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*Final Papers of the 2016 National Symposium
on the Promise of the Declaration of Rights
under the Constitution of Zimbabwe*

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Final Papers of the 2016 National Symposium on the Promise of the Declaration of Rights under the Constitution of Zimbabwe

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Preface

The papers contained herein are the final papers from the 2016 National Symposium on the Promise of the Declaration of Rights under the Constitution of Zimbabwe, held at Cresta Lodge, Harare, Zimbabwe, on 5 December 2016, under the Zimbabwe Human Rights Capacity Development Programme (hereinafter ‘Zimbabwe Programme’). As to their substantive content, they analyse and expand upon the following topics: the interpretation clause of Zimbabwe’s Declaration of Rights; protection of women against violence in Zimbabwe; the constitutional state and traditionalism; and traditional leadership, customary law and access to justice.

The overall objective of the Zimbabwe Programme is: *to contribute to enhanced enjoyment of constitutional rights in Zimbabwe, through legislation, policies, practices and decision-making being increasingly informed by international human rights standards and principles*. Its main implementing partners at the time of writing are: Raoul Wallenberg Institute of Human Rights and Humanitarian Law (hereinafter ‘RWI’) at Lund University, Sweden; Centre for Applied Legal Research (hereinafter ‘CALR’) in Harare, Zimbabwe; College of Business, Peace, Leadership and Governance at Africa University in Mutare, Zimbabwe; Faculty of Law at Midlands State University in Gweru, Zimbabwe; Herbert Chitepo School of Law at Great Zimbabwe University in Masvingo, Zimbabwe; Faculty of Law at University of Zimbabwe in Harare, Zimbabwe; Faculty of Law at Ezekiel Guti University in Bindura, Zimbabwe; and Zimbabwe Human Rights Commission. The Zimbabwe Programme is supported by Swedish development cooperation.

The national symposium is an annual event under the Zimbabwe Programme. It is co-organised by RWI together with the academic partner institutions and CALR, and is a forum where research funded and conducted during the year is packaged and presented before an audience representing diverse sectors of Zimbabwean society, thereby allowing the presenters and participants to in plenary engage in vibrant discussions around the topics at hand and together deliberate on the way forward with regard to critical human rights reform issues. The feedback and experiences shared during the national symposium also aid and feed into the preparation of final papers for publication and dissemination. In addition to the just said, the papers contained herein have undergone a peer review process with the reviewers’ feedback taken into account so as to improve their overall quality.

With that said, RWI would like to conclude by thanking the researchers for their hard work and determination, which resulted in these final papers that make up this collection. RWI would also like to thank Swedish development cooperation for supporting the research, and thereby ensuring it saw the light of day. Finally, it is RWI’s sincere wish that you, the reader, find these papers thought-provoking and informative as well as an eventual source of inspiration and guidance in your own potential efforts towards furthering the provisions contained in the 2013 Constitution of Zimbabwe and its comprehensive Declaration of Rights.

About the Raoul Wallenberg Institute:

The Raoul Wallenberg Institute, based in Lund, Sweden, is a research and academic institution with offices, programmes and convening power covering 40 countries. RWI combines evidence-based human rights research with direct engagement in close collaboration with its partners to bring about human rights change for all. The Institute is named after Raoul Wallenberg, the Swedish diplomat who saved tens of thousands of Jews and other people at risk in Hungary at the end of World War II.

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Constitutional Analysis of the Interpretation Clause of the Zimbabwean Declaration of Rights

*Admark Moyo**

1 Introduction

The interpretation of fundamental human rights and freedoms is an important aspect of constitutional law. If rights are wrongly or narrowly interpreted, citizens will not adequately enjoy what is constitutionally due to them. The interpretation clause is part of the Declaration of Rights (DoRs) in the Zimbabwean Constitution. It provides courts, legal practitioners, law- and policy-makers with guidance on how to interpret the provisions of both the DoRs and Acts of Parliament. To give appropriate meaning and content to the rights and freedoms set out in the DoRs, it is important to ensure that human rights are interpreted in a way that pays homage to the letter and spirit of the interpretation clause.

Constitutional analysis under the now defunct Lancaster House Constitution (LHC) was carried out in a haphazard manner as there was no interpretation clause that stipulated, in a comprehensive manner, how courts had to interpret the provisions of the DoRs. The interpretation clause in the new DoRs requires and anticipates huge transformation in the way courts and other decision-making bodies should interpret and limit the fundamental rights and freedoms protected in the Constitution. Yet, the interpretation clause has not been subjected to scholarly analysis since the adoption of the current Constitution, and judicial officers each approach constitutional interpretation in their own way, sometimes without any reference whatsoever to the interpretation clause. This creates a huge gap between the aspirations of the drafters of the Constitution and the way in which legal practitioners, judges and other state institutions approach the interpretation of the constitutional rights. In the absence of scholarly work on the scope of the interpretation clause, legal practitioners and the courts are facing challenges on how to flesh out the meaning of fundamental rights and freedoms. This research attempts to fill in this gap.

This paper explores the reach of various theoretical models and approaches to constitutional interpretation and examines the interpretation clause with a view to establishing the extent to which the Constitution reproduces some of these theoretical models. This includes an analysis of the scope of the interpretation clause and how the DoRs or statutory laws ought to be interpreted in light of the same clause. The paper also analyses whether international law has, from time to time, been consistently applied to specific fact situations that come before domestic courts as is required by section 46(1)(c) of the Constitution.

