

ACCESSING THE NATIONAL VOTERS' ROLL THROUGH THE RIGHT OF ACCESS TO INFORMATION IN ZIMBABWE

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Abstract

The call for electoral reforms in Zimbabwe has been at the centre of deliberations on political governance and democratic reform in the country. The Constitution² prescribes minimum standards and principles to which the conduct of elections in Zimbabwe must adhere. Zimbabwe is also bound by the SADC Principles and Guidelines Governing Democratic Elections which should give effect to amendments to the Electoral Act³ and related legislation.⁴ Amongst the key changes⁵ which must be made to the Electoral Act are those giving the Zimbabwe Electoral Commission (ZEC) the independence to fundraise for its operations; the independence to decide on foreign observer missions without interference from the sitting government; allowing diaspora Zimbabweans to cast their vote in elections; and imposing certain professional standards⁶ to be applied by ZEC when recruiting staff.

The main opposition party, Movement for Democratic Change led by Morgan Tsvangirai, has collaborated with other opposition parties⁷ to craft a document titled the *National Electoral Reform Agenda*, which details the reforms required to give effect to the standards and principles prescribed by the Constitution. However, the issue of public access to the national

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² 2013. See in particular sections 155, 156 and 158

³ [Chapter 2:13] of Zimbabwe

⁴ Including the legislation governing freedom of the media, freedom of expression and the freedom of assembly.

⁵ This information is gleaned from unpublished position papers presented by various Zimbabwean civil society organisations and academics. Some of the information can be obtained from <https://erczim.org/?cat=36> (Accessed on 29 July 2016)

⁶ To protect the independence and integrity of ZEC. It has been argued that these standards should, amongst other stipulations, prohibit the recruitment of serving State security agents to work within ZEC as this may undermine the independence of the Commission

⁷ Which include the MDC led by Professor Welshman Ncube, Transform Zimbabwe, the African Democratic Party and Progressive Democrats of Zimbabwe.

voters' roll has attracted much attention as signified by the court applications⁸ made to compel ZEC to release the national voters' roll to the public. The national voter's roll should be available to the public as it is an existing constitutional right, which the legislature are obliged to give effect to through amendments to the Electoral Act.

This paper argues that the issue as to whether citizens are entitled to access the national voter's roll has been settled in the Constitution which requires all State institutions to exercise public power and discharge their functions in a transparent and accountable manner as enforced through the right of access to information, enshrined in s 62. This right entitles citizens to request any record of information held by the State which is obliged to provide the requested information if that information is needed by the requester for purposes of fostering public accountability.

ZEC has the duty to provide citizens with access to the national voters' roll because it must be accountable and transparent regarding the state and condition of the national voters' roll. Additionally, the State is obliged to provide access to the requested record if the information is needed by the requester to protect or exercise any of the rights entitled to the citizen by law. Citizens have the right to a free and fair election as interpreted in the context of the entrenched values of transparency and accountability which include the right to hold ZEC accountable for the manner in which elections are organised. To exercise this right, the citizens can request access to the national voters' roll by invoking the right of access to information held by the State.

Introduction

The Constitution of Zimbabwe⁹, s 62 entrenches the right of access to information and provides as follows:

⁸ These include *Justice Mavedzenge v Chairperson of the Zimbabwe Electoral Commission* HC 4014/14

⁹ Constitution of Zimbabwe, Amendment No 20, 2013

*"Every Zimbabwean citizen or permanent resident, including juristic persons and the Zimbabwean media, has the right of access to any information held by the State or by any institution or agency of government at every level, in so far as the information is required for the exercise of public accountability."*¹⁰

In addition, the Constitution provides as follows:

*"Every person, including the Zimbabwean media, has the right of access to any information held by any person, including the State, in so far as the information is required for the exercise or protection of a right."*¹¹

This paper argues that the right to access any information held by the State includes the constitutional right of citizens and permanent residents of Zimbabwe to access the national voters' roll in both electronic and hard copy format. This argument is predicated on the fact that access to the national voters' roll is necessary for citizens to hold the ZEC accountable regarding how it discharges its constitutional duty of managing the national voters' roll and related registers. This argument is also based on the fact that citizens require access to the national voters' roll for them to be able to exercise their political rights, particularly the right to a free and fair election.

This paper is divided into three parts. In Part I, the nature and object of the right of access to information held by the State is discussed and it is sought to show that the purpose of the right of access to information is to give effect to the constitutional values of transparency and accountability. The discussion is also aimed at showing that the purpose of this right is to facilitate the protection and enforcement of other legal rights to which citizens are entitled.

In Part II, the paper discusses the application of the right of access to information held by

¹⁰ See s 62 (1) *ibid.*

¹¹ See s 62 (2) *ibid.*

the State to show that ZEC is an institution of the State and is therefore bound by the right of access to information.

