

# 11 Enhancing Functional Interactions between the Gender Commission and the Judiciary in the Promotion of Gender Equality in Zimbabwe: A Blueprint

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## 1 Introduction

The struggle for gender equality has taken various forms, but the level of dissatisfaction and frustration remains high among victims and other stakeholders. The constitutional system set up by the 2013 Zimbabwean Constitution has created vast opportunities for the promotion and protection of human rights, with gender equality taking pride of place. To that extent, various institutions and agencies of state and government have been established for the purposes of protecting the rights of women, ensuring gender parity in social, economic, political and other activities. Indeed, the work of these state institutions has the potential to have a lasting impact on the enjoyment and realisation of constitutionally entrenched rights to equality, non-discrimination and gender parity. The nature of these constitutional institutions offers huge potential for implementing and operationalising human rights standards and expectations for the benefit of society. Two important institutions with vast opportunities for enhancing the protection and promotion of human rights are the judicial system and the system created by the Gender Commission.

Since 1980, the judiciary has played a noble role as a guardian and protector of human rights and freedoms guaranteed in the constitutional system. Indeed, the judiciary has been able to adjudicate, interpret the law, create comprehensive jurisprudence and guide state practice in the human rights arena. It can be argued that despite the generally stellar performance of the judiciary, more can be achieved if the judiciary works in tandem with other constitutional bodies mandated with the protection or promotion of human rights such as women's rights and the right to equality. For the purposes of this research, and in view of deeply-ingrained patriarchal trends in Zimbabwe, there is scope for considering a complementary relationship between the judiciary and the Gender Commission. It is argued that by working together these two systems can play a significant role in the promotion, realisation and enjoyment of women's rights and gender equality.

Curiously, however, there are no explicit constitutional provisions supporting or encouraging a 'constitutional complementary system' between the judicial and the independent commission systems in the quest to safeguard, promote and protect human rights. Current thinking on the independence of the commissions, and on judicial independence, suggest strict non-interference, and exclusive jurisdictional competences of the judiciary. Accordingly, the institutional mandates of these two systems are cast in separate clusters, suggesting that there is no space for a collective approach or a partnership.

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This paper reviews the functional relationships explicit and implied in the judicial system and the Gender Commission; its major hypothesis is that there exist vast opportunities for functional complementarities between the judicial system and the independent commission systems. There is no literature on this subject matter in Zimbabwe, and in interrogating opportunities and advocating for the ‘constitutional complementary’ argument, South African approaches will be examined, with a view to comparative benchmarking.

The Gender Commission is chosen as a focus because of all commissions in Zimbabwe, it seems to have struggled to introduce any innovative strategies of promoting gender equality and confronting gender related social issues. It must be motivated to consider such innovative strategies if its constitutional mandate is to be discharged effectively.

## **2 Method**

This is largely desk research, and in analysis the paper shall adopt the doctrinal, comparative and descriptive approaches. The research is also enriched through interviews with members of the Judicial Services Commission, individual judges of the High Court and the Supreme Court, traditional leaders and members of the Gender Commission, Ministry of Women’s Affairs and the Zimbabwe Human Rights Commission.<sup>1</sup>

## **3 The Constitutional Framework**

From a simplistic perspective, it can be stated that any functional relationship between constitutional bodies must not only be permitted by the four corners of the Constitution, but also be supported by clear constitutional provisions. This is because of the principle of legality — all actions of constitutional bodies and organs of state and government must be in accordance with the provisions of written law. Without doubt, where the Constitution permits and supports the partnership, parameters can be drawn concerning their jurisdictional boundaries. Thus, there is a critical need for investigating the provisions of the Constitution to determine whether there is room for a complementary system of the form and shape envisaged throughout this paper.

## **4 The Constitutional Value System**

To start with, there are no constitutional provisions that call for a functional relationship between the Gender Commission and the judiciary. There exist, however, provisions in the Constitution that call for the achievement of various social aspirations and human rights outcomes. The Constitution does not give a body or commission exclusive jurisdiction on the achievement of such aspirations. To exemplify this point, an analysis of the constitutional value system is apposite.