Given that the Constitution stipulates that international law should play an important role in the interpretation of the rights in the DoRs, it is also important to explore the functions actually performed by international law in the interpretation of rights. To this end, the significance of the proposed research lies in the fact that it explains the meaning of the provisions governing the relationship between national law and international law, thereby enabling the courts to take full advantage of the interpretation clause (section 46(1)–(2)) and sections 326(2) and 327(6) of the Constitution. Lawyers and the courts may not take full advantage of the interpretation clause if the scope of its provisions has not been fully explored. This places the analysis of the interpretation clause in a position of practical relevance to not only lawyers and judges, but also

to the overall goal of ensuring that the jurisprudence of the local courts is strongly influenced by international legal norms and standards.

Equally compelling is the fact that the interpretation clause introduces new interpretive guidelines which were not part of the DoRs analysis under the LHC. For instance, the interpretation clause requires courts and other decision-making bodies to pay due regard to the national objectives set out in Chapter 2 of the Constitution and to be guided by the founding values when interpreting provisions in the DoRs. These new provisions entrench new ideas, norms and values which should inform constitutional interpretation. If these norms and values are to influence the way our courts interpret human rights, it is necessary for these provisions to be unpacked so that courts and lawyers are aware of both the tools of constitutional analysis and their peremptory obligations when interpreting the provisions of the DoRs.

2 Models of Interpretation

2.1 *The Role of the Constitutional Text – Grammatical Interpretation*

The constitutional text is the starting point for determining the meaning and scope of the provisions entrenching fundamental human rights and freedoms. Where the words of the Constitution are clear and unambiguous, the courts ought to give effect to them. In *State v. Zuma*,¹ Kentridge, J.A. had the following to say about the role of the text in the interpretation of constitutional provisions:

While we must always be conscious of the values underlying the Constitution, it is nonetheless our task to interpret a written instrument. I am well aware of the fallacy of supposing that general language must have a single 'objective' meaning. Nor is it easy to avoid the influence of one's personal intellectual and moral preconceptions. But it cannot be too strongly stressed that the Constitution does not mean whatever we might wish it to mean. We must heed Lord Wilberforce's reminder that even a constitution is a legal instrument, the language of which must be respected. If the language used by the lawgiver is ignored in favour of a general resort to 'values' the result is not interpretation but divination ... I would say that a constitution 'embodying fundamental rights should *as far as its language permits* be given a broad construction'.²

These remarks underline the danger associated with utter disregard of the constitutional text, especially the fact that if judges would interpret rights to mean whatever they wish them to mean then they are given a licence to ignore the words that embody the spirit of the Constitution. Kentridge emphasises the fact that constitutional interpretation must be grounded in the letter of the Constitution and the letter draws the boundaries of a possible interpretation.

However, constitutional interpretation often requires more than simply according words their literal or ordinary grammatical meaning. Most, if not all, of the substantive provisions entrenching human rights are couched in overly abstract and open-ended language, thereby leaving wide room for the courts to formulate wide formulations about the meaning and scope of these provisions. As a result, constitutional interpretation necessarily entails more than locating the ordinary literal meaning of the provisions under scrutiny. This explains why the interpretation clause envisages the role of many other factors in interpreting the provisions of the DoRs, not just the text protecting the right in question. Section 46(1) of the Constitution stipulates that when interpreting provisions in the DoRs, every court, tribunal or forum must, among others, give full effect to the rights or freedoms set out in the Declaration; take into account international law; pay due regard to all the provisions of the Constitution, in particular the principles and objectives set out in Chapter 2; and promote the values and principles that underlie a democratic

¹ 1995 (2) SA 642 (CC) para. 17.

² Paras. 17 and 18.

society based on openness, justice, human dignity, equality and freedom, and in particular the values and principles set out in section 3(1) and (2) of the Constitution.

In instances where exclusive resort to the text of the Constitution does violence to the relevance of other factors enumerated in the interpretation clause, it is a constitutional imperative for the courts to depart from the literal approach and to have regard to other factors which define the scope of the constitutional right in question. This means that even when there is an apparently self-evident literal meaning to be accorded to a particular constitutional provision, the proper interpretation of the provision may involve looking beyond that meaning. In *S v. Makwanyane*,³ the Constitutional Court of South Africa underscored the idea that “whilst paying due regard to the language that has been used, [an interpretation of the Bill of Rights must be] generous and purposive and give ... expression to the underlying values of the Constitution”.⁴ Value-based constitutional interpretation does not, however, mean that courts should ignore evident and plain meanings that should be accorded to the text of substantive provisions, but that courts should flesh out meanings that are consistent with the broader imperatives of the Constitution. Accordingly, a literal meaning of the text should be regarded as an appropriate interpretation if it is consistent with a generous and purposive interpretation which promotes the values that underlie the Constitution.

2.2 Systemic Interpretation

The idea of systemic interpretation presupposes that all the laws of a particular country constitute a consistent system of rules, principles and norms. It is premised on the assumption that although the law is fragmented, decentralised and contained in different sources, all the new rules are made with an awareness of the existing rules.⁵ In the international law context, it has been observed that the principle of systemic interpretation assumes and reinforces the formal unity of the legal system.⁶ At the domestic level, systemic interpretation essentially means that all the sources of law – from the Constitution to legislation, the common law and judicial precedent – constitute one legal system and the obligations they impose on citizens and the state must be interpreted and performed holistically. Given that our constitutional state is founded on the doctrine of the supremacy of the Constitution, legislation may not be interpreted in a manner that does not pay homage to the provisions of the Constitution.