In Part III, the paper discusses the scope and meaning of this right in order to show that it includes the right of the citizens to access the national voters' roll. The paper discusses the two possible constitutional grounds, within the scope of the right of access to information, upon which citizens can claim access to the national voters' roll. It is argued that the right to a free and fair election, as opposed to the right to participate in a free and fair election, includes the right to know that the elections will be or have been free and fair and that right can only be exercised if one has access to the national voters' roll.

Reference will be made to existing literature on access to information as a human right. The paper also refers to comparative foreign law because a wide or elaborate right of access to information is still a new right in Zimbabwe¹² and the local courts are yet to develop adequate jurisprudence in this area. Reference to relevant foreign law is permitted by the Constitution.¹³

Much of the foreign case law referred to in this paper is drawn from the jurisprudence of the Constitutional Court of South Africa and the Supreme Court of Kenya because both countries can be regarded as comparable jurisdictions in relation to Zimbabwe. The Constitution of South Africa¹⁴ and that of Kenya¹⁵ provide for the right to access information in a context where transparency, accountability and free and fair elections are entrenched as constitutional values. In Zimbabwe, constitutional rights are to be interpreted in a manner which upholds,

¹² The right of access to information was an implied right under the auspice of the right to freedom of expression enshrined in s 20 of the former Constitution of Zimbabwe, 1979. However the scope of the right was not as widely formulated as it exists in section 62 of the current Constitution.

¹³ Section 46 (1) (e) provides that, '*when interpreting this Chapter [the Declaration of Rights], a court, tribunal, forum or body may consider relevant foreign law.*'

¹⁴ 1996 s 32

¹⁵ 2010 s 35

resonates and promote these values¹⁶ and, as Zimbabwean courts develop their own jurisprudence on the right of access to information, they ought to be persuaded by how the courts in Kenya and South Africa have interpreted this right to give effect to the values of transparency, accountability and free and fair elections.

Another comparable point between Kenya and South Africa is the creation of independent electoral bodies¹⁷ with a constitutional mandate to ensure the realisation of certain political rights entrenched in the Bill of Rights, including the right to vote in a free and fair election.¹⁸ The Constitution of Zimbabwe creates ZEC to perform a similar constitutional function¹⁹ and Zimbabwean courts, therefore, ought to be persuaded to hold their electoral management bodies accountable to honour the rights enshrined in the Constitution's Bill of Rights. Thus, there are sufficient constitutional similarities between Zimbabwe, Kenya and South Africa which make it possible to refer to those jurisprudences regarding comparative foreign law to advance the arguments made in this paper.

Part I: Nature and object of the right of access to information held by the State

Jagwanth and Calland²⁰ have described the right of access to information as a leverage right, whose purpose is, on one hand, to facilitate the enforcement of public accountability and, on the other hand, the enforcement of other rights. This notion has been endorsed by various other authors, for instance, Currie and de Wal argue that the right to access information originates from the idea that, in an open and democratic society, government should be transparent and accountable for its actions and decisions, and therefore the public must have access to the relevant information in order to assess the rationality of Government decisions.²¹ In his commentary on the South African Bill of Rights, Devenish asserts that

¹⁶ See ss 3 and 46 (1) (b). Also see *Mudzuru v Ministry of Justice, Legal & Parliamentary Affairs* [2015] ZWCC 12 at 26

¹⁷ These are the Independent Electoral and Boundaries Commission of Kenya and the Electoral Commission of South Africa

¹⁸ See section 19 of the Constitution of South Africa, 1996 and Article 38 of the Constitution of Kenya, 2010

¹⁹ See sections 238 and 239 of the Constitution of Zimbabwe, 2013

²⁰ Saras Jagwanth and Richard Calland. 'The Right to Information as a Leverage Right'. *University of Cape Town* (2002) at 3

²¹ Iain Currie and Johan De Wal. *The Bill of Rights Handbook* 5th Ed (2005) at 684

the right of access to information is predicated on the need for accountability.²² Diallo and Calland²³ posit that the right of access to information serves different democratic objectives which include holding government to account and increasing citizen participation in State or public affairs.

The right of access to information is perceived as a leverage right which gives effect to the values of transparency and accountability because it allows citizens to access certain useful information held by the State; to scrutinize the lawfulness, propriety and rationality of decisions taken;²⁴ and to hold their leaders accountable. Furthermore, the right of access to information gives the citizens access to certain information which they can use to assess and establish whether or not their rights have been violated or are being threatened.²⁵ Hence the right of access to information is perceived as a right which is meant to give effect to the idea of open and transparent government, as well as facilitate the exercise of other rights.

