of Zimbabwe. See also Article 4 of the ICCPR.

4.1 Internal Limitations

As has already been highlighted, internal limitations refer to the limitation that is found within the provision that establishes a right or freedom.

For instance, section 49(1)(b) of the Constitution provides that “[e]very person has the right to personal liberty, which includes the right not to be deprived of the liberty or *without just cause*”. This simply entails that the right to liberty can be limited internally where it is justified to do so in an open and democratic society,⁶⁰ for instance where the right holder has committed an offence and is arrested. Section 49(2) clearly provides that “no person may be imprisoned merely on the ground of inability to fulfil a contractual obligation”. It appears the Constitution did not change civil imprisonment where a party wilfully fails to file to satisfy a contractual obligation.

4.1.1 Civil and Political Rights

Zimbabwe is a state party to the International Convention on Civil and Political Rights⁶¹ which establishes a wide range of civil and political rights and states parties’ obligations. Zimbabwe is therefore under an obligation to ensure that these rights are respected, protected, promoted and fulfilled. Civil and political rights are covered from section 48 to 74 of the Constitution. Usually, the enjoyment of civil and political rights and freedoms is limited for the purposes of national security, public order, safety, health and for democratic values.

The right to life is limited for the purpose of public order in that it can be infringed if the right holder has been convicted of murder committed in aggravating circumstances.⁶² The Constitution provides safeguards to ensure that the right to life can only be limited under exceptional circumstances since a death penalty can only be effected in accordance with a final judgment of a competent court.⁶³ This gives the right holder an opportunity to approach every court in the jurisdiction in a bid to avoid the death penalty. The right holder is also given an opportunity to seek

⁶⁰ See the case of *Chinamhora v. Angwa Furniture's and Anor* 1996 (2) ZLR 664 (S), paras. 681–682 where the Supreme Court was called to determine the constitutionality of civil imprisonment. Gubbay CJ noted that there are basically two requirements that must be met in order to justify the deprivation of personal liberty: the deprivation may only be sanctioned “in execution of the order of a court and that the decree of imprisonment can only be made to secure the fulfilment of an obligation imposed on him by law”. The Court went on to hold that civil imprisonment of a person who is unwilling to pay the debt but who is in a position to do so is constitutional. See also *Bull v. A-G and Another* 1986 (1) ZLR 117 (SC), at p. 119. In this case the Supreme Court noted that the right to liberty can be infringed where there is reasonable suspicion that a person has committed an offence. See also *Immigration Officer and Anor v. Narayansamy* 1916 TPD 274, at p. 276.

⁶¹ Zimbabwe ratified the ICCPR on 13 May 1991.

⁶² Section 48(2) of the Constitution of Zimbabwe. In the case of *S v. Mutero* SC 53-18, where the appellant had raped and murdered a three-year-old child of his girlfriend, the Supreme Court held that the murder was committed in aggravating circumstances. The Court went on to dismiss the appeal against the death penalty imposed by the High Court. Article 6(2) of the ICCPR provides that death sentence “may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime ...”

⁶³ Section 48(2)(b) of the Constitution of Zimbabwe. See also Article 6(2) of the ICCPR.

presidential pardon before the right can be infringed.⁶⁴ Where the accused has been convicted and sentenced to death, even if he appeals against the sentence only, the conviction will also be deemed to have been appealed against.⁶⁵

The right to freedom of expression and freedom of the media has an internal limitation in that the provision itself stipulates that the right holder cannot enjoy the right in a manner that can lead to incitement of violence,⁶⁶ that advocate hatred,⁶⁷ that maliciously injure another person's reputation or dignity⁶⁸ or that is malicious or lead to unwarranted breach of a person's right to privacy, public order and public safety.⁶⁹ In the case of *Banana v. Attorney-General*⁷⁰ the Supreme Court was called upon to determine whether the right to freedom of expression infringes the right of the accused to fair trial.⁷¹ It has been held that the right to freedom of expression is very important in a democratic society and therefore it has to be jealously guarded.⁷² It was held in *Banana v. Attorney-General* that the right to freedom of expression in the context of legal proceedings must be exercised reasonably, especially where the person targeted is awaiting trial on a criminal charge.⁷³ The Court held that there is need to balance the right of the public to information and of the media to report and express views freely, against the right of an accused to a fair trial.

The right to access to information has several internal limitations. The right can only be enjoyed if the information is required in the interests of public accountability,⁷⁴ if the information is required for the exercise or protection of a right.⁷⁵ In terms of section 62(3) of the Constitution a person can only seek for the correction or the deletion of untrue information, erroneous or misleading information held by the state or any institution or agency of government if that information relates to right holder himself. This therefore means that only the person whose information is held has the *locus standi* to approach courts of law. Section 62(4) of the Constitution is quite interesting in that it provides for the enactment of legislation to give effect to the right to access to information. The legislation may provide for restriction of access to information in the interests of defence, public security or professional confidentiality.

⁶⁴ Section 48(2)(e) of the Constitution of Zimbabwe. See also Article 6(4) of the ICCPR and *Makoni v. Commissioner of Prisons* CCZ 08-16.

⁶⁵ *S v. Muteru* SC 28-17.

⁶⁶ Section 61(5)(a) of the Constitution. See also *Chimakure and Others* case, *supra* note 58.

⁶⁷ Section 61(5)(b) of the Constitution.

⁶⁸ Section 61(5)(c) of the Constitution of Zimbabwe; see also *Zimbabwe Lawyers for Human Rights and Another v. President of Zimbabwe and Anor* 2003 (2) ZLR 444 (H), at para. 448H.

⁶⁹ *Chimakure and others* case, *supra* note 58, at para. 506C.

⁷⁰ *Banana v. Attorney-General* 1998 (1) ZLR 309 (S).

⁷¹ The case involves the former non-executive president of Zimbabwe who was being charged of several counts of sodomy, attempted sodomy and indecent assault. The case had attracted a lot of publicity after one of his aide police officer was convicted and in the process implicated him as the reason why he committed murder. The applicant wanted the matter to be stayed since he believed that there would not be a fair trial because of the publicity the matter had attracted. He feared that the court would be clouded with a negative attitude thereby affecting its impartiality.

⁷² *Banana* case, *supra* note 70; see also *United Parties v. Minister of Justice, Legal and Parliamentary Affairs & Ors* 1997 (2) ZLR 254 (S), at p. 269.

⁷³ *Ibid.*

⁷⁴ Section 62(1) of the Constitution of Zimbabwe.

⁷⁵ Section 62(2) of the Constitution of Zimbabwe.

In the *Banana* case, the Court outlined some circumstances where the right to access to information can be limited. These include where information sought: (i) would disclose the identity of an informer whom it is necessary to protect; (ii) would disclose police techniques of investigation which it is similarly to protect; (iii) might imperil the safety of the witness; or (iv) would otherwise not be in the interest of the public.⁷⁶

The right to demonstrate and present petitions is subject to internal limitations in that it can only be exercised 'peacefully'.⁷⁷ This is one of the most litigated rights in Zimbabwe especially under the Public Order and Security Act which has since been repealed.⁷⁸ In the *Democratic Assembly for Restoration and Empowerment (DARE) & Others v. Saunyama N.O. & Others* and the case of *Zimbabwe Divine Destiny v. Saunyama & Others*,⁷⁹ the Court found that section 27 of the Public Order and Security Act⁸⁰ which allowed the regulating authority of an area to ban public demonstrations was an infringement to the right to demonstrate and to present petitions.⁸¹ In *MDC-T v. Officer Commanding Bulawayo Central District Police N.O. & Others*, the Court held that the right to demonstrate can only be limited where the responsible authority has managed to establish on a preponderance of probabilities that there is a real likelihood that the demonstration will not be peaceful. A mere allegation that it will not be sufficient is not sufficient.⁸² In this case the respondents had not authorised the applicant to hold a demonstration on the basis that the previously held demonstration was not peaceful and that they have not enough manpower to provide security to the applicant. The Court viewed this as a lame excuse since the police has a constitutional mandate to protect the citizens. It was

⁷⁶ *Banana* case, *supra* note 70.

⁷⁷ Section 59 of the Constitution: see Article 21 of the ICCPR and Article 11 of the ACHPR. See also *MDC-T v. Officer Commanding Bulawayo Central District Police N.O. & Others* HB 126-16 where Makonese J stated that: "The right to demonstrate only applies to peaceful gatherings and does not protect intentionally violent protests. There will be interference with the right to demonstrate if the authorities prevent a demonstration from going ahead; halt a demonstration, take steps in advance of a demonstration in order to disrupt it; or store personal information on people because of their involvement in a demonstration." See generally G. Feltoe, G. Linington and F. Mahere, 'Worlds Apart: Conflicting Narratives on the Right to Protest', *The Zimbabwe Electronic Law Journal* (2016) where the authors were analysing the DARE cases. See also General Comment No. 32: The Nature of the General Legal Obligations Imposed on State Parties to the Covenant.