In the context of constitutional interpretation, the idea of systemic interpretation suggests that the whole Constitution should be interpreted as creating a single unitary system targeted at achieving certain social, political and economic goals. As is shown below, the Constitution mandates systemic interpretation by requiring courts to have regard to all provisions of the Constitution, including national objectives, when interpreting fundamental rights and freedoms.⁷ Similarly, the obligatory constitutional duty of the courts to take international law into account when interpreting the provisions of the DoRs also tends to suggest that the drafters of the

³ 1995 (3) SA 391 (CC).

⁴ Para. 9.

⁵ J. D’Aspremont ‘The Systemic Integration of International Law by Domestic Courts: Domestic Judges as Architects of the Consistency of the International Legal Order’, in O. K. Fauchald and A. Nollkaemper (eds.), *The Practice of International and National Courts and the (De-)Fragmentation of International Law* (2012) 141, 148.

⁶ P. Sands, ‘Treaty, Custom and the Cross-Fertilization of International Law’, 1 *Yale Human Rights & Dev Law Journal* (1998) 85, 95. See also Article 33(1)(c) of the Vienna Convention on the Law of Treaties (VCLT) which provides for an interpretation of treaties that takes into account “any relevant rules of international law applicable in relations between the parties”.

⁷ See section 3.2 of this paper.

Constitution intended international law and domestic law to be construed as forming the bedrock of a unified legal system with provisions to be interpreted as part of one system.

2.3 *Evolutive Interpretation*

Dynamic or evolutive interpretation supposes that where important social and technical changes have occurred, then past legal doctrines laid out in judicial precedent should also change along the same lines.⁸ In *Tyrer v. United Kingdom*, the European Court on Human Rights (ECtHR) was called upon to determine whether the practice of corporal punishment in schools was consistent with the European Convention of Human Rights (ECHR).⁹ In its consideration of the matter, the ECtHR emphasised that it had to “recall that the Convention is a living instrument which ... must be interpreted in the light of present-day conditions ... The Court cannot but be influenced by the developments and commonly accepted standards in ... the Member States of the Council of Europe.”⁹ Ultimately, the Court considered corporal punishment to be inconsistent with the prohibition of degrading and inhuman treatment or punishment which is enshrined in the ECHR. After *Tyrer v. United Kingdom*, the ECtHR relied on evolutive interpretation to expand the meaning and reach of the provisions of the ECHR to other areas of the law.¹⁰ The importance of evolutive interpretation for the effective protection of human rights has been emphasised by the former president of the ECtHR, Luzius Wildhaber,¹¹ and other scholars of European Union law.¹²

Evolutive interpretation becomes an effective tool for the realisation of human rights as the treaty or constitution being interpreted comes of age. This is because the circumstances to which the treaty or constitution in issue was originally designed to govern often change over time, and it becomes necessary for the courts to be flexible enough to accommodate emerging values and social goals. To this end, it has been argued that the doctrine of dynamic interpretation affords a necessary degree of flexibility to constitutional and treaty law, thereby allowing courts to adapt the law to rapidly changing socio-political and economic environments.¹³ This argument has been made powerfully in the context of European Union law where Dzehtsiarou, relying on earlier academic scholarship, makes the following remarks:

The ECtHR can hardly avoid using evolutive interpretation if it wishes to maintain the effectiveness of the ECHR. Contemporary Europe represents a different landscape in terms of human rights protection compared with 60 years ago. Application of the standards adopted during the early years of the ECHR would have resulted in turning it to an instrument of stagnation ... The rudimentary form nature of the ECHR provisions and the age of the instrument have acted as the main driving forces behind an evolutionary interpretation.¹⁴

⁸ See *Christine Goodwin v the United Kingdom*, 35 Eur.Ct.H.R 18 (2002), at para. 74.

⁹ *Ibid.*, at para. 183.

¹⁰ The doctrine of evolutive interpretation was explored in relation to the meaning of article 3 of the ECHR in the context of the death penalty in *Soering v. the United Kingdom*, Eur. Ct. H.R 403 (1989), at para. 104, and in relation to the definition of torture in *Selmouni v. France*, 29 Eur. Ct. H.R 403 (2009), at para. 101. See also *Kress v. France*, VI, Eur. Ct. H.R. (2001), at para. 70; *Stafford v. the United Kingdom*, 35 Eur. Ct. H.R 32 (2002), at para. 68 applying evolutive interpretation in the context of the right to liberty and security of the person (Article 5 of the ECHR), *Niemietz v. Germany*, 251B Eur. Ct. H.R (Ser A) (1995), at para. 29; and *Halford v. the United Kingdom*, 32 Eur. Ct. H.R (1997), at paras. 42–46.

¹¹ L. Wildhaber, ‘European Court of Human Rights’, 40 *Canadian Yearbook of International Law* (2002) 310.

¹² See G. Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (2009) 79.

¹³ See M. Varju ‘Transition as a Concept of European Human Rights Law’, *European Human Rights Law Review* (2009) 170, 172.

¹⁴ See K. Dzehtsiarou, ‘European Consensus and the Evolutive Interpretation of the *European Convention on Human Rights*’, 12:10 *German Law Journal* (2011) 1730, 1732. See also C. Rozakis, ‘The European Judge as Comparativist’, 80 *Tulane Law Review* (2005) 257, 260–261.