The notion that the right of access to information is purposed to foster transparency and State accountability has also been endorsed in South Africa,²⁶ for instance, in the seminal case of *Brümmer v Minister for Social Development*²⁷ where the Constitutional Court of South Africa held as follows:

“The importance of this right ... in a country which is founded on values of accountability, responsiveness and openness, cannot be gainsaid. To give effect to these founding values, the public must have access to information held by the State. Indeed one of the basic values and principles governing public administration is transparency. And the Constitution demands that transparency must be fostered by providing the public with timely, accessible and accurate information”

²² Gorge Devenish. *A Commentary of the South Africa Bill of Rights* (1999) at 446

²³ Fatima Diallo and Richard Calland (Ed). *Access to Information in Africa: Law, Culture and Practice* (2013) at 21

²⁴ See Note 23 at 685

²⁵ See Note 23 above

²⁶ See ss 1 (d) and 32 of the Constitution of South Africa, 1996

²⁷ 2009 (6) SA 323 (CC); 2009 (11) BCLR 1075 (CC) at 62.

More recently, the South African Constitutional Court maintained the same stance in *President of the Republic of South Africa v M & G Media Ltd*,²⁸ , when it held that:

"The constitutional guarantee of the right of access to information held by the state gives effect to accountability, responsiveness and openness, as founding values of our constitutional democracy. It is impossible to hold accountable a government that operates in secrecy. The right of access to information is also crucial to the realisation of other rights in the Bill of Rights. The right to receive or impart information or ideas, for example, is dependent on it. In a democratic society such as our own, the effective exercise of the right to vote also depends on the right of access to information. For without access to information, the ability of citizens to make responsible political decisions and participate meaningfully in public life is undermined."

Similarly, in *De Lange v Eskom Holdings*,²⁹ the South African High Court had the occasion to interpret the significance and purpose of the right of access to information held by the State where it held as follows:

"Various authorities and our higher courts have consistently held that the purpose of the right of access to information is to subordinate the organs of the state to a new regimen of openness and fair dealing with the public."

Thus, the South African jurisprudence on the interpretation of the right of access to information shows that the judiciary has taken the view that the purpose of this right is to guarantee citizens' access to information held by Government as a means of compelling the State to operate transparently and to be accountable. The Court also endorses this right to provide citizens with access to certain information necessary for them to exercise their other rights as transparency and accountability are entrenched as constitutional values³⁰

²⁸ 2012 (2) BCLR 181 (CC); 2012 (2) SA 50 (CC) at 10

²⁹ 2012 (1) SA 280 (GSJ); [2012] 1 All SA 543 (GSJ); 2012 (5) BCLR 502 (GSJ) at 28

³⁰ See s 1 (d) of the Constitution of South Africa, 1996

to be interpreted in a manner which upholds and promotes those values.³¹ Zimbabwean courts ought to be persuaded by this stance due to the entrenchment of similar values in the Constitution of Zimbabwe.

That the right of access to information is a leverage right, predicated on the need to enforce public accountability and other rights, is unequivocally endorsed by the Constitution of Zimbabwe, s 62 which allows that the right of access to information held by the State is guaranteed for two purposes. First, access to State information is guaranteed in order to foster public accountability. Section 62 (1) entitles citizens and permanent residents as well as Zimbabwean media to

"... any information held by the State or by any institution or agency of government at every level, in so far as the information is required in the interests of public accountability."

Second, through section 62 (2) the notion that the right of access to information is a leverage right to facilitate the enforcement of other rights is established, and entitles Zimbabweans to any information held by the State, *"in so far as the information is required for the exercise or protection of a right."*

The term 'right' is not only limited to constitutionally entrenched rights. Section 47 indicates that the entrenchment of the Declaration of Rights *"does not preclude the existence of other rights and freedoms that may be recognised or conferred by law, to the extent that they are consistent with this Constitution"*. Therefore the term 'right', as used in section 62 (2) should be interpreted broadly to include any right recognised under the law applicable in Zimbabwe, as long as the exercise of that right will not infringe or violate any provision of the Constitution. Lovemore Madhuku observes that law in Zimbabwe includes legislation, common law and customary law³² and, although this observation was made prior to the enactment of

³¹ See section 39 (1) (a) of the Constitution of South Africa, 1996

³² Lovemore Madhuku. *An Introduction to Zimbabwean Law* (2010) at 13-25

the 2013 Constitution, his views are still relevant as signified by section 332. Therefore the term 'any right' include those rights conferred upon the citizens by any legislation, common law, customary law or international law that is applicable in Zimbabwe.

The foregoing discussion demonstrates that, in terms of the Constitution of Zimbabwe, citizens have a right to access any information held by the State if they need that information for purposes of enforcing government transparency and accountability, or for purposes of enforcing any legal right. This paper contends that access to the national voters' roll can be justified on both grounds and therefore fits within the ambit of the right to access information, as enshrined in s 62.