⁷⁸ See *Dzamara and Others v. Commissioner General of Police and Others; MDC-T v. Officer Commanding Byo Central District Police N.O. & Others* HB 126-16. The POSA was the main law of general application that was being used to limit the right to demonstrate. The Act requires that a notice be given to the regulatory authority of the intended demonstrations. The notice should also include the names and particulars of the organisation on whose behalf the gathering is convened. The purpose of the gathering, its anticipated number of participants, the route of the processions are all to be included. The time and place where the procession will end or begin is also to be disclosed. Pursuant to section 27(1) of the POSA on 1 September 2016 the police officer commanding the Harare district issued a notice prohibiting for two weeks the holding of all public processions and demonstrations in the Central Business District of Zimbabwe. See Statutory Instrument 101A of 2016.

⁷⁹ HH 589-16.

⁸⁰ Public Order and Security Act, [Chapter 11:17], 2001. The POSA has since been repealed and was replaced by the Maintenance of Peace and Order Act [Chapter 11:23]

⁸¹ DARE case, *supra* note 77.

⁸² *Ibid.* See also *Forum Party of Zimbabwe and Others v. Minister of Local Government* 1996 (1) ZLR 461 (H) where Adam J said at 486 that a situation cannot be said to have arisen if it has no facts.

therefore the Court's view that the decision of the respondent was arbitrary, indiscriminate and disproportionate restriction on the right of the applicant to demonstrate.⁸³

4.1.2 Socio-Economic and Cultural Rights

The phrase 'socio-economic rights' is a short name for social, economic and cultural rights that are accepted as necessary for individuals and groups to live sustainably in dignity and freedom within society.⁸⁴ Since human rights are said to be intertwined and interdependent, some of the socio-economic rights are believed to be pillars for human dignity.⁸⁵ Article 55 of the Charter of the United Nations imposed an obligation on the international world to ensure that socio-economic are progressively realised.⁸⁶ This is an acknowledgment that these rights are inherently limited in their scope and enjoyment.

The 2013 Constitution introduced socio-economic rights in its Bill of Rights⁸⁷ whereas the 1980 Constitution did not provide for these rights as fundamental rights.⁸⁸ Like any other rights, socio-economic rights are not absolute.⁸⁹ Socio-economic rights are usually crafted in such a manner that they are limited internally. The enjoyment of socio-economic rights is generally subject to the availability of resources. The fact that socio-economic rights are subject to progressive realisation points that there is an element of flexibility in terms of the obligations of states and also in their enforcement.⁹⁰ In terms of the current Constitution the right to education,⁹¹ right to

⁸³ The Court went on to state that: "It ought to be noted that the freedom to take part in a peaceful assembly was of such importance that the right could not be restricted in any way, on flimsy grounds. A fair balance has to be struck on the one hand, the general interest requiring the protection of public safety and, on the other, the applicant's freedom to demonstrate."

⁸⁴ G. Farese, 'Socio-Economic Rights', in *International Human Rights, Social Policy and Global Development*, April 2020, p. 105,

<www.researchgate.net/publication/342039515_International_Human_Rights_Social_Policy_and_Global_Development_Critical_Perspectives>, visited on 3 December 2020.

⁸⁵ Kiss, *supra* note 42, p. 104.

⁸⁶ *Ibid.*, p. 105. See also Article 55 of the Charter of the United Nations which provides that: "With a view to the creation of conditions of stability which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

a. higher standards of living, full employment, and conditions of economic and social progress and development:

b. solutions of international economic, social, health, and related problems; and international cultural and educational co-operation;"

⁸⁷ See sections 73–77 of the Constitution of Zimbabwe. See also Chitimira, *supra* note 7, p. 358; T. Kondo, 'Socio-Economic Rights in Zimbabwe: Trends and Emerging Jurisprudence', 17:1 *African Human Rights Law Journal* (2017) p. 165.

⁸⁸ Chitimira, *supra* note 7, p. 352. See also T. Chiviru, 'Socio-Economic Rights in Zimbabwe's New Constitution', 36 *Strategic Review for Southern Africa* (2014) p. 111.

⁸⁹ *Ibid.*

⁹⁰ L. Chenwi, 'Unpacking Progressive Realisation, Its Relation to Resources, Minimum Core and Reasonableness, and Some Methodological Considerations for Assessing Compliance', 46 *De Jure* (2013) p. 744.

⁹¹ Section 75 of the Constitution of Zimbabwe Amendment (No. 20) Act, 2013.

health care,⁹² right to food and water,⁹³ rights of the elderly,⁹⁴ rights of persons with disabilities⁹⁵ and environmental rights⁹⁶ are subject to availability of resources.

The current Constitution also limits the enjoyment of the right to have access to basic health-care services to citizens and permanent residents of Zimbabwe.⁹⁷ Of interest is that the rights of veterans of the liberation struggle are not subject to availability of resources.⁹⁸ The fact that socio-economic rights are subject to the availability of resources and that the right can only be realised progressively have raised questions as to the justiciability of the rights. More often in litigation where government institutions were drawn to court to fulfil these socio-economic rights, they often advance an argument that they have no sufficient funds but they are taking reasonable measures to ensure the progressive realisation of the rights.⁹⁹

The issue of separation of powers is also another critical issue which affects the litigation of socio-economic rights. The issue of resource allocation is the preserve of the executive usually through budget allocations. For a court of law to determine how such resources are allocated may be taken as usurpation of executive functions by the judiciary. In cases where there is an allegation of the limitation of socio-economic rights, the state must show that there is tangible progress towards the realisation of rights.¹⁰⁰ The state must not only state that there is a policy which is aimed to realise the right in question but also that the policy is being implemented.

4.2 External Limitations of Human Rights and Freedoms

The first thing that comes to one's mind when you hear of external limitation is the general limitation clause¹⁰¹ and limitation of rights during state of public emergency.¹⁰² The current Constitution has a general limitation clause which sets out the circumstances under which human rights as contained in the Bill of Rights can be limited. The insertion of the general limitation clause in the Constitution simply entails that human rights and freedoms are not absolute. Human rights and freedoms are enjoyed taking into consideration for the rights of other persons.¹⁰³ The human rights and freedoms are limited in terms of a set out formula. This formula is not new to our legal system but it has been put in our Constitution for the first time. It was part of our law since the Constitution codified the criteria as enunciated in the case

⁹² Section 76 of the Constitution of Zimbabwe.

⁹³ Section 77 of the Constitution of Zimbabwe.

⁹⁴ Section 82 of the Constitution of Zimbabwe.

⁹⁵ Section 83 of the Constitution of Zimbabwe.

⁹⁶ Section 73 of the Constitution of Zimbabwe.

⁹⁷ Section 76(1) of the Constitution of Zimbabwe.

⁹⁸ Section 84 of the Constitution of Zimbabwe.

⁹⁹ Chenwi, *supra* note 90, p. 745, where she argues that the obligation on the state is to move as expeditiously and effectively as possible towards the full realisation.

¹⁰⁰ *Ibid.*

¹⁰¹ Section 86 of the Constitution of Zimbabwe.

¹⁰² Section 87 of the Constitution of Zimbabwe.

¹⁰³ Section 86(1) of the Constitution of Zimbabwe provides that the fundamental rights and freedoms set out in this Chapter must be exercised reasonably and with due regard for the rights and freedoms of other persons.

of *Nyambirai v. National Social Services Authority*. In that case the Supreme Court held that:

the court will consider three criteria in determining whether or not the limitation is permissible in the sense of not being shown arbitrary or excessive. It will ask itself whether:

- (i) the legislative objective is sufficiently important to justify limiting a fundamental right;
- (ii) the measures designed to meet the legislative objective are rationally connected to it; and
- (iii) the means used to impair the right or freedom no more than that is necessary to accomplish the objective.¹⁰⁴

The right to freedom of assembly and association is one of the most litigated rights. This right is subject to external limitations¹⁰⁵ because the literal reading of it shows no limitation.¹⁰⁶ The right should therefore be limited by a law of general application. The main law of general application limiting this right is the Maintenance of Order and Peace Act (MOPA.)¹⁰⁷

4.2.1 Laws of General Application

Section 86 of the Constitution provides that human rights and freedom enshrined in the Bill of Rights can only be limited by a law of general application.¹⁰⁸ The requirement that human rights and freedoms can only be limited in terms of a law of general application is consistent with the principle of rule of law.¹⁰⁹ The phrase law of general application as used in human rights and freedoms jurisprudence entails that any infringement of a human right or freedom must be sanctioned or based on the law.¹¹⁰ The term 'law' is defined in section 332 of the Constitution to mean any provision of the Constitution, an Act of Parliament or a statutory instrument, or any unwritten law in force in Zimbabwe,¹¹¹

¹⁰⁴ Juxtapose this criteria with section 86(2)(a) – (f) of the Constitution of Zimbabwe.