Whilst these remarks could have been relevant to the interpretation of the provisions of the LHC, their relevance to the interpretation of a new Constitution which is, at the time of writing, less than five years of age, may be doubtful. The LHC governed the exercise of public power and the enjoyment of human rights for close to 33 years and was amended 19 times before its repeal by the new Constitution of 2013. As such, the doctrine of evolutive interpretation could have, had the judges been aware of it, played an important role in construing the previous Constitution in a manner consistent with contemporary developments for over three decades, but the challenge confronting the courts today concerns the scope and meaning of the provisions of the Constitution rather than whether the courts' approach to it is evolutive or dynamic. Nonetheless, dynamic interpretation will become an issue as the Constitution becomes of age and challenges begin to arise.

One of the key challenges confronting dynamic interpretation, as a doctrine or an approach, is whether it is legitimate for the courts to develop new interpretations of constitutional provisions, sometimes contrary to what the legislature might have originally intended. To begin with, judicial decisions built on the idea of dynamic interpretation may amount to no more than legislative or executive decision-making which ordinarily is the preserve of the political organs of the state. Courts have wide latitude to bypass the sovereign consent of the political organs of the state and to engage in counter-majoritarian conduct, sometimes on controversial issues, in the name of evolutive interpretation. Accordingly, the courts may rely on the doctrine to justify law reforms that are far beyond the social or cultural changes that are taking place in political communities. Further, counter-majoritarian concerns also surface in the process of locating the appropriate time for an evolution.¹⁵ If the judiciary is liberal and overly activist, there is a great likelihood that liberal judges will rely on dynamic interpretation to justify reforms which put the law ahead of its own people.

Another challenge is that dynamic interpretation undermines the consistency of the legal system, pays little regard to the system of judicial precedent and negates such core values and principles of a common law legal system as equality, uniformity, legal certainty and predictability. In the end, the legitimacy of judicial decisions is severely undermined when judges have the freedom to move from one interpretation to another in the name of legal dynamism. Besides, it is difficult to determine at what point exactly a society acquires consensus over change of values or goals. Even in instances where such change is concretely determined, there is a real risk of suppressing the rights and interests of minorities within majorities or minorities within minorities.

If it is to mirror consensus over changing values, evolutive interpretation may not be based on the understanding of minorities, but on the beliefs and values that are revered by the majority. In *Sheffield and Horsham v. the United Kingdom*,¹⁶ the ECtHR had to determine the failure to change birth certificates after gender reassignment surgery constituted an infringement of Article 8 of the ECHR. In addressing this question, the Court was at pains to emphasise that it could not depart from the existing case law because, for it, transsexualism gives rise to multiple and complex scientific, legal, moral and social issues in respect of which there existed no generally shared approach among members of the European Union.¹⁷ However, the same question arose from similar facts in *Christine Goodwin v. the United Kingdom*¹⁸ and the Court overturned its prior decision

¹⁵ See generally L. B. Tremblya, 'General Legitimacy of Judicial Review and the Fundamental Basis of Constitutional Law', 23 *Oxford Journal of Legal Studies* (2003) 525, 525 and J. Waldron, 'The Core of the Case Against Judicial Review', 115 *Yale Law Journal* (2006) 1346.

¹⁶ Eur. Ct. H.R (1998).

¹⁷ *Ibid.*, para. 58.

¹⁸ 35 Eur. Ct. H.R (2002) 18.

by holding that there was a ‘continuing international trend’ towards the recognition of the rights of transsexuals.¹⁹

2.4 Purposive/Teleological Interpretation

Purposive interpretation revolves around fleshing out the values that underpin enumerated human rights and freedoms – especially the founding values of the Constitution – and then to give an interpretation that best promotes those values. Often, this implies a broad and value-based approach to fleshing out the meaning of constitutional texts. At the heart of purposive interpretation is the idea that a Constitution is a living document *sui generis* (of its own kind) designed to address deep social and political problems which are mirrored by an unequivocal commitment to new values and political goals. In *Government of the Republic of Namibia and Another v. Cultura 2000 and Another*,²⁰ the Court held that “[a] Constitution is an organic instrument. Although it is enacted in the form of a statute it is *sui generis*. It must broadly, liberally and purposively be interpreted so as to avoid ‘the austerity of tabulated legalism and so as to enable it to continue to play a creative and dynamic role in the expression and the achievement of the ideals and aspirations of the nation, in the articulation of the values bonding its people and in disciplining its Government’.”²¹ Accordingly, the meaning of rights and freedoms should be construed in light of both the purpose for which the right or freedom became part of the DoRs and the values upon which our constitutional state is founded. In *R v. Big M Drug Mart Ltd*,²² the Canadian Supreme Court made the following seminal remarks:

The meaning of a right or freedom guaranteed by the Charter was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect. In my view, this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought, by reference to the character and larger objects of the Charter itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter. The interpretation should be ... a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the Charter’s protection.

The purposes for which various rights were included in the Constitution play an important role in determining the scope of the provisions entrenching these rights. For instance, it is impossible to justify the practice of hate speech against a particular racial or ethnic group on the basis of the right to freedom of speech and expression. This is because the purpose behind protecting free speech and expression is not to incite racial or ethnic hatred between various social groups. Yet, the same rights can be justifiably relied upon by an individual seeking to criticise the government for adopting policies which they consider to be unreasonable or unfair. Moreover, at a general level, a right that has the purpose of protecting interest A may not be violated by conduct which infringes upon a right designed to protect interest B that underlies another right. This general statement is subject to the caveat that the courts should be mindful that at a much broader level the protection of fundamental human rights serve one ultimate purpose – hence the principle that all rights are indivisible, interrelated, interconnected and mutually reinforcing.

2.5 Generous Interpretation

There is a tendency, even from top courts in developed countries, to conflate two methods of constitutional interpretation, namely generous and purposive interpretation. Whilst these two

¹⁹ At para. 85.