The 2013 Constitution is underpinned by a value system that guides the understanding of its main features, and these can be gleaned from the preamble itself. The latter confirms the need for the constitutional system “to entrench democracy, good, transparent and accountable governance and

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<sup>1</sup> These organisations had an opportunity to input their suggestions and contributions at a symposium organised and funded by the Raoul Wallenberg Institute of Human Rights and Humanitarian Law on 5 and 6 November 2018 at Cresta Lodge, Harare.

the rule of law”. It further affirms the need for a commitment to upholding and defending fundamental human rights and freedoms. Read together with the Declaration of Rights, and other provisions in the Constitution, there is no doubt that the preamble sets out the foundation for the human rights agenda that permeates the whole Constitution. Implicit in the setting of this agenda, it can be argued that it aspires to a multifaceted approach to promoting the human rights agenda.

Section 3 of the Constitution sets out the founding values and principles underpinning it. These values are the specific principles that give expression to critical aspects of a nation’s constitutional identity. Indeed, constitutional values point to a nation’s aspirations, and these aspirations are important as they reflect the national fabric; they define the historical background, beliefs, hopes, morals and projected horizons of a nation. It is contested that section 3 necessarily becomes an entry point in searching for possible relationships between constitutional institutions. It can be argued that the constitution system, through the preamble and the values, implicitly calls for a concerted constitutional effort, not a silo approach at meeting human rights expectations and outcomes.

Gender equality is recognised in section 3 as a fundamental value and principle, along with the rule of law, good governance and equality of all human beings. Recognition is extended to the rights of women, children, the youths and the elderly. Further, section 3 recognises transparency, justice, accountability and responsiveness as integral principles of good governance that bind the state and all institutions and agencies of government at every level. By so doing the constitutional system recognises the central place of gender inequality in the Zimbabwean social system, and the pride of place that must be given to solutions that address the consequences of such inequality.

These provisions are noble. They generate positivity in the struggle for the realisation and enforcement of women’s rights and gender equality. They guide constitutional interpretation and consequently social transformation in important economic sectors such as the mining sector. It can thus be argued that devising a system that enables the Gender Commission to feed into the judicial system may be necessary to give the noble constitutional objectives life and practical form. There is nothing that specifically counsels against institutional complementary relationships for purposes of achieving such goals. Indeed, the Constitution enjoins the state to ensure that all its various bodies, including commissions, “are provided with adequate resources and facilities to enable them to carry out their functions conscientiously, fairly, honestly and efficiently”.<sup>2</sup> Establishing a mutually complementary system might go a long way towards providing ‘facilities’ for efficiency in the work of constitutional bodies.

Another important national objective is the injunction on the state to promote gender balance in society.<sup>3</sup> This can be achieved by, among other strategies, promoting the full participation of women in all spheres of society based on their equality with men. The measures that the state must take include ensuring women access to resources and the rectification of gender discrimination and imbalances.<sup>4</sup>

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<sup>2</sup> Section 9 of the Constitution.

<sup>3</sup> Section 17.

<sup>4</sup> Section 17.

## **5 Does Equality and Gender Equality Matter in the Constitution?**

Traditionally, the right to equality and non-discrimination was not in the Constitution in the explicit way it is now; the vague provisions of the right to equal protection of the law in the Lancaster House Constitution provided the only platform to promote gender equality. The 2013 Constitution has changed the game; it has introduced a specific right to equality and non-discrimination in section 56. Additionally, the Constitution has surrounded the right to equality with other gender equality provisions. Consequently, it can be argued, the right to equality in relation to gender must be interpreted considering these other provisions located outside of the Declaration of Rights.

Section 56 of the Constitution entrenches the equality of ‘all persons’ before the law, and their right to equal protection and benefit of the law. It also emphatically expresses the equality of men and women, and the right of both to equal treatment, and equal opportunities in political, economic, cultural and social spheres. An important leg of this right is the prohibition of unfair discrimination on various grounds. For the purposes of this research, these include sex, gender, marital status, age, pregnancy, social status and custom.

Customary practices deriving from a deeply patriarchal society have marginalised women, relegated their contribution to social development and subjected them to various forms of discrimination. They also entrench women as minors, excluding them from important decision-making platforms. Under customary law, women have limited, if any, voice in important social platforms, and where such a voice exist, it is subject to veto by their male counterparts. Nor has this discrimination been confined to rural communities; it has cascaded to mainstream social, economic and political platforms. The role of women in the legislature is always downplayed, as it is in the executive organs of the state. Discrimination against women has infiltrated the workplace<sup>5</sup> and other economic spheres such as the extractive sector.