¹⁰⁵ See the case of *Dzamara*, *supra* note 78. In re *Munhumeso and Others* 1994 (1) ZLR 49 (S).

¹⁰⁶ Section 58(1) and (2) provides that every person has the right to freedom of assembly and association, and the right to assemble or associate with others. Moreover, no person may be compelled to belong to an association or to attend a meeting or gathering.

¹⁰⁷ This Act replaces the Public Order and Security Act [Chapter 11:17] commonly known as POSA.

¹⁰⁸ *Currie and de Waal*, *supra* note 54; *Majome v. ZBC and Others* CCZ 14-16; *Makani and Another v. Arundel Schools*; *Ismael v. St Georges*; *Dzvova v. Minister of Education*; *Chavhunduka* case *supra* note 108; *Chimakure* case, *supra* note 58.

¹⁰⁹ *Chimakure* case, *supra* note 58. The principle of the rule of law is one of the founding values and principles of the Constitution as provided for in section 3.

¹¹⁰ *Currie and De Waal*, *supra* note 54, p. 155.

¹¹¹ In *the Sunday Times v. The United Kingdom* (1979-80) 2 EHRR 245, 'law' was held to include unwritten law such as common law as well as statutes and subordinate legislation. The case arose from the newspaper's intention to publish an article discussing evidence pertaining to the negligence of a drug manufacturer in producing thalidomide. The manufacturer and the parents of the deformed children were in the process of negotiating settlements. An interdict against the newspaper was issued on the grounds that the publication would be in contempt of court. Upon hearing the complaint, the European Court of Human Rights held that the *Sunday Times'* right to freedom of expression had been violated. The restrictions imposed by the common law rules of contempt of court satisfied the requirement of 'prescribed by law'. The contempt rules served a legitimate purpose, but because they were not 'necessary in a democratic society' to preserve the 'authority of the judiciary', the interference was impermissible.

including customary law.¹¹² The Constitution also provides that the law to be administered by the courts of Zimbabwe is the law that was in force on the effective date,¹¹³ as subsequently modified.¹¹⁴ For a law to qualify as being of general application it must be sufficiently clear, precise that those affected by it can ascertain the extent of their rights and obligations.¹¹⁵ It must also be accessible to all.¹¹⁶ A law of general application should provide adequate safeguards against abuse.¹¹⁷ It is however not necessary for the safeguards to be written in the law itself.¹¹⁸ If a conduct limiting the enjoyment of rights and freedoms is not sanctioned by law, such conduct is unlawful and cannot be justified.¹¹⁹ In the case *Minister of Safety and Security and Another v. Xaba*,¹²⁰ where police officers had compelled a suspect to have surgery so as to remove a bullet that they believed would provide evidence connecting the suspect to a crime he was alleged to have committed, there was no law which provided for that. As a result, it was held that there was no law of general application and the infringement was unlawful. In the *Makani* case, the Court held that a private contractual stipulation is not a law and that section 86(2) of the Constitution has no direct bearing on the constitutionality or enforceability of the contract of admission at a school.¹²¹ The question of the validity of conduct or law which falls within the ambit of a law of general application cannot be determined by reference to the Constitution but by reference to the provisions of the law of general application unless the constitutionality of the law is itself being attacked.¹²²

¹¹² Currie and de Waal, *supra* note 54, p. 156. See also *Du Plessis v. De Klerk* 1996 (3) SA 850 (CC), para. 44.

¹¹³ Effective date refers to the date on which the current Constitution came into operation. The current Constitution came into force on the 22nd of May 2013.

¹¹⁴ Section 192 of the Constitution of Zimbabwe.

¹¹⁵ Currie and de Waal, *supra* note 54, p. 156; *South African Liquor Traders Association v. Chairperson, Gauteng Liquor Board* 2009 (1) SA 565 (CC), pp. 25–28. In the *Chavhunduka*, *supra* note 108, para. 563, the Supreme Court held that section 50(2)(a) of the Law and Order (Maintenance) Act which criminalises the publication of false statements that may cause alarm and despondency could not meet the requirement of being ‘under the authority of any law’ because its language was so broad and broad that it can be interpreted in many ways. In *The Sunday Times v. The United Kingdom* (1979-80) 2 EHRR 245, the European Court of Human Rights in interpreting what the expression ‘prescribed by law’ meant stated that the law concerned must be adequately accessible, the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case, and a norm cannot be regarded as a ‘law’ unless it is formulated with sufficient precision to enable the citizen to regulate his conduct;

¹¹⁶ *Masiya v. Director of Public Prosecutions*, Pretoria 2007 (5) SA 30 (CC).

¹¹⁷ Lockwood *et al.*, *supra* note 31, p. 49.

¹¹⁸ *Ibid.* See also B. Rose, ‘Limitations on Human Rights in International Law: Their Relevance to the Canadian Charter of Rights and Freedoms’, 6 *Human Rights Quarterly* (1984) p. 190.

¹¹⁹ See Woolman and Bishop ‘Constitutional Law of South Africa’, 2nd edition (Juta Law Publications, Johannesburg 2012) pp. 34–47; see also *Dladla and Anor v. City of Johannesburg and Ors* 2018 (2) SA 327 (CC) and *August v. Electoral Commission and Others* 1999(3) SA 1(CC), para. 23.

¹²⁰ 2003 (2) SA 103 D.

¹²¹ See also Currie and de Waal, *supra* note 54, p. 156, and *Barkhuizen v. Napier* 2007 (5) SA 323 (CC), para. 26.

¹²² Woolman and Bishop, *supra* note 119.

4.2.2 Reasonableness and Justifiability of the Limitation

The law of general application limiting human rights and freedoms should be fair, reasonable,¹²³ necessary and justifiable in an open and democratic society that is based on openness, justice, human dignity, and equality and freedom. Since there is a presumption of constitutionality in Zimbabwe, there is the presumption that the legislation is reasonably justifiable in a democratic society.¹²⁴ When determining the reasonableness and justifiability of a limitation, the court takes into consideration the following: (1) the nature of the rights; (2) the importance of the purpose of the limitation; (3) the nature and extent of the limitation; (4) the relation between the limitation and its purpose; and (5) less restrictive means to achieve the purpose.¹²⁵ The reasonableness of the law limiting human rights entails that the law in question should not infringe rights more than the purpose it needs to achieve.¹²⁶ That law must be one that serves a constitutionally acceptable purpose and must be sufficiently proportional with the benefits it is designed to achieve.¹²⁷ A law limiting human rights and freedoms should do so for reasons that are permissible in an open and democratic society.¹²⁸ Since there is a presumption of constitutionality,¹²⁹ the onus of establishing on a preponderance of probability that the law is not reasonably justifiable in a democratic society lies on the challenger.¹³⁰ In the case of *Woods and Others v. Minister of Justice, Legal and Parliamentary Affairs and Others*¹³¹ the Supreme Court of Zimbabwe had an occasion to determine the meaning of the phrase ‘reasonably justifiable in a democratic society’. The Court noted that the phrase ‘democratic society’ is an elusive concept and cannot have one precise definition.¹³² There have also been difficulties in determining what is meant by ‘democratic society’. In the case of *Commissioner of Taxes v. CW (Pvt) Ltd*¹³³ Gubbay CJ noted that “there is no single immutable standard of what constitutes a democratic society.”¹³⁴ Since it has been said that human rights and freedoms are not absolute, in determining what is reasonably justifiable in a democratic society the court has to be guided by the fact that there is always the presumption of constitutionality in favour of the legislation.¹³⁵

¹²³ *Capital Radio (Pvt) Ltd v. Broadcasting Authority of Zimbabwe* 2003 (2) ZLR 236 (S).

¹²⁴ *Ibid.*

¹²⁵ Currie and De Waal, *supra* note 54, pp. 158–160.