²⁰ (1994) (1) SA 407.

²¹ *Ibid.*, at 418.

²² 1985 18 DLR (4th) 321, 395–396.

methods of interpretation may have overlaps and have ordinarily been construed to mean one thing, they are not necessarily the same. The Privy Council has, on numerous occasions, indicated that “the language of a Constitution falls to be construed, not in a narrow and legalistic way, but broadly and purposively, so as to give effect to its spirit, and this is particularly true of those provisions which are concerned with the protection of human rights”.²³ The term ‘generous’ should be viewed as an invitation to judges to avoid interpreting constitutional provisions in a narrow and restrictive manner. This represents a departure from formalism, literalism and intentionalism. A constitution should be interpreted in a flexible and liberal way. Thus, ordinary rules of statutory interpretation must give way to a more adaptable and flexible method when it comes to locating the scope of constitutional provisions.

Generous interpretation of constitutional provisions entails the development of new principles of construction, different from those developed in relation to the ordinary interpretation of statutes.²⁴ In the words of Lord Wilberforce, a generous interpretation does not only avoid “the austerity of tabulated legalism”, but is also amenable to giving an “individual the full measure of the fundamental rights and freedoms” entrenched in a constitution.²⁵ A constitution is drafted in broad and general terms which lay down principles of width and generality applicable to different contexts. As such, it should not be narrowly and simply construed in the way that an ordinary statute drafted to govern a specific issue is construed.

A constitution requires its interpreters to approach it with less rigidity, greater generosity and an awareness of the need to ensure that fundamental rights and freedoms are not unnecessarily unduly circumscribed. As the Privy Council would have it, “the way to interpret a constitution ... is to treat it not as if it were an Act of Parliament, but ‘as *sui generis*, calling for principles of interpretation of its own, suitable to its character ... without necessary acceptance of all the presumptions that are relevant to legislation or private law”.²⁶ As will be demonstrated below, the injunction that courts give full effect to all fundamental rights or freedoms when interpreting the DoRs, demonstrates that the Constitution should be interpreted both systematically and generously. Below is a discussion on the interpretive guidelines enumerated in section 46(1) and (2) of the Zimbabwean Constitution.

3 Interpretive Guidelines Given to Courts When Interpreting the DoRs

3.1 *The Peremptory Obligation to “Give Full Effect to the Rights and Freedoms Enshrined in” the DoRs*

Section 46(1)(a) imposes on courts an obligatory duty to “give full effect to the rights and freedoms enshrined in” the DoRs. An approach that gives full effect to the rights and freedoms entrenched in the Zimbabwe Constitution echoes the elements of a generous interpretation of the constitutional provisions. Section 46(1)(a) requires courts to give full effect to the rights and freedoms enshrined in Chapter 4 (*i.e.* the DoRs) of the Constitution. This is an interpretation in favour of rights and against their restriction. Courts must be particularly sensitive to the impact which the exercise of judicial functions may have on all the rights of individuals who appear before them, especially the weak and the most vulnerable. In order to do so, the DoRs must be

²³ *A-G of Trinidad and Tobago v. Whiteman* (1991) 2 AC 240, 247. See also *A-G of The Gambia v. Momodou Jobe* (1984) AC 689, 700, where the Court held that “a constitution, and in particular that part of it which protects and entrenches fundamental rights and freedoms to which all persons in the state are to be entitled, is to be given a generous and purposive construction”.

²⁴ R. Clayton, H. Tomlinson and C. George, *The Law of Human Rights* (2000), 112–113, para. 3.11.

²⁵ *Minister of Home Affairs v. Fisher* (1980) AC 319 PC, 328.

²⁶ *Ong Ah Chuan v. Public Prosecutor; Koh Chai Cheng v. Public Prosecutor* (1981) AC 648.

interpreted broadly so as to give expression to the underlying values of the Constitution in light of the context and purpose of the provision. This will make it possible for courts to construe provisions of the DoRs in a manner which secures for individuals the full measure of its protection. The entire process involves interpreting the Constitution in a manner that ensures both that no one is left behind and that there is equal protection for all persons.

Courts must avoid the literal approach to constitutional interpretation in favour of that which gives all provisions or rights the full measure of protection they deserve. Another reason for a more generous or broad meaning rather than a narrow one is that the Constitution has a limitation clause. This suggests that a provision in the DoRs should be interpreted as broad as the language permits to ensure that rights are not limited at the point of interpretation. Section 46(1)(a) of the Constitution provides that when interpreting the provisions of Chapter 4, “a court, tribunal, forum or body, must give full effect to the rights and freedoms enshrined in” the DoRs. Like many other positive duties imposed on the courts by the interpretation clause, this duty is framed in peremptory language, thereby implying that all decision-making bodies are obliged to follow the letter of this sub-clause. In addition, the obligatory duty to ‘give full effect’ to all rights and freedoms enshrined in Chapter Four of the Constitution, suggests that courts must determine the scope of all constitutional rights holistically. Accordingly, it is imperative for the courts to take cognisance of the fact that human rights are not discrete silos that may be given content without recourse to the meaning and content of other rights. This approach implies that individual rights ought not to be interpreted in a manner that unnecessarily limits the meaning and significance of the other rights.