The equality and non-discrimination clause is further elaborated in section 80 (elaboration of certain rights), which recognises equal dignity between men and women, reiterates right to equal opportunities between men and women, and extends rights of women to guardianship and custody of children. It also calls for the invalidity of “all laws, customs, traditions and cultural practices that infringe the rights of women”.

Importantly, the equality clause calls for the state to take legislative and other measures to promote the achievement of equality. Can the state devise strategies to ensure a cooperative governance framework between relevant institutions for the realisation of these rights?

## **6 Measures, Strategies and Approaches**

The above analysis points to one clear fact: the substantive aspects of the law are watertight, progressive and comprehensive. What remains to be seen is whether the objectives targeted can be given practical effect. The success or otherwise of the 2013 Constitution will be measured by how it is implemented, by the practical outcomes to be realised and by the tangible objectives achieved.

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<sup>5</sup> Section 65 of the Constitution (labour rights) recognises that women and men have a right to equal remuneration for similar work; further, all employees have a right to just, equitable and satisfactory conditions of work.

To understand the importance of implementation, it is necessary to explore the Constitution itself. It enjoins the state to ‘take legislative and other measures’ to give practical effect to the objects of its provisions. The obligation on the state is clear-cut, and this is positive and welcome. It is positive because the state can be compelled to act in the interest of realising the constitutional objectives. The state, its organs, agencies, institutions and the subsidiary bodies it manifests itself in have this obligation. The state comprises three main organs: the legislature, the executive and the judiciary. The executive has a stronger obligation because it is the organ that ‘executes’ and implements law and policy. It generates resources, establishes implementing institutions, controls taxation and revenue generation and has authority to disburse and allocate national resources.

The state, through Parliament, must take ‘legislative’ and other measures. Parliament must pass the laws that give effect to the structures, procedures and promises in a constitution. Similarly, the judiciary has an obligation to ensure that constitutional promises and ideas are realised in practical terms as far as this can be done through judicial adjudication, legal interpretation and application of the law.

The mutual relationship proposed in this paper derives from these mandates and obligations of the organs of state. Currently, the legislature and the judiciary have worked together in law making; the courts have struck down various pieces of legislation, holding them unconstitutional and giving the legislature the opportunity to amend, or formally repeal the impugned legislation.<sup>6</sup> In some instances, the courts have directed the government to act where a piece of legislation is foul to the Constitution. On various occasions, the executive has acted in response to a call to act by the judiciary.<sup>7</sup>

Important cases abound where the judiciary has worked in tandem with the legislature. In *Katekwe v. Muchabaiwa*,<sup>8</sup> the courts held that women who had been perpetually considered as minors with lesser rights than men had more rights than before owing to the passage of the Legal Age of Majority Act. This was later overturned by another judgment that held that African customary law’s inequalities between men and women had to be maintained in issues of inheritance.<sup>9</sup> Gradually, discrimination based on gender or sex was rejected, culminating in section 56 of the Constitution.

Parliament is on the verge of passing the General Laws (Statutory Bodies and Gender Parity Provisions) Bill that seeks to ensure gender parity in statutory bodies. This complements the Public Entities Corporate Governance Act that seeks to achieve gender equality in public appointments. These two laws are critical in enabling women to participate in statutory and public entities concerned with regulating the mining sector. The question is, what relationship can be consummated between the Gender Commission and the judiciary for the purposes of better serving Zimbabwean society in gender parity and women’s rights issues.

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<sup>6</sup> See for instance *DARE & 3 Others v. Saunyama & 3 Ors*, CCZ 9/2018, where the Constitutional Court held that section 27 of the Public Order and Security Act [Chapter 7:11] is unconstitutional, but suspended the declaration of constitutional invalidity of section 27 of the Public Order and Security Act for six months, giving the state ample time to amend the provision before the declaration becomes valid (in effect, striking down the impugned provision).

<sup>7</sup> See for instance the case of *Loveness Mudzuru & Ruvimbo Tsopodzi v. Minister of Justice, Legal & Parliamentary Affairs N.O; Minister of Women’s Affairs, Gender & Community Development & Attorney General of Zimbabwe*, CCZ12/2015.