¹²⁶ *Ibid.*, p. 162. See also the *Dzamara* case, *supra* note 78, where the Court stated that: “It cannot be said that overall police action in this case amounts to a disproportionate restriction on their freedom of assembly and their right to demonstrate, since prevention of crime, as part of public security is a legitimate reason for imposition of restrictions on a demonstration that has shown propensity for degenerating into unlawful activities.”

¹²⁷ *Ibid.*

¹²⁸ Currie and de Waal, *supra* note 54, p. 163; see also section 86(2) of the Constitution of Zimbabwe.
¹²⁹ *Zimbabwe Township Developers (Pvt) Ltd v. Lou’s Shoes (Pvt) limited* 1983 (2) ZLR 376 (S), para. 382.

¹³⁰ *Ibid.*

¹³¹ 1995 (1) SA 703 (ZS).

¹³² *Woods and Others v. Minister of Justice, Legal and Parliamentary Affairs and Others* 1995 (1) SA 703 (ZS).

¹³³ 1989 (3) ZLR 361 (S)

¹³⁴ *Ibid.*

¹³⁵ *Zimbabwe Township Developers (Pvt) Ltd v. Lou’s Shoes (Pvt) Ltd* 1983 (2) ZLR 376 (S) para. 382E.

In *Woods and Others v. Minister of Justice and Others*,¹³⁶ where the applicants were challenging section 141(1)(a) of the Prison Regulations 1956 which limits the right of Class D prisoners' freedom of expression. The said provision only allows the prisoner to send and receive one letter per four weeks. The letters were also supposed to be checked by the prisons officers to effectively censor all outgoing and incoming mails for subversive content or physical contraband. The Supreme Court reasoned that the said provision is "unnecessarily broad" and it lacks the quality of reasonableness".¹³⁷ The Court went on to hold that section 141(1)(a) of the Regulations is not reasonably justifiable in a democratic society in the interests of public safety or public order.

In *Nyambirai v. NSSA*, the Supreme Court concluded that the law providing for compulsory payment of contributions by employees and employers was reasonably justifiable in a democratic society.¹³⁸ The Court considered the rationale behind the compulsory contributions by employees to a social welfare scheme. In *Mangwiro v. Minister of Justice* the Court held that section 5(2) of the State Liabilities Act, which provides that state property cannot be attached to satisfy a judgment against the state, is not justifiable in a democratic society based upon openness, justice, fairness, human dignity, equality and freedom. The Court therefore stated that thus proportionally the respondents justifications are neither reasonable nor necessary and in fact are destructive of the applicant's rights.¹³⁹

In *James v. Zimbabwe Electoral Commission and Others*¹⁴⁰ the Constitutional Court was called upon to determine whether section 119(2)(i) of the Electoral Act limits the right of a suspended councillor to stand for and hold public office. The Court held that the provision cannot be justified as being necessary in the general public interest.¹⁴¹ It was the Court's view that the nature and extent of limitation imposed by the provision far exceeded the means necessary to achieve its primary purpose. The limitation imposed by section 119(2)(i) of the Electoral Act was held to be not reasonably justifiable in a democratic society based on respect for liberties and freedom.¹⁴²

In determining the proportionality between the harm done by the infringing law and the benefits of the infringing law, a court is supposed to weigh up the competing values. In doing so the court has to determine whether the means used by the state to limit a right or freedom are suitable for the achievement of the legitimate objective pursued.¹⁴³ There will be justification for limiting a right where there is no danger of direct, serious and proximate harm to national defence or security, public safety,

¹³⁶ *Woods and others case*, *supra* note 132.

¹³⁷ *Ibid.*

¹³⁸ See also *Capital Radio case* at para. 279C-D where it was held that section 6, 9(1) and (2) are unconstitutional.

¹³⁹ The matter is yet to be confirmed by the Constitutional Court.

¹⁴⁰ 2013 (2) ZLR 659 (CC).

¹⁴¹ *James v. ZEC and Others* p. 667G-H.

¹⁴² *Ibid.*

¹⁴³ In the case of *Zimbabwe Township Developers case*, *supra* note 135, it was held that the court will only interfere where the restriction is oppressive.

public morality, public order, public health,¹⁴⁴ regional or town planning, or in the general public interest.¹⁴⁵ In the case of *S v. Makwanyane*, the Court had this to say:

the balancing process, the relevant considerations will include the nature of the right that is limited, and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy, and particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question.¹⁴⁶

The fact that the infringement is enshrined in a law does not automatically make the limitation constitutional since it must be one that is “sufficiently clear, accessible and precise that those affected by it can establish the extent of their rights and obligations”¹⁴⁷ and must be applied equally to all for it to be regarded as a law of general application.¹⁴⁸ A party cannot approach a court arguing that his or right is or has been infringed by a certain conduct or law where there is no legislative provision to that effect.¹⁴⁹ Currie and de Waal argue that “courts of law can also develop limitations of human rights by virtue of their power to develop common law”.¹⁵⁰ A law of general application “should apply generally to all citizens and not target a few individuals”.¹⁵¹

4.2.3 Nature of the Right or Freedom

When determining the reasonableness of a law limiting the enjoyment of a right or freedom, the court considers the nature of the right and the purpose the law limiting the right want to achieve. The right to freedom of expression has been held in a plethora of cases to be of great significance in a democratic society.¹⁵² The purpose

¹⁴⁴ See the case of *Dzamara*, *supra* note 78. where the Court reasoned that: “Equally, they did not speak in their response to the concerns raised *in limine* regarding infringing the rights of others, given that Africa Unity Square is indeed extensively used on a daily basis by members of the public. Offices and business also surround the square. Continuous demonstrations do create potential health and safety issues, traffic problems sanitary problems, all of which cannot be overlooked by those who seek to take over such public spaces. These problems can justify limitations on the exercise of freedom of assembly and the right to demonstrate.”

¹⁴⁵ *Chimakure and Others* case, *supra* note 58; in *Superintendent Central Prison Fatehgarh v. Ram ManoharLohia* 1960 SCR (2) 821 the Supreme Court of India stated that: “The limitation imposed in the interests of public order to be a reasonable restriction, should be one which has a proximate connection or nexus with public order, but not one far-fetched, hypothetical or problematical or too remote in the chain of its relation with public order.”

¹⁴⁶ *S v. Makwanyane & Another* 1994 (3) SA 868 (A) p. 104.

¹⁴⁷ Currie and De Waal, *supra* note 54, p. 156; *In re Munhumeso & Ors* 1994 (1) ZLR 49; see also the comments made by McNally JA in the *Chavhunduka* case, *supra* note 108, para. 570.

¹⁴⁸ *President of the Republic of South Africa v. Hugo* 1997 (4) SA 1 (CC), at p. 99.

¹⁴⁹ *Minister of Safety and Security and Another v. Xaba* 2003 (2) SA 103 (D). See also *August v. Electoral Commission and Others* 1999 (3) SA 1 (CC), para. 23.

¹⁵⁰ Currie and de Waal, *supra* note 54, p. 156.

¹⁵¹ *Ibid.*

¹⁵² In *United Parties v. Minister of Justice & Ors* 1997 (2) ZLR 254 (S), at para. 268C-F, freedom of expression was held to serve the following objectives: (1) it helps an individual to obtain self-fulfilment; (2) it assists in the discovery of truth, and in promoting political and social participation; (3) it strengthens the capacity of an individual to participate in decision-making; and (4) it provides a mechanism by which

of the court is therefore to balance the two.¹⁵³ In *Netone Cellular (Private) Limited and Another v. Econet Wireless (Private) Limited & Another*,¹⁵⁴ the Supreme Court was called upon to balance the right to privacy and the right of access to information. The first appellant submitted that the subpoena sought by the respondent in the Court was too broad and unreasonably infringed the appellant's right to privacy. The Court then concluded that:

This case buttresses the point that invasion of privacy when permissible should be rational and should not unnecessarily place a harsh and oppressive burden on the party whose right is infringed. When the first appellant's right to privacy is weighed against the other rights that accrue to the first respondent, it is clear, in the circumstances of this case, that the first appellant's right to privacy must prevail.