In order to ‘give full effect’ to the rights and freedoms entrenched in the whole of Chapter 4 of the Constitution, it is vital for the courts to view different rights not in an oppositional manner, but in a manner that accommodates the notion that all rights are mutually reinforcing and should be read together whenever this is possible. Against this background, it is patent that the interpretation clause codifies the idea that all human rights are, as a matter of principle, indivisible, interrelated and interconnected. It is the indivisibility and interconnectedness of human rights that calls for the holistic interpretation of all the rights that are protected in the DoRs.

More importantly, reference to an interpretation that ‘gives full effect’ to all the rights that are entrenched in the DoRs transcend the historical divides between the so-called generations of rights. In the past, there were three generations of rights in terms of which civil and political rights were dubbed first generation rights. These rights were initially thought to generate negative duties only, although there is adequate evidence, at least now, that civil and political rights generate positive duties on the part of both state and non-state actors. Social, economic and cultural rights were generally referred to as second generation rights and were thought to generate mainly positive obligations, especially on the part of the state, to provide the resources needed to enjoy these rights. Group rights such as the right to self-determination or the rights of linguistic and religious communities were referred to as third generation rights.²⁷ These latter rights were not viewed as important and were generally relegated to the margins of the international legal system. It is clear that the idea of rights created, if not intentionally, a hierarchy of rights in terms of which civil and political rights were viewed as more important and therefore deserving more protection than the other sets of rights. Section 46(1)(a) of the Constitution departs from this rather artificial classification of rights and stipulates that rights should be read holistically if they are to be ‘given full effect’.

²⁷ For a fuller description of generations of rights, *see generally* L. Seafeld, ‘South Africa: The Interdependence of All Human Rights’, in A. A. An-Na’im (ed.), *Human Rights under African Constitutions* (2003) 295.

3.2 The Peremptory Obligation to “Promote the Values and Principles that Underlie a Democratic Society” Based on Founding and Other Values

Section 46(1)(b) of the Constitution provides that when interpreting the provisions of the DoRs, “a court, tribunal, forum or body, must promote the values and principles that underlie a democratic society”. This is a peremptory obligation which requires courts and other decision-making bodies to locate the values and principles which underlie a democratic society and to ensure that the interpretation these bodies give to fundamental rights is consistent with those values and principles. It would seem that the first question under this inquiry is: What are the values which underlie a democratic society? This part of the inquiry is partly answered by the fact that section 46(1)(b) refers to a “democratic society based on openness, justice, human dignity, equality and freedom”. These and other values play an important role in assessing whether a court or other decision-making body has reached a decision which promotes the values which underlie a democratic society. Part of the reason for this claim is that openness, justice, human dignity, equality and freedom are, in themselves, values which underlie a democratic society.

Furthermore, the general claim that courts must promote the values and principles which underlie a democratic society suggests that the values and principles which are mentioned in the interpretation clause merely provide guidelines on the kind of values which underlie a democratic society. Whilst section 46(1)(b) of the Constitution avoids providing an exhaustive list of values and principles, it then underlines the significance of the values and principles upon which the Zimbabwean state is founded. It stipulates that apart from considering ‘openness, justice, human dignity, equality and freedom’ as some of the core values, courts must, in particular, promote the values and principles referred to in section 3(1) and (2) of the Constitution. The founding values and principles referred to in section 3(1) and (2) of the Constitution include, among other things, the supremacy of the Constitution; the rule of law; the nation’s diverse cultural, religious and traditional values; human dignity; equality of all human beings; and good governance. In interpreting rights provisions, courts and other decision-making bodies should promote these values and principles, as a minimum. Where decision-making bodies make decisions that are inconsistent with these values and principles, such decisions ought to be disregarded for want of consistency with the Constitution.

Founding values and principles play a secondary but nonetheless important role in determining the content of rights. This is because the Constitution requires a value-laden approach to the interpretation of rights. Since they entrench normative values and standards, the founding provisions do not create self-standing and enforceable constitutional rights, but merely lay down the principles and values with which all the rights and their interpretation must be consistent. To this end, section 46(1)(b) reproduces the notion that the fundamental human rights and freedoms protected in the DoRs are informed by and give effect to the founding values and principles. As such, courts may not ignore this fact when interpreting and giving effect to all the provisions in the DoRs.

At a more critical level, reference to the “values which underlie a democratic society” imposes on courts the duty to consider the spirit of the Constitution when interpreting the rights in the DoRs. In *New Patriotic Party v. Attorney-General*,²⁸ Francois JSC made the following seminal remarks about the need to respect the spirit of the Constitution:

A broad and liberal interpretation [is necessary] to allow the written word and the spirit that animates it, to exist in perfect harmony ... My own contribution to the evaluation of a Constitution is that a Constitution is the outpouring of the soul of the nation and its precious life-blood is its spirit. Accordingly, interpreting the

²⁸ [1993–1994] 2 GLR 3531.

Constitution, we fail in our duty if we ignore its spirit. Both the letter and spirit of the Constitution are essential fulcra which provide leverage in the task of interpretation. [Judges] are enjoined to go beyond the written provisions enshrining human rights, and to extend the concept to areas not specifically or directly mentioned but which are inherent in a democracy and intended to secure the freedom and dignity of man.²⁹

Values, whether enumerated or not, animate the underlying spirit and philosophy of the Constitution. The idea of unenumerated values and rights implies that in constitutional interpretation there is a place for the unwritten in the written Constitution. These values represent the spirit of the Constitution.³⁰ As Francois JSC would have it, “it is the proper attainment of these silences that provide the measure of understanding the basic constitutional concepts of the fundamental law”.³¹ In *Agyei Twum v. Attorney-General and Akwetey*,³² Date-Baj JSC held as follows:

It has to be remembered that there is room for the *unwritten in the written constitution*. The fact that a country has a written constitution does not mean that only its letter may be interpreted. The courts have the responsibility for distilling the spirit of the Constitution, from its underlying philosophy, core values, basic structure, the history and nature of the country’s legal and political system etc, in order to determine what implicit provisions in the written constitution flow exorably from this spirit.³³

Thus, if the letter of the does not explicitly authorise a particular form of interpretation, then the spirit of the Constitution as embedded in its unwritten architecture permits the courts to derive meaning from the underlying values of the Constitution. When interpreting statutory provisions, the courts are allowed to engage models of reasoning that might be considered, from the theoretical point of literalism and intentionalism, to be outside the text of the statute or to be remedying problems in the text or filling gaps in the text. Perhaps the most inspirational remarks about the centrality of the underlying values or spirit of the Constitution were made by Francois JSC in *Kuenyehia v. Archer*,³⁴ where he held as follows:

Any attempt to construe the various provisions of the Constitution ... must perforce start with awareness that a constitutional instrument is a document *sui generis* to be interpreted according to principles suitable to its peculiar character and necessarily according to the ordinary rules and presumptions of statutory interpretation. It appears that the overwhelming imperatives are the spirit and objectives of the Constitution itself, keeping an eye always on the aspirations of the future and not overlooking the receding footsteps of the past. It allows for a liberal and generous interpretation rather than a narrow legalistic one. It gives room for a broader attempt to achieve enlightened objectives and tears apart the stifling straight jacket of legalistic constraints that grammar, punctuation and the like may impose.³⁵

All the values upon which the nation-state is founded play an important role in promoting the achievement of an egalitarian or just society. They are broadly designed to respond to the socio-economic challenges confronting citizens, especially those living on the margins of society and to ensure that the government is anchored on such timeless principles as democracy and the rule of law. Founding values are largely shared by the generality of the entire population and transcend social divisions based on race, gender, political affiliation and other prohibited grounds of discrimination. The fact that values prescribe how state functionaries and key government institutions or agencies are to perform public functions and to exercise public power underlines

²⁹ At 79–80.

³⁰ See *Asare v. Attorney General* [2003–2004] 2 SCGLR 823, 835–836, where Date-Bah held that “the spirit to which Sowah JSC refers is another way of describing the unspoken core underlying values and principles of the Constitution. Justice Sowah enjoins us to have recourse to this spirit or underlying values in sustaining the Constitution as a living organism”.

³¹ See *New Patriotic Party v. Attorney-General*, 84.

³² [2005–2006] SCGLR 732.

³³ *Ibid.*, 766.

³⁴ [1993–1994] 2 GLR 525.

³⁵ At 561–562.

their importance in shaping public policy and interpreting the DoRs. Constitutional values guide and influence the behaviour of both the state and individuals, including natural and juristic persons. They generally define the aims and purposes of the government, and constitute detailed guidelines to be followed when governing citizens.³⁶

3.3 The Peremptory Obligation to Take into Account International Law and All Treaties and Conventions to Which Zimbabwe is a Party

3.3.1 General Remarks

Regardless of the above mentioned constitutional imperatives, it remains questionable whether all legal practitioners and judges are aware of their obligation to take international law into account when performing their interpretive functions. For those who have read the provisions governing the relationship between international law and domestic law, it may be difficult to determine what it means to take international law into account. Does it mean that international law has persuasive value (if it does, why the provision in the first place, especially given that all sources of law that are not strictly legally binding on the courts have persuasive value?) or does it mean that international law is now part of Zimbabwean law (if it does, why not just provide, as the Constitution of Namibia does, that international law forms part of the law of Zimbabwe?) or does it mean that the force of international law in domestic courts is somewhere between being persuasive authority and mandatory authority (if it does, what exactly does this mean?).

Under the Zimbabwean legal system, international law constitutes both a direct and indirect source of law. International law is a direct source of law in two respects. First, section 326(1) stipulates that customary international law forms part of the law of Zimbabwe unless it is inconsistent with the Constitution or an Act of Parliament. Thus, general principles of public international law need not be incorporated into domestic law by statute for them to be binding on all agencies of government. Customary international law is binding on Zimbabwe as long as there is no domestic statute or constitutional provision providing for the contrary.³⁷ In applying principles of customary international law, courts and other decision-making forums should attempt to reach an interpretation that is consistent with the Constitution or municipal legislation, but if this is not feasible, domestic law will always prevail. Second, section 327(2)(a)–(b) provides that “an international treaty which has been concluded by the President ... does not bind Zimbabwe until it has been approved by Parliament and does not form part of the law of Zimbabwe unless it has been incorporated into the law through an Act of Parliament”.

International law is an indirect source of law in that it aids the courts in their interpretation of the provisions of the DoRs. Many provisions of the Constitution prescribe an important interpretive role for norms of public international law – whether customary in nature or contained in international treaties.³⁸ Section 46(1)(c) imposes on those interpreting the DoRs the peremptory duty to “take into account international law and all treaties and conventions to which Zimbabwe is a party”. This provision leaves the courts with no discretion over whether or not they should consider international law when interpreting constitutional provisions entrenching fundamental rights and freedoms. Section 46(1)(c) also indirectly imposes on practicing lawyers an ethical duty to refer to all applicable laws to ensure that the court is acquainted with the relevant international

³⁶ See G. J. Austin, ‘Constitutional Values and Principles’. in M. Rosenfeld and A. Sajo (eds.), *The Oxford Handbook on Comparative Constitutional Law* (2012) 777, 777. See also M. L. Fernandez Esteban, *The Rule of Law in the European Constitution* (1999) 40–41.