Part II: Application of the right of access to information held by the State

In order to understand why and how access to the national voters' roll can be justified as part of the right of access to information, it is important to understand certain aspects regarding how the right of access to information applies in terms of the Constitution of Zimbabwe. First, the Declaration of Rights binds the State and all its agencies, including those that are in the executive, legislative and judicial branch of Government, as defined by the constitution.³³ In addition, the Constitution prescribes that the State and all the institutions and agencies of government at every level must respect, protect, promote and fulfil the rights enshrined in the Declaration of Rights.³⁴

The Constitution establishes the ZEC as an independent constitutional body³⁵ responsible for the proper custody of the national voters' roll and related registers.³⁶ Therefore, ZEC is an institution of the State. It has been argued elsewhere³⁷ that, by virtue of being an

³³ See s 45 (1) of the Constitution of Zimbabwe, 2013

³⁴ See s 44 *ibid.*

³⁵ See ss 232 (a) and 238 *ibid.*

³⁶ See s 239 (e) *ibid.*

³⁷ In the opposing affidavit submitted by the Chairperson of the Zimbabwe Electoral Commission in *Justice Alfred Mavedzenge v Chairperson of the Zimbabwe Electoral Commission* case no. HC 4014/14

independent constitutional body, ZEC is not bound by the Declaration of Rights. The fact that ZEC is an independent constitutional commission does not exonerate it from being bound by the Declaration of Rights or the Constitution. A Constitution prescribes how the State shall be organised or structured, creates State institutions, confers power to those institutions and prescribes rules, principles and values through which the assigned power shall be exercised by those institutions.³⁸ ZEC is guaranteed independence from being pressured by other State institutions or non-State actors but is still subject to law and Constitutional provisions. Only the judiciary, when applying the law, has the authority to direct how ZEC shall operate.³⁹ Therefore, there should not be doubt that ZEC is an institution of the State, which is required to respect, protect, promote and fulfil the rights enshrined in the Constitution.

Furthermore, ZEC is bound by the Declaration of Rights given that it is a Commission created to ensure the effective realisation of the rights enshrined in the Declaration of Rights. ZEC's mandate is to organise, supervise and conduct elections in a manner that is consistent with the principles set by the Constitution, in order to fulfil the right to a free and fair election⁴⁰ as enshrined in s 67 (1) (a). As will be shown later, the right to a free and fair election is not a right which can be exercised in isolation as it is closely related and sometimes dependent on other rights such as the right to access certain information which enables citizens to cast their votes freely and have those votes counted fairly. ZEC is thus not only bound by the right to vote but by the entire Declaration of Rights, to respect, protect, promote and fulfil the relevant rights enshrined therein, which include the right of access to information held by the State.

The notion that ZEC is bound by the rights enshrined in the Declaration of Rights is further supported by s 233 (a) and (c), which binds ZEC to support human rights and promote

³⁸ I derive this definition from Gorge Devenish's discussion of constitutionalism in *A Commentary on the South African Bill of Rights* (1999) at 16-17

³⁹ See s 165, read together with s 69 of the Constitution of Zimbabwe, 2013

⁴⁰ As well as other rights enshrined in the Declaration of Rights.

constitutionalism. Section 233 is significant as it is one of the provisions through which ZEC is created and it can be argued that the same constitutional provisions which create ZEC further bind it to honour human rights. Access to information is recognised as a constitutional human right and therefore ZEC is bound to honour that right. Constitutionalism is a complex phenomenon to define but, as Francois Venter argues, it is a doctrine that encapsulates the idea that:

"... those who govern are obliged to conduct the business of government in accordance with publicly articulated, prospective rules that enable citizens to assess the legitimacy and propriety of public policies".⁴¹

These rules are set by the Constitution and expanded in the enabling legislation and regulations. Constitutionalism, therefore, implies respect for the Constitution and all other laws which flow from it. In terms of s 233, ZEC is therefore obliged to promote respect for the Constitution, which also includes respect of the rights enshrined in the Constitution. In that regard, ZEC is bound not only to honour the right of access to information, enshrined in s 62, but to actively promote the observance of this right when discharging its constitutional mandate.

Since the adoption of the Constitution in May 2013, the Zimbabwean courts have handled some petitions⁴² in which citizens and or political parties sought to hold ZEC accountable on the basis of the Declaration of Rights. However, the courts have not been able to deal with this issue as most of those petitions were thrown out on technicalities.

However, prior to the commencement of the 2013 Constitution, the Zimbabwean Electoral Court in *Movement for Democratic Change v the Chairperson of the Zimbabwe Electoral*

⁴¹ Francois Venter 'The Withering of the Rule of Law' (1973) Vol 8 *Spectrum Juris* at 69-88

⁴² These are largely unreported because they were dismissed on technicalities.