In *Banana v. Attorney-General*, the Court reasoned in obiter that the right to fair trial must be given priority over the right to freedom of expression. The Court had noted that on a hierarchy of constitutional rights, there can be no doubt that the right to receive a fair trial is the central precept of our criminal law and must be given priority.¹⁵⁵

4.2.4 Purpose of the Limitation

In determining the reasonableness of the law limiting the enjoyment of a right, the court has to consider the purpose of the limitation.¹⁵⁶ In determining the purpose of the limitation, the court must have regard to the intention of Parliament when the provision in question was enacted.¹⁵⁷ In *Nyambirai v. National Social Security Authority and Another*,¹⁵⁸ the Supreme Court was called upon to determine whether the compulsory contribution to a social security was infringing the right to property. The Court held that in determining the permissible limitation of rights the courts should ask itself whether the legislative objective is sufficiently important to justify limiting a fundamental right; the measures designed to meet the legislative objective are rationally connected to it and the means used impair the right or freedom no more than is necessary to accomplish the objective. In this case the Court considered the purpose of the limitation and concluded that:

For a national social security scheme to be viable and effective, contributions payable by employees and employers to it must be made compulsory. To allow such funding to be optional would place the very existence and life-span of the scheme in jeopardy. As stressed by the Minister, it is the Government's national responsibility to care for its people who have no social

it would be possible to establish a reasonable balance between stability and social change. See also *Banana* case *supra* note 70, and *Handyside v. The United Kingdom* (1979-80) 1 EHRR, at p. 754, para. 49.

¹⁵³ *Bernstein v. Bester* NO 1996 (2) SA 751 (CC), at para. 67.

¹⁵⁴ *Netone Cellular (Private) Limited and Another v. Econet Wireless (Private) Limited & Another*, Civil Appeal No. 695/15 [2018] ZWSC 47.

¹⁵⁵ *Banana* case, *supra* note 70, p. 315.

¹⁵⁶ *Chimakure and Others* case, *supra* note 58, para. 515G-H; see also the *DARE* case, *supra* note 77.

¹⁵⁷ *Chavhunduka* case, *supra* note 108, para. 565. See also *R v. Zundel* (1992) 10 CRR (2d) 193 (Can SC)

¹⁵⁸ 1995 (9) BCLR 1221 (ZS).

security and no means to provide for themselves at old age. Government cannot afford to carry the burden for such a scheme alone. It is necessary to finance it through contributions by employees and employers.¹⁵⁹

The Court went on to say that “[t]o my mind, the limitation on the applicant’s right, that is, the compulsion to contribute to a national pension scheme, is far outweighed by the objective to which the limitation is directed. For that objective is of major import.”¹⁶⁰ In *S v. Makwanyane* the Court had to consider the purpose of the limitation of the right to life in an open and democratic a society. The Court concluded that the right to life and dignity are of great importance in an open and democratic society. There were no compelling reasons to justify the limitation of those rights.

In terms of the Constitution, the purpose of limiting the right to freedom of expression is to avoid incitement of violence,¹⁶¹ avoid advocacy of hatred or hate speech,¹⁶² malicious injury to a person’s reputation or dignity¹⁶³ and malicious or unwarranted breach of a person’s right to privacy.¹⁶⁴ In *Chavhunduka and Others v. Minister of Home Affairs and Others* the Court had to determine the effect of section 50(2)(a) of the Law and Order (Maintenance) Act on the right to freedom of expression. The Court held that the above cited provision limits the right to freedom of association.

4.2.5 Less Restrictive Means to Achieve the Purpose

Human rights and freedom enshrined in the Bill of Rights are meant to be enjoyed to the fullest way possible. They can only be limited in exceptional circumstances where there is a reasonable justification for such limitation.¹⁶⁵ Instead of infringing rights, the person or law infringing the right must look for other means that does to not violate a human right or freedom to achieve the intended purpose.¹⁶⁶ The African Commission in its Declaration of Principles of Freedom of Express stated that “sanctions should never be so severe so as to interfere with the exercise of the right

¹⁵⁹ *Ibid.*

¹⁶⁰ *Ibid.*

¹⁶¹ Section 61(5)(a) of the Constitution.

¹⁶² Section 61(5)(b) of the Constitution.

¹⁶³ Section 61(5)(c) of the Constitution.

¹⁶⁴ Section 61(5)(d) of the Constitution; Human Rights Committee; *Keun-Tae Kim v. The Republic of Korea*, Communication No. 5741/1994, CCPRIC/64/D/5741/1994, 4 January 1999, para. 12.

¹⁶⁵ *Chavhunduka* case, *supra* note 108; *Woods* case, *supra* note 132.

¹⁶⁶ In *Castells v. Spain* (1992) 14 EHRR 445, at para. 46, the European Court of Human Rights stated that: “[The] dominant position which the Government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to unjustified attacks and criticisms.” In African Commission on Human and Peoples’ Rights, *Zimbabwe Lawyers for Human Rights & Associated Newspapers of Zimbabwe v. Zimbabwe* Communication No. 284/03, para. 176, the African Commission stated that: “In law, the principle of proportionality or proportional justice is used to describe the idea that the punishment for a particular offense should be proportionate to the gravity of the offense itself. The principle of proportionality seeks to determine whether, by State action, there has been a balance between protecting the rights and freedoms of the individual and the interests of society as a whole.” The Commission concluded that the closing of the newspapers of the complainants infringed their right to freedom of expression.

to freedom of expression".¹⁶⁷ In the *Nyambirai* case the Court held that one of the criteria used in determining whether the limitation is reasonably justifiable in a democratic society is to consider whether the means used to impair the right or freedom are no more than is necessary to accomplish the objective.¹⁶⁸ The necessity of limiting any right or freedom must be convincingly established.¹⁶⁹ In *Zimbabwe Lawyers for Human Rights & Associated Newspapers of Zimbabwe v. Zimbabwe*, the African Commission stated that "in order to determine that an action is proportional, a number of questions should be asked, such as: Are there sufficient reasons to justify the action?, Is there a less restrictive solution? Does the action destroy the essence of the rights guaranteed by the Charter?"¹⁷⁰ In the *DARE* case, Judge President Chiweshe noted that the limitation imposed by section 27(1) of the POSA "has the effect of imposing greater restrictions than are necessary to achieve its purpose".¹⁷¹

The European Court of Human Rights has held that criminal defamation laws should only be used as a last resort, when there is a serious threat to the enjoyment of other human rights.¹⁷² The Court was of the view that instead of criminalising statements which are viewed as false, civil proceedings for defamation should rather be preferred.¹⁷³ In *S v. Ncube and Others*¹⁷⁴ it was held that the sentence of administering strokes on a person convicted of a crime was so unfit as to be grossly disproportionate to what would have been appropriate.¹⁷⁵ In the *Capital Radio* case Sandura JA in his dissenting judgment concluded that the limitation imposed by section 12(2) and 12(3) of the Broadcasting Services Act¹⁷⁶ were more than necessary to accomplish the legislative objectives and as such they are not

¹⁶⁷ African Commission on Human and Peoples' Rights, Declaration of Principles on the Freedom of Expression.

in Africa, para. 1 of Principle XII ("Protection of Reputation"); see also Human Rights Committee, General Observation No. 34, Article 19: Freedom of Opinion and Freedom of Expression, para. 33. The European Court in *Tolstoy Miloslavsky v. The United Kingdom*, Application No. 18139/91 (1995), para. 55, noted even though damages were provided by law, they are not necessary in a democratic society.

¹⁶⁸ See James case, *supra* note 141, where the Constitutional Court found that section 119(2)(i) of the Electoral Act which limit the right of a suspended councillor to stand for a public office far exceeded the means necessary to achieve the primary purpose. See also *Chimakure* case, *supra* note 58, paras. 515D-E.

¹⁶⁹ *Chimakure* case, *supra* note 58, paras. 516B-C. See also *Thorgeirson v. Iceland* (1992) 14 EHRR 843, para. 63.

¹⁷⁰ *Ibid.*

¹⁷¹ *DARE* case, *supra* note 77, para. 13 of the cyclostyled judgment.

¹⁷² ECtHR, *Gavrilovic v. Moldova*, Application No. 25464/05 (2009), para. 60.

¹⁷³ ECtHR, *Radio France and all v. France*, Application No. 53984/00 (2004), para. 40; ECtHR, *Raichinov v. Bulgaria*, Application No. 47579/99 (2006) 50; ECtHR, *Kubaszewski v. Poland*, Application No. 571/04 (2010), para. 45; ECtHR, *Lyashko v. Ukraine*, Application No. 210/40/02 (2006), para. 41 (f); ECHR, *Fedchanko v. Russia*, Application No. 33333/04 (2010). Application 15469/04 (2009); ECHR, *Lombardo et al. v. Malta*, Application No. 7333/06 (2007).

¹⁷⁴ 1987 (2) ZLR 2.

¹⁷⁵ *S v. Ncube and Others* 1987 (2) ZLR, at p. 265.