<sup>8</sup> 1984 (2) ZLR 112 (S).

<sup>9</sup> See *Magaya v. Magaya*, Judgment No. S.C. 210/98.

## 7 A Feeder System between the Judiciary and the Gender Commission

The Gender Commission is established in terms of section 245 of the Constitution. It is one of the so-called ‘independent commissions’ supporting democracy found in Chapter 12 of the Constitution. The general objectives of all these commissions includes supporting and entrenching democracy, promoting constitutionalism and ensuring that injustices are remedied.<sup>10</sup> Without doubt, the objective of achieving gender equality is inherent in each of these objectives.

Gender inequality is a social and cultural injustice suffered by women in Zimbabwe, and it must be addressed. In addressing it, the commissions will be promoting constitutionalism, since gender equality is a core human rights objective to be promoted through enforcement, application and giving effect to various provisions of the Constitution, including the equality clause. On the other hand, the judiciary’s role is circumspect; the judiciary is “paramount in safeguarding human rights and freedoms and the rule of law”.<sup>11</sup> Further, the courts have an obligation to not only give effect to the rights and freedoms in the Constitution, but also to promote the values and principles underlying the Constitution, and these values are based on justice, human dignity, equality and other values in section 3 discussed above.<sup>12</sup> This function is integral to constitutionalism and human rights protection. Clearly, any constitutional relationship between the Gender Commission and the judiciary made for purposes of giving effect to these ideals will always be noble.

The question this begs is what sort of relationship can be envisaged. Can the judiciary rely on the Gender Commission for anything to enhance the discharge of its mandate, and vice versa?

### 7.1 Giving Legal Effect to the Gender Commission’s Findings in Courts of Law

The Gender Commission is critical to the rule of law, gender equality and constitutionalism in Zimbabwe. It monitors issues concerning gender equality and also investigates possible violations of gender rights. The reports it makes must be taken seriously, and the government must strive to implement its findings and recommendations. These reports touch on important issues such as customary marriages, inheritance, succession, children rights, women’s rights, gaps and flaws in the implementation of gender laws, gender violence, and sexual and reproductive health.<sup>13</sup> In adopting this approach, the Gender Commission will be in good company. In the South African case of *S v. Jordan and Ors*,<sup>14</sup> the courts admitted that:

In determining whether the discrimination is unfair, we pay particular regard to the affidavits and argument of the (South African) Gender Commission. It is their constitutional mandate to protect, develop, promote respect for and attain gender equality. This Court is of course not bound by the Commission’s views but it should acknowledge its special constitutional role and its expertise. In the circumstances, its evidence and argument that section 20(1)(a) is unfairly discriminatory on grounds of gender reinforces our conclusion.

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<sup>10</sup> See section 233 of the Constitution.

<sup>11</sup> Section 165(1)(c) of the Constitution.

<sup>12</sup> See section 46(1)(a) and (b)

<sup>13</sup> See important cases such as *Magaya v. Magaya*, (1999) 3 L.R.C 35, 40 (Zimb. Sup. Ct.) and *Katekwe v. Muchabaiwa*.

<sup>14</sup> CCT31/01.

Indeed, in that case, the Court accepted the need to be guided by its own analysis and conclusions, but did not miss the opportunity to acknowledge the ‘reinforcement’ given by the Gender Commission. This approach is plausible and must define the relationship between the Zimbabwe Gender Commission and the judiciary.

## **7.2 The Gender Commission and Rights Enforcement**

The Gender Commission is also granted an advisory role by the Constitution. One of its mandates is to advise public and private institutions “on steps to be taken to ensure gender equality”. The institutions envisaged here encompass all agencies and institutions of the state and other private bodies. This role is important in rights enforcement and implementation. In terms of section 85(3)(d) of the Constitution, persons (including juristic persons or organisations) have a right to appear, with the leave of court, as *amicus curiae* (a friend of the court). As a specialised commission overseeing gender equality, the Gender Commission must always take the opportunity to appear in court where relevant issues are being adjudicated such as inheritance, succession, customary marriages or gender violence. In the *Jordan* case above, four organisations with an interest in gender equality appeared as *amicus curiae*.<sup>15</sup> Such an appearance may be based on invitation or application, following the relevant rules of law.<sup>16</sup>

## **7.3 The Gender Commission and Public Interest Litigation**

The *locus standi* provisions of the Constitution have been broadened to provide that institutions such as the Gender Commission can approach the courts for the enforcement of other people’s human rights. In terms of section 85(1), the Gender Commission can approach the courts acting in its own interests, or on behalf of another person who cannot act for themselves or acting in the public interest. The qualification is that the Commission needs to demonstrate that a fundamental right or freedom enshrined in the Declaration of Rights is being or is likely to be infringed.