*Commission*⁴³ held that:

"The clear intention of the Legislature in s 61 (5) of the Constitution [1979] was to ensure ZEC's independence provided it was operating within the law. It has to exercise its functions as provided by subs (4) for it to enjoy that immunity. It cannot for example conduct elections unfairly, outside the law, and which are not free and fair, but on being sued insist that the courts have no jurisdiction over it. The court would in such circumstances have jurisdiction to hear and determine complaints against ZEC."

This case was decided in 2008 in terms of the former Constitution of Zimbabwe,⁴⁴ which created ZEC as an independent constitutional body. However the Court insisted that the independence is not from the law and ZEC was subject to the jurisdiction of the Courts. Given that the 2013 Constitution has maintained a similar legal principle of subjecting all State institutions to the principle of the rule of law⁴⁵ and to honour the constitutional rights,⁴⁶ the courts must be able to follow a similar approach to hold ZEC accountable on the basis of the Constitution's Declaration of Rights.

The argument in favour of ZEC's accountability on the basis of the Declaration of Rights is well supported in comparative jurisdictions that have persuasive force in the Zimbabwean legal system.⁴⁷ In Kenya, in the case of *Raila Odinga v the Independent Electoral and Boundaries Commission*,⁴⁸ (IEBC) the IEBC was petitioned by a contestant of the State Presidential elections for having failed to maintain a credible national voters' roll.⁴⁹ On the question of whether the IEBC was bound by the Bill of Rights or not, the court made the following indication:

"[The] IEBC is a constitutional entity entrusted with specified obligations, to organize,

⁴³ HH-37-08 at 3

⁴⁴ The Lancaster House Constitution, 1979

⁴⁵ Section 3 (1) (b) of the Constitution of Zimbabwe, 2013

⁴⁶ Section 44 *ibid*.

⁴⁷ By virtue of section 46 (1) (e) *ibid*.

⁴⁸ Petition No. 5 of 2013, [2013] eKLR

⁴⁹ See *Raila Odinga v the Independent Electoral and Boundaries Commission*, Petition No. 5 of 2013, [2013] eKLRat 10

*manage and conduct elections, designed to give fulfilment to the people's political rights (Article 38 of the Constitution). The execution of such a mandate is underpinned by specified constitutional principles and mechanisms and by detailed provisions of the statute law".*⁵⁰

Thus the Supreme Court of Kenya interpreted the IEBC as an entity created to fulfil certain rights enshrined in the Constitution's Bill of Rights and thus bound by the Bill of Rights to honour the various fundamental rights enshrined therein, including the political rights entrenched in Article 38 of the Constitution of Kenya. This approach should be applicable in the Zimbabwean context as in similar situation, the ZEC is a constitutional entity, entrusted with the responsibility to protect, promote and fulfil the rights enshrined in the Declaration of Rights, which include the right to free and fair elections⁵¹ and the right of access to information.⁵²

In South Africa, the judiciary has also taken a similar stance that, although the electoral management body is created as an independent institution, it remains a State institution bound by the Bill of Rights. This was first confirmed by the Constitutional Court in its landmark judgment in the *August v Electoral Commission*.⁵³ In this case, the Independent Electoral Commission (IEC) was petitioned in an application which challenged the constitutionality of its decision to deny prisoners their right to vote. On the question regarding whether the IEC is bound by the Bill of Rights, the Court indicated as follows:

"The right to vote by its very nature imposes positive obligations upon the legislature and the executive. A date for elections has to be promulgated, the secrecy of the ballot secured and the machinery established for managing the process. For this purpose the Constitution provides for the establishment of the [Independent Electoral] Commission

⁵⁰ Ibid at 197

⁵¹ Enshrined in s 67 (1) (a) of the Constitution of Zimbabwe, 2013

⁵² Enshrined in s 62 ibid.

⁵³ Case CCT 8/99

to manage elections and ensure that they are free and fair."⁵⁴

Thus the Court took the view that the electoral commission is created to fulfil the rights enshrined in the Constitution's Bill of Rights, particularly the right to vote. Therefore, the IEC is bound to respect, protect, promote and fulfil the rights enshrined in the Bill of Rights.⁵⁵

Jagwanth observes that the right of access to information held by the State creates positive duties which must be performed by the State.⁵⁶ In Zimbabwe, these duties are encapsulated in s 44, whose import is to require the State to protect and promote the citizen's right to access information held by the State. The duty to protect human rights entails the obligation to take positive steps to protect rights bearers from activities which have the potential to undermine the enjoyment of their constitutional rights.⁵⁷ The duty to promote fundamental rights encompasses the obligation to take positive measures to create conditions which enable citizens to access and enjoy their fundamental rights.⁵⁸ Therefore both the duty to protect and promote culminate in the establishment of the obligation of the State to take positive measures to ensure that citizens enjoy their rights. Regarding the right of access to information, ZEC is therefore bound to take positive steps to provide citizens with information when they request it. The scope of this duty must be interpreted consistent with s 194 (1) which obliges all institutions of the State to ensure that they discharge their functions in accordance with the basic values and principles governing public administration, as enshrined in the Constitution. These include the requirement to foster transparency by providing the public with timely, accessible and accurate information.⁵⁹ Therefore ZEC has a positive obligation to timeously provide the national voters' roll when requested to do so and it must be provided in its accurate form.