¹⁷⁶ [Chapter 12:06]

reasonably justifiable in a democratic society.¹⁷⁷ In the *Chavhunduka* case the Court stated that instead of limiting the right to freedom of expression by criminal liability, the government can take other less restrictive measures like political action whereby it will provide appropriate evidence to refute the allegation which would have been made.¹⁷⁸ The Court noted that since section 50(2)(a) of the Law and Order (Maintenance) Act had not been utilised since the country obtained independence that only shows that it was no longer serving the intended purpose. It went on to conclude that “[t]here are other ways of achieving this legitimate aim far less arbitrary, unfair and invasive to free expression”.¹⁷⁹

4.2.6 The Relationship between Purpose and Extent of the Limitation

In the *Chavhunduka* case, it was stated that section 50(2)(a) of the Law and Order (Maintenance) Act, which criminalises the publication of false information which may cause fear, alarm and despondency “has the effect of overriding the most precious of all the protected freedoms, resting as it does at the very core of a democratic society”. The Court concluded that the provision could not stand the reasonableness in an open and democratic society test because it “fails for want of proportionality between its potential reach on one hand and the ‘evil’ to which it is claimed to be directed on the other.”

In *James v. ZEC and Others* after the Constitutional Court held that section 119(2)(i) of the Electoral Act limit the right of a suspended councillor to stand and hold public office, the Court stated that “[t]here must be a rational connection between the objective of the derogation and the implementing law. Moreover, the means employed should not impair the right in question more than is necessary to achieve the declared objective.”¹⁸⁰ The Court noted that section 86(2) of the Constitution is actually a restatement of the criteria for permissible derogation from constitutional rights as was stated in *Nyambirai v. NSSA and Another*. The Court further held that the reasons advanced by the Attorney-General for justifying the limitation of the right to stand for a public office did not meet the test of the criteria established in section 86(2) of the Constitution. There was no “rational connection between the undeniably valid objective of protecting and preserving public assets and the need to disqualify a suspended councillor from standing for re-election”.¹⁸¹ The Court however noted that the purpose of the provision is noble but that was not enough to limit the right of the applicant to stand for public office. It is the duty of the court to ensure that constitutional rights are not rendered nugatory.¹⁸²

¹⁷⁷ *Capital Radio (Pvt) Limited v. Broadcasting Authority of Zimbabwe and Others*, S-99-2000, p. 295B-C.

¹⁷⁸ *Chavhunduka* case, *supra* note 108, para. 566. See also *Die Spoorbond and Anor v. South African Railways*, 1946 AD 999, paras. 1012–1013.

¹⁷⁹ *Chavhunduka* case, *supra* 108, para. 567.

¹⁸⁰ *James* case, *supra* note 141, p. 666 C-D; see also *Ncube* case, *supra* note 175, at p. 264F; *Minister of Home Affairs and Others v. Dabengwa and Another* 1982 (1) ZLR 236 (S), at p. 244B-C.

¹⁸¹ *Ibid.*

¹⁸² *Ibid.*

In the *Chimakure* case, the Court noted that there is a direct and vital relationship between the exercise of freedom of expression and the preservation of public peace and tranquillity.¹⁸³ In a dissenting judgment in *Capital Radio (Pvt) Limited v. Broadcasting Authority of Zimbabwe and Others*, Sandura JA was of the view that there was “no rational connection between forbidding non-resident citizens of Zimbabwe from investing in private broadcasting” and that there was “no rational connection between the total prohibition of foreign investment in private broadcasting and the legislative objective of ensuring ‘compliance and monitoring of the provisions of the Act’”.¹⁸⁴ Sandura JA went on to say that there was “no rational connection between the total prohibition of foreign investment in private broadcasting and the defence and security of Zimbabwe”.¹⁸⁵ The observations by Sandura JA makes good law and the courts are urged to follow that approach.

In *S v. Makwanyane* it was noted that despite the fact that the death penalty serves the purpose of deterrence of crimes, the Court concluded that the death penalty “can never be a worthy purpose of punishment in the enlightened society to which we South Africans have now committed ourselves”.¹⁸⁶ In the *Chavhunduka* case, the Court observed that the provision which was being challenged by the applicants had not been employed by the state since this country attained independence in 1980, which “strongly suggests that it is not rationally connected to, and essential for, the intended objective of avoiding public fear, alarm or despondency and so to the securement of public safety or order”.¹⁸⁷ The Court also noted that the provision was too broad that it “gives rise to the inevitable consequence of failing to confine and impair the exercise by the applicants of their right to freedom of expression as little as possible”.¹⁸⁸

4.3 Limitations of Rights during State of Public Emergency

In terms of the current Constitution, human rights and freedoms can be limited during public emergency.¹⁸⁹ The Constitution of Zimbabwe does not define what is meant by state of public emergency.¹⁹⁰ That being the case, the provision that provides for the declaration of state of public emergency can be abused by the executive. It is however common cause that a state of public emergency can be declared where

¹⁸³ *Chimakure* case, *supra* note 58, para. 506.

¹⁸⁴ *Capital Radio* case, *supra* note 177, p. 285G-H,

¹⁸⁵ *Ibid.*, para. 286A. It is important to note that this was after Chidyausiku CJ in the majority judgment had concluded that the applicant had no *locus standi* to challenge section 11(1) of the Broadcasting Services Act [Chapter 12:06] as read together with para 9(1)(b) and (c) of the Fifth Schedule.

¹⁸⁶ *Makwanyane* case, *supra* note 146, p. 185.

¹⁸⁷ *Chavhunduka* case, *supra* note 108, p. 567.

¹⁸⁸ *Ibid.* McNally JA in the same case, at p. 570 also commented that: “The section is too widely expressed, too unclear as to its limitations, and too intimidating (because no-one can be sure whether what he says or writes will not attract prosecution and imprisonment). That is why it cannot stand.”

¹⁸⁹ See section 87 of the Constitution.

¹⁹⁰ This is also the position with the Zambian Constitution.

there is a threat to the existence or security of a state.¹⁹¹ Section 113 of the Constitution fall short of international standards since it does not state what is regarded as a situation which the president can declare a state of public emergency.¹⁹² This provision can be abused by the president¹⁹³ and the court may be reluctant to question the discretion of the president, and thereby ultimately contributing to the derogation of human rights.¹⁹⁴ Section 3(4)(b) of the Emergency Powers Act¹⁹⁵ also empowers the president to make regulations which are even inconsistent with subsection (2) of the same provision.¹⁹⁶ Further the position in Zimbabwe is that state of public of emergency can be declared for only a part of the country.¹⁹⁷ This is not in line with international standards since at international law the effects of a situation where a state of public emergency can be declared must be one which affects the whole population.¹⁹⁸

Such limitation should however be provided by a written law¹⁹⁹ which must be published in a government Gazette.²⁰⁰ This law can provide for the summary arrest, detention or restriction of movement of people, deportation of non-Zimbabwean,²⁰¹ removal of persons from any part of the country to another where it appears to the Minister to be expedient in the public interest,²⁰² regulation and control of persons employed or engaged in any trade or profession,²⁰³ among others.²⁰⁴ The law limiting

¹⁹¹ Currie and de Waal, *supra* note 54, p. 816; Mavi, *supra* note 14, p. 110; C. Beyani, 'International Law and the Lawfulness of Derogations from Human Rights during States of Emergency in Zambia', *Zambian Law Journal* (1998) p. 103. See also Article 4 of the ICCPR.

¹⁹² *Ibid.*

¹⁹³ J. Hatchard, 'The Constitution of Zimbabwe: A Model for Africa?', 35 *Journal of African Law* (1991) p. 79 where the author was discussing about the reasons why the state of public emergency remained in force even after independence of Zimbabwe. In *S v. Hove* 1976 RLR 127 MacDonald ACJ (as he then was) warned of the likelihood of the Emergency Powers Act being abused by the president. He stated that the purpose of the Act is "to prevent a state of emergency degenerating into a state of anarchy by conferring extraordinary powers on the President to deal with it."

¹⁹⁴ *Ibid.*

¹⁹⁵ Emergency Powers Act [Chapter 11:04].

¹⁹⁶ Section 3(2) of the Emergency Powers Act generally provides for what can be included in a law which has been put in place in when a declaration of state of public emergency is made.

¹⁹⁷ See paragraph 2(2) of the second schedule of the Constitution.

¹⁹⁸ *Lawless* case ECHR Series A Vol. 3 (1961) [28].