It has to be admitted that this approach may be envisaged in the strategy of the Gender Commission, but remains to be implemented to the benefit of society. Using these provisions, the Gender Commission can compel government agencies and other non-state organisations to abide by certain standards that promote and enhance gender equality. These areas include religious practices, customary and cultural practices, the conduct of elections and the allocation and distribution of natural resources.

The options canvassed in this paper are not far-fetched or being discussed for the first time. In fact, evidence of complementarities abound in relation to constitutional bodies in Zimbabwe. One example suffices. In its *Preliminary Election Monitoring Report on the 2018 Harmonised Elections*, the Zimbabwe Gender Commission recommended as follows:

- In future elections, ZEC (the Zimbabwe Electoral Commission) should improve on infrastructure set-up and provisions at polling stations to take into consideration gender differences and basic needs.
- ZEC should also review its approach to the recruitment of short-term election staff through existing institutions and take measures to ensure gender balance across all levels.

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<sup>15</sup> These were the Commission on Gender Equality, Centre for Applied Legal Studies, the Sex Workers Education and Advocacy Taskforce and the Reproductive Health Research Unit.

<sup>16</sup> See section 85 (3) (d) of the Constitution.

Since the Commission has the additional power to recommend affirmative action initiatives, it can indeed engage in progressive consultative dialogue with the Zimbabwe Electoral Commission for the improvement of electoral infrastructure and to enhance its staff recruitment policy. In the event that the Commission is of the opinion that there is evident reluctance by the Zimbabwe Electoral Commission to undertake those reforms, there is nothing that can hinder the Gender Commission from approaching the courts and seeking an order urging them to undertake those reforms before the next elections.

#### **7.4 Research Feeder System**

For grounded judgments that speak to lived realities in society, it is strongly recommended that the courts make use of reports, submissions and other literature, information and discourses produced by the Gender Commission in judicial adjudication and dispute resolution of cases involving gender issues. The increasing complexity of society and legal disputes requires the judiciary to be well informed about the fluid developments in law and social practice. The Gender Commission can interact with the judiciary by constantly generating research which the judiciary can use in relevant cases. The research function of the Gender Commission is provisioned for in the Constitution, and there is no doubt that such research can be critical in adjudication, law reform and legislative review. The research findings can guide judicial action and interpretation of the law. Modern judiciaries the world over rely on such research in guiding their decision making, and the Zimbabwean judiciary has lagged in this area.

#### **7.5 The Gender Commission and the Specialist Courts**

The face of Zimbabwean courts is rapidly changing, with a move towards specialist courts gaining momentum. At present, there exist the Children's Court (Juvenile Court), the Family Court, and a special court division in the Magistrates Court called the Victim Friendly Unit, the Labour Court and the mooted Commercial Court. To enhance their relevance in Zimbabwe's legal system, the Gender Commission must interact with these courts since they deal with issues central to gender inequality in Zimbabwe. The interaction may include feeding them with relevant cutting-edge research on issues within its purview, acting as *amicus curiae* and making recommendations that would enhance gender equality.

### **8 Conclusion**

The establishment of the Gender Commission is a confirmation of the existence of gender inequality and women oppression in Zimbabwean society. Since the Commission is a new actor in Zimbabwe's constitutional framework, its relevance must be emphasised. It cannot discharge its mandate on its own but must interact with pre-existing institutions and complement their work. There is potential for the Gender Commission to consummate these relationships with the judicial courts for the benefit of gender equality and other human rights outcomes. This paper has outlined a few opportunities that must be utilised, but there is no doubt that the Gender Commission has the capacity to generate and implement a range strategies and approaches. By so doing, it can remain relevant, useful and necessary in the realisation and promotion of gender equality in Zimbabwe.