⁵⁴ *August v Electoral Commission* Case CCT 8/99 at 16

⁵⁵ See s 7 (2) of the Constitution of South Africa, 1996

⁵⁶ See Note 23 at 7

⁵⁷ A. Akintayo. "Planning law versus the right of the poor to adequate housing: A progressive assessment of the Lagos State of Nigeria's Urban and Regional Planning and Development Law of 2010" (2014) *African Human Rights Law Journal* at 561

⁵⁸ *Ibid*

⁵⁹ See section 194 (1) (h) of the Constitution of Zimbabwe

Currie and de Wal rightly observe that constitutional rights are not absolute.⁶⁰ Constitutional rights must be exercised in a manner which respects the boundaries set by other rights and by important social concerns which include national security, public order and safety.⁶¹ Section 86 (1) read together with (2) (a) of the Constitution of Zimbabwe entrenches this principle of limitation by cautioning that the rights enshrined in the Declaration of Rights "*must be exercised reasonably and with due regard for the rights and freedoms of other persons.*" However, it ought to be emphasised that, although these rights are subject to limitations, they may only be limited for a reason and in a manner that is constitutionally valid.

Constitutional rights may only be limited through a law of general application, to the extent that the limitation is fair, necessary and is consistent with the underlying values of a democratic state⁶² which are openness, justice, human dignity, equality and freedom. Whether the limitation is justifiable is determined by considering the nature of the right being limited, the purpose, nature and extent of the limitation, the relationship between the limitation and the purpose of such limitation, and whether there are any less restrictive means of achieving the same purpose.⁶³ In South Africa, where similar guidelines exist, this has been interpreted to mean that the limitation must be for a purpose regarded as compelling in a democratic constitutional state,⁶⁴ there must be a good reason to believe that the purpose will be achieved by restricting the right, the restriction of the right must not be more than what is necessary to achieve the purpose and it must be the least restrictive manner through which the purpose may be achieved.⁶⁵

In view of the foregoing, the right of access to information may only be limited through a law of

⁶⁰ See Note 24 at 163

⁶¹ Ibid

⁶² See s 86 (2) of the Constitution of Zimbabwe, 2013

⁶³ See section 86 (2) (a)-(f) of the Constitution of Zimbabwe, 2013

⁶⁴ Based on such values as openness, freedom and human dignity. Also see Denise Meyerson. *Rights Limited: Freedom of Expression, Religion and South African Constitution* (1998) at 36-43

⁶⁵ *S v Manamela* 2000 (3) SA 1 (CC) at 32

general application, and such law includes legislation which applies to everyone in Zimbabwe. This right may be limited only for a purpose that is considered acceptable and compelling in a democratic state⁶⁶ and the State may enact legislation which may restrict access to certain information. Currently this legislation is the Access to Information and Protection of Privacy Act⁶⁷ which was, however, enacted prior to the adoption of the Constitution and it is due for realignment. The Constitution allows this legislation to restrict access to information if it is necessary for purposes of protecting or promoting national defence, public security or professional confidentiality.⁶⁸ Additionally, in terms of section 86 (2) (b, access to information may also be restricted if it is necessary to protect public order, public safety and health. However, it is not enough for the State to merely give one of these reasons as justification for restricting access to information. There must be a rational connection between the nature of the information for which access is being denied and the purpose for such restriction. Put differently, the nature of the information must be such that if released to the citizen, the legitimate purpose for the protection of such information will be undermined. Furthermore, the Constitution unequivocally cautions that, even where restriction is contemplated in order to promote or protect any of the aforementioned legitimate interests, the restriction must not go beyond what is necessary, fair and must be consistent with the values of a democratic society that is based on accountability and transparency⁶⁹ and must remain reasonable both in terms of the length of time and the amount of information for which access is being restricted.

In the next section of this paper, it will be demonstrated that there is no constitutionally justifiable reason for denying a citizen access to the national voters' roll. To the contrary, the Constitution obliges ZEC to provide citizens with access to the national voters' roll because it is in the interest of public accountability to do so and it is necessary for the exercise of

⁶⁶ See s 86 (2) of the Constitution of Zimbabwe, 2013

⁶⁷ [Chapter 10:27]

⁶⁸ See s 62 (4) *ibid*

⁶⁹ See ss 62 (4) and 86 of the Constitution of Zimbabwe, 2013

one's political rights, particularly the right to a free and fair election, enshrined in section 67 (1) (a) of the Constitution.