¹⁹⁹ Section 87(1) of the Constitution. See also paragraph 2(1) of the Second Schedule of the Constitution. The written law referred to must provide for the measures to deal with situations arising during state of public emergency.

²⁰⁰ Section 87(2) of the Constitution. See also principle ii of the Siracusa Principles.

²⁰¹ Section 3(2)(b) of the Emergency Powers Act.

²⁰² Section 3(2)(c) of the Emergency Powers Act.

²⁰³ Section 3(2)(d) of the Emergency Powers Act.

²⁰⁴ See section 3(2)(e-l) of the Emergency Powers Act:

(e) the taking of possession or control on behalf of the State of any property or undertaking;

(f) the regulation and control of companies registered in or persons carrying on business in Zimbabwe, including the suspension or discharge of persons employed by any such company or other person or, in

the case of a company or association, concerned with the management thereof;

(g) the acquisition on behalf of the State of any property other than land;

(h) the entering and search of any premises;

(i) the assistance to be afforded to persons affected by a natural disaster;

rights must not be greater than is strictly required by the emergency.²⁰⁵ Human rights are in most cases violated during public emergencies, when states employ extraordinary powers to address threats to public order.²⁰⁶

In Zimbabwe, the use of emergency powers has been characterised by detention without trial.²⁰⁷ The Preventive Detention (Temporary Provisions) Act of 1959 when it was renewed in 1964, the renewal was held to be unconstitutional in *Nkomo v. Minister of Justice and Another*.²⁰⁸ In the case of *Dabengwa and Anor v. Minister of Justice, Legal and Parliamentary Affairs* it was established that the applicants were re-detained even after they were acquitted.²⁰⁹ In terms of the current Constitution, human rights and freedoms can be limited during public emergency.²¹⁰ Such limitation should however be provided by a written law²¹¹ which must be published in a government Gazette.²¹² In actual fact, the president has to officially proclaim the start of a state of public emergency and this is aimed at giving a signal for the existence of grave danger to the state.²¹³ In declaring a state of public emergency, the president may make regulations outlining rights that maybe limited and penalties

(j) the payment of compensation and remuneration to persons affected by any regulations or order made in

terms of this section;

(k) the arrest of any person contravening or offending against any regulations or order made in terms of this

section;

(l) the penalties to be imposed for any contravention of or failure to comply with any regulations or order made in terms of this section.”

²⁰⁵ Section 87(3) of the Constitution.

²⁰⁶ Hatchard, *supra* note 8, pp. 35–70, where he was analysing the violations of human rights in Zimbabwe in period of state of public emergency going back from the 1965 when Ian Smith declared a Unilateral Declaration of Independence. He argues that during the UDI period there was widespread detention without trial. The same *modus operandi* was utilised by the ZANU PF regime when it wanted to deal with dissidents from Matebeleland. This resulted in the detention of the leaders like Dumiso Dabengwa. See the cases *Dabengwa and Masuku*, *supra* note 180, 1982 (4) SA 301 (SC); *Minister of Home Affairs v. Dabengwa 1984* (2) SA 344 (SC). This has been the case in Zimbabwe where members of the security forces descent heavily on citizens. See also *York v. Minister of Justice* and *S v. Slatter 1983* (2) ZLR 144 (H).

²⁰⁷ *Ibid*. Detention without trial can be traced from the Preventive Detention (Temporary Provisions) Act, Chapter 74 of the Laws of Southern Rhodesia of 1959, the Emergency Powers (Maintenance of Law and Order) Regulations 1965, which empowered the Minister of Law and Order to order the detention of any person where it appeared to the Minister that it was ‘expedient in the public interest’, and the Emergency Powers (Maintenance of Law and Order) Regulations 1983. A state of public emergency in the then Southern Rhodesia was first introduced in 1965. It remained in force even after independence up until July 1990. During all these years, the state of public emergency was being renewed by Parliament every six months.

²⁰⁸ [1964] R.L.R. 520.

²⁰⁹ In the case of *Bull*, *supra* note 60, it was established by the Court that the persons the applicant wanted to be released were once released by an order of the High Court only to be re-arrested after their release. Reasons for their re-arrest were not proffered.

²¹⁰ See Section 87 of the Constitution.

²¹¹ Section 87(1) of the Constitution; see also paragraph 2(1) of the Second Schedule of the Constitution.

²¹² Section 87(2) of the Constitution; see also principle ii of the Siracusa Principles, the Human Rights Committee’s General Comment 5 CCPR/C/21/Rev.1/1989.

²¹³ Article 4(1) of the ICCPR.

for contravention of the regulations.²¹⁴ The law limiting rights must not be greater than is strictly required by the emergency.²¹⁵ The rationale behind this safeguard is to guard against violations of human rights when the situation does not warrant such justification in the maintenance of public order.²¹⁶ The question as to whether or not the measures adopted by a state to deal with a situation that threatens the existence of the nation are proportional to the exigencies of the situation is a matter which needs the application of a legal standard to the existing facts on which the emergency is alleged to exist.²¹⁷

There are however certain rights that cannot be limited even during state of public emergency because they are considered absolutely fundamental and indispensable to the protection of the human being.²¹⁸ These rights include the right to life, the right to human dignity, the right not to be tortured or subjected to cruel, inhuman or degrading treatment or punishment, the right not to be placed in slavery or servitude, the right to a fair trial²¹⁹ and the right to obtain an order of *habeas corpus*.²²⁰ The right to legal representation cannot be limited even during a state of public emergency.²²¹ Since the right to liberty is the one which is usually derogated in a state of public emergency,²²² the Constitution provides for the establishment of the Detainees Review Tribunal.²²³ People are usually subjected to detention without trial during public emergency.²²⁴ The Tribunal is supposed to be informed within ten days after the initial detention of the name of the detainee, the place of detention and reasons for such detention.²²⁵ The Tribunal is supposed to review such cases and the detainees should be allowed to be represented by legal practitioners either assigned to them by the state or at their own expense.²²⁶ In *Hickman and Anor v. The Minister of Home Affairs and Anor* where the Minister had submitted the case of the petitioners for review but review had not taken place, with the Tribunal arguing that there are a lot of cases pending, the Court held that the delay was not reasonable. It should however be noted that because of lack of resources or utter ignorance the right to legal representation at the state's expense may not be realised since there are specified offences where the state can offer free legal representation. In *Minister of Home Affairs v. Dabengwa and Another*, the Supreme Court held that

²¹⁴ Currie and De Waal, *supra* note 54, p. 820.

²¹⁵ Section 87(3) of the Constitution. See also Currie and De Waal, *supra* note 54, p. 819, as well as Article 4 of the ICCPR.

²¹⁶ *Ibid.*

²¹⁷ *Ibid.*

²¹⁸ *Ibid.* See also Article 4(2) of the ICCPR.

²¹⁹ Currie and De Waal, *supra* note 54.

²²⁰ Section 87(4)(b) of the Constitution.

²²¹ Paragraph 4(1)(b) of the second schedule of the Constitution. See also cases of *Dabengwa and Masuku*, *supra* note 180, where the Supreme Court held that the rights was enshrined in the second schedule of the Constitution and could not be derogated by any provision.

²²² Currie and De Waal, *supra* note 54, p. 820.

²²³ Paragraph 3(1) of the second schedule of the Constitution of Zimbabwe.

²²⁴ Dumbutshena CJ, in *Austin and Anor v. Chairman, Detainees' Review Tribunal and Another* 1986 (4) SA 281 (ZS), stated that detention during public emergency is an evil but a necessary evil.

²²⁵ Paragraph 5(1) of the Second Schedule of the Constitution of Zimbabwe.