Part III The transparency and public accountability argument

Every Zimbabwean citizen has a constitutional right to access the national voters' roll in order to enforce public accountability by ZEC regarding the management of elections. This view is predicated on the fact that ZEC has a constitutional mandate to ensure proper custody of the national voters' roll and at the same time, it has the obligation to discharge this function in a transparent and accountable manner, especially when requested to do so.

Transparency and accountability are necessary normative values upon which every constitutional democratic State must be based.⁷⁰ Transparency is a normative constitutional value which demands that State institutions must discharge their duties and exercise public power in a manner that is open to the citizens as well as other State institutions.⁷¹ State accountability encapsulates the obligation of State institutions entrusted with public power and public resources to be answerable for the exercise of their power and utilisation of resources.⁷² Thus transparency is the idea that state affairs should be conducted in a manner that is open to public scrutiny and accountability is the idea that the State must account for its actions. A democratic society must incorporate adherence to these two values, amongst others, because public power is less likely to be abused when exercised openly and when the State is legally obliged to account to the citizens.

The Preamble to the 2013 Constitution shows that the Zimbabwean society has committed itself to establish a united, just, prosperous nation, founded on transparency as one of the cardinal values.⁷³ Additionally, transparency and accountability are entrenched amongst

⁷⁰ Justice Mavedzenge and Doug Coltart. *A Constitutional law guide towards understanding Zimbabwe's socio-economic human rights* (2014) at 18

⁷¹ Ibid

⁷² See Black's *Law Dictionary* 2nd Edition

⁷³ See paragraph 9 of the Preamble to the Constitution of Zimbabwe, 2013

the founding values and principles upon which the government should be based.⁷⁴ To give effect to these two values, the 2013 Constitution entrenches as fundamental the right of access to any information held by the State,⁷⁵ and a duty for all public institutions to ensure that they are:

*"... governed by the democratic values and principles enshrined in this Constitution, including [that] transparency must be fostered by providing the public with timely, accessible and accurate information"*⁷⁶

By entrenching transparency and accountability as founding values and by guaranteeing the right of access to information held by the State, there cannot be doubt that the 2013 Constitution has subordinated the exercise of all public power to openness and public scrutiny.

ZEC exercises public power to prepare, supervise and conduct elections of public office bearers in Zimbabwe, as described in Part II of this paper. This power should be discharged to give effect to the constitutional principle that the authority to govern is derived from the people⁷⁷ and through a free and fair election⁷⁸ which is conducted in accordance with the principles enshrined in s 155 as well as the founding values stated in s 3 of the 2013 Constitution. ZEC has the responsibility to compile voters' rolls⁷⁹ and to ensure the proper custody and maintenance of these rolls and registers.⁸⁰ This constitutional function must be exercised in a manner which adheres to the normative values of transparency and accountability, as discussed earlier.

The proper maintenance of the national voters' roll is the bedrock of the electoral democracy⁸¹

⁷⁴ See s 3 (2) (g) of the Constitution of Zimbabwe, 2013

⁷⁵ See s 62 (1) and (2) *ibid*

⁷⁶ See s 194(1) (h) *ibid*

⁷⁷ Entrenched in section 3 (2) (f) *ibid*

⁷⁸ See s 3 (2) (a) and (b) *ibid*

⁷⁹ See s 239 (d) *ibid*

⁸⁰ See s 239 (e) *ibid*

⁸¹ This is because the right to vote is exercised when one is registered as a voter on the voters' roll. See schedule 4 of the

because, in terms of the 2013 Constitution,⁸² the authority to govern is acquired through a free and fair election and the right to vote in that election may only be exercised when a citizen is registered as a voter.⁸³ It is impossible to achieve the constitutional goal of establishing and maintaining a democratic Zimbabwean society in which the authority to govern is derived from the people through a free and fair election, if the national voters' roll is not managed properly. Thus, ZEC has a duty to inspire confidence amongst the citizens that the elections are based on a properly managed national voters' roll. In that regard, the citizens have both a legitimate interest and a justiciable fundamental right to know if the national voters' roll does exist in proper shape and condition necessary for the proper conduct of elections.⁸⁴ This right is exercised on the basis of s 62 (1)⁸⁵ by requesting ZEC to provide a copy of the national voters' roll in a manner that enables the public to scrutinize its' quality. ZEC has an obligation to respect, protect and promote this right and therefore has a duty, especially when requested to do so, to uphold and foster the obligation of transparency and accountability in the management of the national voters' roll and the maintenance of the democratic electoral system.

Access to the national voters' roll as a means of enforcing the right to a free and fair election.

In addition to the public accountability argument, access to the national voters roll is constitutionally justified for purposes of protecting and enforcing the right to a free and fair election. The right of access to information guarantees the citizens access to any information held by the State, if access to the requested information is necessary to exercise or protect their rights.⁸⁶

Constitution of Zimbabwe, 2013

⁸² See s 3 (2) of the Constitution of Zimbabwe, 2013

⁸³ See schedule 4 *ibid*

⁸⁴ Section 155

⁸⁵ Which guarantees citizens the right of access to information held by the State

⁸⁶ See s 62 (2) of the Constitution of Zimbabwe, 2013

Section 67(1) (a) entrenches the right of every Zimbabwean citizen to a free and fair election for any elective public office.⁸⁷ Despite the numerous election petitions brought before it, the Zimbabwean judiciary has not yet elaborately interpreted what this right entails. Devenish⁸⁸ argues that when interpreting the provisions of the Constitution, the starting point should be the consideration of the grammatical formulation of the provision. In Zimbabwe, this principle is constitutionally entrenched in section 46(1) (d) which requires the court or a body to duly consider the relevant provisions of the Constitution when interpreting the fundamental rights. It is therefore imperative to pay attention to the grammatical formulation of the right to a free and fair election, in order to establish its scope and meaning.

"Every Zimbabwean citizen has the right-(a) to free, fair and regular elections for any elective public office established in terms of this Constitution or any other law".⁸⁹

The grammatical formulation of this right shows that it is not limited to the right to 'participate' in a free and fair election. Citizens are not mere participants in an electoral process, but are also active agents with legitimate interests or concerns. Therefore, in addition to the right to 'participate' in a free and fair election, they have the right to know that the elections have been or are going to be free and fair, and the right to take legally valid corrective actions to ensure that the elections comply with set requirements of being free, fair and regular. Additionally, s 46(1) (b) of the 2013 Constitution, prescribes that:

"When interpreting this Chapter [The Declaration of Rights], a court, tribunal, forum or body must promote the values and principles that underlie a democratic society based on openness, justice, human dignity, equality and freedom, and in particular, the values and principles set out in section 3 [of the Constitution]"

The above provision has been interpreted by the Constitutional Court of Zimbabwe⁹⁰ to

⁸⁷ Elective public offices in Zimbabwe include the State President, Legislators and Local authority councillors.

⁸⁸ Gorge Devenish. Interpretation of Statutes (1992) 26

⁸⁹ Section 67(1) (a)

⁹⁰ See *Mudzuru v Ministry of Justice, Legal & Parliamentary Affairs* [2015] ZWCC at 26

imply that constitutional rights must be interpreted in a manner which adequately resonates with the entrenched founding constitutional values and principles. Therefore the scope and meaning of the right to a free and fair election ought to be established in a manner which incorporates and upholds the values of openness and accountability.

The incorporation of the value of transparency into the scope of the right to a free and fair election creates the right of a citizen to an election which is conducted transparently. The management of the national voters' roll is an integral part of the process of organising the elections. Therefore, the citizens have the right to have their national voters' roll managed properly and in a manner that is open to them. Put differently, as part of the right to a free and fair election, the citizens have the right to know and verify the condition of the national voters' roll. This right may be exercised by invoking the right of access to information held by the State through access to the national voters' roll as that information is necessary to exercise their right to know and verify the condition of the national voters' roll.

The incorporation of the value of accountability into the scope and meaning of the right to a free and fair election creates a duty for ZEC to be accountable to the citizens when called upon to do so, during the process of preparing or conducting an election. As indicated above, the management of the national voters' roll is a significant part of preparing for an election in terms of the 2013 Constitution. Therefore, as part of the right to a free and fair election, the citizen is entitled to the right to call ZEC to account on the condition of the national voters' roll and it is impossible to demand accountability without access to the necessary information.

For the citizens to be able to call ZEC to account regarding the condition of the national voters' roll, they need to have access to a copy of the national voters' roll in a form which is suitable for them to assess whatever they need to ascertain. On that basis, the citizens can

invoke section 62 (2) of the 2013 Constitution to request access to the national voters' roll.

Conclusion

Access to the national voter's roll is guaranteed as a constitutional right. This right is derived from the governance framework as entrenched in the 2013 Constitution. This framework requires that the exercise of all public power and the discharge of all public functions must be done in a manner that is open to the public, and the State must be accountable to its citizens. The right of access to any information held by the State is a constitutional right which citizens are entitled to use in order to enforce public transparency and accountability. It is a mechanism provided by the Constitution to give effect to the underlying values of transparency and accountability.

Therefore the citizens may request access to the national voters' roll in order to foster transparency in the manner in which ZEC manages and maintains the national voters' roll. In addition, the right of access to information is a leverage right, which can be used to access information necessary to exercise or protect other rights. The right to a free and fair election implies the right to know if the elections have been free and fair or are going to be free and fair. This right may only be exercised if a citizen has access to the national voter's roll.

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