²²⁶ Paragraph 5(4) of the Second Schedule of the Constitution of Zimbabwe. See also *Austin and Another* case, *supra* note 224, p. 29.

the right to legal representation was enshrined in the second schedule of the Constitution, and hence it could not be derogated by any law.²²⁷ The Tribunal may make a written recommendation for the release of the detainees to the responsible authority.²²⁸

Even though, rights and freedoms can be limited during public emergency, the detaining authority should not take any action which exceeds what could reasonably have been thought to be required for the purpose of dealing with the situation prevailing otherwise the derogation of the rights of the detainees will be unlawful.²²⁹ The rights of the detainees in question are then supposed to be restored.²³⁰ Before independence and soon thereafter, it was prevalent that once detainees are released they would be re-arrested. Bearing that in mind, the Constitution clearly prohibits the re-detention of persons on the same grounds,²³¹ and there is a presumption that a person is detained on the same grounds if he or she is re-detained after the release.²³² Even where the matter is not yet brought before the tribunal, the detained person is allowed to challenge such detention in a court.²³³ In *York v. The Minister of Home Affairs*, the applicants had been detained under emergency laws. Both the High Court²³⁴ and Supreme Court²³⁵ held that the provision under which they had been detained was invalid and ordered their release. Soon after their release, they were re-arrested with the Minister arguing that their detention was necessary for the security of the country. The Court rejected such submission and ruled the re-detention to be invalid.²³⁶

A person who is being detained pursuant to emergency laws has the right to be informed of the reasons thereof²³⁷ and challenge such detention in a court of law.²³⁸ In *Paweni v. Minister of State (Security)*, it was submitted by that the respondent that the person was being detained for “acts of economic sabotage against the state and people of Zimbabwe” and that “it was considered that your activities pose a threat to the economic security of Zimbabwe”. The Court accepted submissions on behalf of the petitioner that the reasons for detention were vague.²³⁹ Another challenge that can be faced by detainees is that their detention may not be known since there is no law which provides for the publication of detention orders.²⁴⁰ This therefore creates an environment where human rights can be violated without the knowledge of the public. Although the Constitution provides for *habeas corpus*, this may not be enough

²²⁷ *Ibid.*

²²⁸ Paragraph 6 of the second schedule of the Constitution.

²²⁹ Austin and Anor case, *supra* note 224.

²³⁰ *Ibid.*

²³¹ Paragraph 7(1) of the Second Schedule of the Constitution of Zimbabwe.

²³² Paragraph 7(2) of the Second Schedule of the Constitution of Zimbabwe.

²³³ Paragraph 8 of the Second Schedule of the Constitution. See also Currie and De Waal, *supra* note 54, p. 817.

²³⁴ HC-H-218-82.

²³⁵ 1982 (4) SA 496.

²³⁶ See *Wood v. Minister of Home Affairs* H-247-82.

²³⁷ *Minister of Home Affairs and Anor v. Austin and Anor* 1986 (1) ZLR 440 (SC).

²³⁸ *Austin and Anor v. Chairman, Detainees' Review Tribunal* case, *supra* note 224, p. 29.

²³⁹ *Ibid.*

²⁴⁰ J. Hatchard, *supra* note 8, p. 45.

to curb the violations. In most cases the government will be denying knowledge of the whereabouts of such persons.²⁴¹ There are however certain rights that cannot be limited even during state of public emergency. These rights include the right to life; the right to human dignity, the right not to be tortured or subjected to cruel, inhuman or degrading treatment or punishment; the right not to be placed in slavery or servitude; the right to a fair trial and the right to obtain an order of *habeas corpus*.²⁴²

4.4 Absolute Rights

The Constitution provides that there are some rights that cannot be limited under any circumstances.²⁴³ Section 87(4)(a) of the Constitution provides that a law providing for the declaration of a state of public emergency should not limit the rights listed in section 86(3). Rights listed in section 86(3) include the right to life,²⁴⁴ right to human dignity; right not to be tortured or subjected to cruel, inhuman or degrading treatment or punishment;²⁴⁵ the right not to be placed in slavery or servitude; the right to a fair trial; and the right to obtain an order of *habeas corpus*. Tripathi believes that the rationale behind non-derogable rights can be inferred from the natural law theory.²⁴⁶ Another reason is that they are not created by men or societies but are rather discovered by them.²⁴⁷ Once a right is recognised as non-derogable there is no law which can be said to be justifiable to limit that right.²⁴⁸

The right to dignity and right not to be tortured or subjected to cruel, inhuman or degrading treatment or punishment are some of the most litigated rights.²⁴⁹ The

²⁴¹ See the *Dzamara* case, *supra* note 78; see also the story of the three Movement for Democratic Change-Alliance where the three women were allegedly abducted. The spokesperson of the Zimbabwe Republic Police initially indicated that the Police had custody of the three women only to deny that later. ²⁴² Section 87(4)(b) of the Constitution.

²⁴³ See generally R. Tripathi, 'Non Derogable Human Rights: A Comparative Study of Indian Constitution and International, Regional Instruments', 2 *Indian Journal of Law and Justice* (2011) pp. 66–78 where the author argues that the philosophical basis of non-derogable rights can be inferred from the natural law theory; O. Gross, 'Once More into the Breach: The Systematic Failure of Applying the European Convention on Human Rights to Entrenched Emergencies', 23 *Yale Journal of International Law* (2011) p. 437.

²⁴⁴ The right to life can only be limited to the extent permitted in section 48. See also Article 2(1) of the European Convention.

²⁴⁵ See also Article 7 of the ICCPR.

²⁴⁶ Tripathi, *supra* note 243, pp. 66–78.

²⁴⁷ M. Freeman, 'The Philosophical Foundation of Human Rights', 16 *Human Rights Quarterly* (1994) p. 499.

²⁴⁸ *Ibid.*

²⁴⁹ *S v. Chokuramba Justice For Children's Trust Intervening As Amicus Curiae Zimbabwe Lawyers For Human Rights Intervening As Amicus Curiae* CCZ 10-19. In this case the Constitutional Court was called upon to determine whether section 353 of the Criminal Procedure and Evidence Act [Chapter 9:07] which authorises the imposition of a sentence of moderate corporal punishment on a convict was constitutional. In the case of *S v. A Juvenile* 1989 (2) ZLR 61 (S) the Supreme Court, sitting as a Constitutional Court, held by a majority decision that moderate corporal punishment inflicted on a male juvenile in execution of a sentence for any offence of which he had been convicted was an inhuman and degrading punishment within the meaning of section 15(1) of the former Constitution of Zimbabwe. *Ncube* case, *supra* note 175. In that case, the Supreme Court held by a unanimous decision that corporal punishment inflicted in execution of a sentence imposed by a court on an adult male person

reasons for making the right to dignity a non-derogable right has been said to be that it is a special status which attaches to a person for the reason that he or she is a human being.²⁵⁰ The legislature must not enact a law that authorises the infliction of inhuman and degrading treatment or punishment.²⁵¹ Corporal punishment in execution of a sentence has been held to be inhuman and degrading punishment.²⁵² In the *Mangwiro* case the Court ruled in favour of the applicant on the basis that the right to dignity and access to the courts are not subject to the test of proportionality. There is no need for a court to consider the degree of infringement of this right since its mere infringement is a violation of the constitutionally enshrined right. The Court in *Mangwiro* case also noted that the right to a fair trial cannot be limited under any circumstance.²⁵³

5 Conclusion

This research has managed to espouse the concept of rights focusing on the nature, scope and extent to which these rights can be exercised. It is not in doubt that rights are not absolute, at the very least the majority of rights are conditional and subject to limitations. However, this does not translate into implying that rights can be infringed upon willy-nilly. The law has recognised grounds and well-established parameters upon which these rights can be limited. These conditions reinforce and emphasise the impression that limitation of rights is a peculiar exercise that should be done in accordance with principles related to fairness, reasonableness, justice, rationality and equality to withstand legal scrutiny. To this end the law sets out recognised boundaries upon which rights can be limited. The limitation of rights is usually subject to the balancing of competing interests which are both protected by law. There is need to accord rights to everyone, but at the same time there is need to ensure that those rights are exercised in a responsible manner so that they do not interfere or intrude into other rights, be it for individuals, minority groups or for a collective group. There is no hard and fast rule when it comes to the justification of limitations of rights; however, the guidelines provided in various legal instruments, the constitution being the prime guide, offer a standard that should be observed in the limitation of rights. It is unquestionable that the legal framework providing guidelines on the limitations of rights are somewhat satisfactory. The question remains as to whether there is a clear political will to uphold the rule of law in

convicted of any offence was an inhuman and degrading punishment within the meaning of section 15(1) of the former Constitution; *Pfungwa and Another v. Headmistress Belvedere Junior Primary School and Others* HH 148-17.

²⁵⁰ General Comment No. 13 Of 1999, the United Nations Committee on Economic, Social and Cultural Rights. See also *S v. Makwanyane* 1995 (3) SA 391 (CC), at para. 328.

²⁵¹ *Chokuramba* case, *supra* note 249. See also General Comment No.4 to Article 37(a) of the Convention on the Rights of the Child. It should be noted that Zimbabwe is yet to ratify the United Nations Convention Against Torture of 1984.

²⁵² *Pfungwa* case, *supra* note 249.

²⁵³ This finding by the High Court is yet to be confirmed by the Constitutional Court. Section 167(3) of the Constitution provides 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."

Zimbabwe. It remains to be seen how rights will be respected under the current and future dispensations.