³⁷ For comparative literature, see M. J. Nkhata, *Malawi Country Report*, <http://www.icla.up.ac.za/images/country_reports/malawi_country_report.pdf> (accessed 8 September 2015).

³⁸ See, for example, sections 46(1)(c), 326(2) and 327(6) of the Constitution, which are discussed below.

norms when locating the meaning and scope of the constitutional provision or right in question. There are limited, if any, sections of the DoRs which do not have corresponding provisions at the international level. As such, it is highly likely that the interpretation of constitutional rights almost invariably requires the consideration of equivalent provisions in international law.

The duty imposed on the courts is to ‘take into account’ international law when interpreting fundamental human rights and freedoms. At a general level, the phrase ‘take into account’ means ‘to take consideration of something’ or to ‘pay attention to something’. Accordingly, section 46(1)(c) prescribes that the Court should ‘consider’ the scope of the right in question under international law. As Chisala-Tempelhoff and Bakare would have it, courts are under an obligation “to interpret laws in such a way as to avoid creating breaches [of] international law or international agreements. [In other words], the judiciary must make every effort to take judicial notice of all treaties that are binding on” the country.³⁹ It is debatable whether our Constitution merely requires our courts to “take judicial notice of all treaties that are binding” on Zimbabwe as the duty of the courts is framed in peremptory terms. This suggests an approach that is more than “taking judicial notice of all [binding] treaties”. The duty to ‘take into account’ embraces international law into the domestic legal system, thereby requiring courts to let international law influence the outcome of concrete cases where such law is not inconsistent with statutory or constitutional provisions.

The duty to ‘take into account’ does not, however, mean that the Court is required to interpret the right in exactly the same way it has been interpreted by international courts, treaty-monitoring bodies and other forums. As O’Shea would observe, the duty to ‘consider’ international law “means that an inquiry must be made into the relevant provisions of international law; however they need not necessarily be applied to the particular situation if there are other overriding considerations arising out of other rules of interpretation.”⁴⁰ The position would, however, be different if the Constitution of a particular country – Namibia is a good example – has a provision stipulating that customary international law and all international treaties to which the country is a state party form part of domestic laws and need no domestication for them to be binding on the country in question.

Nonetheless, the phrase must take into account suggests that international law should play more than a persuasive role in the interpretation of fundamental human rights and freedoms. It means that it is inadequate for the court to just have a glance at international law, but for it to genuinely consider its role in the interpretation of the provisions of the DoRs. Accordingly, it will be inconsistent with the Constitution for judicial officers to just cast a ceremonial glance at international law and then proceed to hastily dismiss its relevance to constitutional issues before the courts. Justice Kapindu once made compelling remarks which resonate with the way the Constitution anticipates our courts to approach international law when interpreting rights or legislation. He posited that:

The position ... is that where...a party to a treaty containing provisions that are relevant to the facts of a case at hand, it is peremptory that if a court is interpreting the Constitution, it must demonstrate that it paid due regard to that treaty. The courts, as an organ of the state, will be bound not to act in a manner that defeats the object and purpose of such a treaty in interpreting the Constitution. In cases where the treaty has been domesticated, it will obviously easily be directly enforceable by the courts as part of domestic law.⁴¹

³⁹ See S, Chisala Tempelhoff and S. S. Bakare, ‘Malawi’, in V. O. Ayeni (ed.) *The Impact of the African Charter and the Maputo Protocol in Selected African states* (2016) 149, 153.

⁴⁰ See A O’shea ‘International law and the Bill of Rights’, in Lexis Nexis, *Bill of Rights Compendium* (1996) 7A1, 7A-6, para. 7A2.

⁴¹ Paper presented at the Judicial Colloquium on the Rights of Vulnerable Groups, held at Sunbird Nkopola Lodge, Mangochi, Malawi, 6 and 7 March 2014, available at

Under the Vienna Convention on the Law of Treaties (VCLT), it is imperative that where a state party has signed a treaty without ratifying it, the same state may not act in a manner which is not consistent with the spirit and object of the treaty it has signed. Considering the relevance of international law to matters regulated by domestic law, Mohamed D P, in *Azanian People's Organisation (AZAPO) v. President of the Republic of South Africa*,⁴² held as follows:

The issue which falls to be determined by this Court is whether s 20(7) of the Act is consistent with the Constitution. If it is, the inquiry as to whether or not international law prescribes a different duty is irrelevant to that determination. International law and the contents of international treaties to which South Africa might or might not be a party at any particular time are, in my view, relevant only in the interpretation of the Constitution itself, on the grounds that *the law-makers of the Constitution should not lightly be presumed to authorise any law which might constitute a breach of the obligations of the state in terms of international law*.⁴³

The first two sentences are very dismissive of the role of international law in determining the legality of the statutory provisions under consideration; focussing instead on whether the statute is consistent with the Constitution. Nonetheless, Mohamed, D. P. deserves credit for emphasising that Parliament should not be “lightly presumed to authorise any law” which is inconsistent with international law. This encourages the systemic interpretation of human rights which emphasises the idea that instruments protecting human rights – whether international or domestic in character – should be viewed as a single system targeted at respecting and protecting the full dignity of the human person. Perhaps one of the shortcomings of the interpretation clause is that it does not provide guidelines on how the process of ‘taking into account’ should be conducted and how international legal norms should be read into the DoRs’ interpretive matrix. At common law, there is a presumption that Parliament would not make laws that are contrary to the state’s international obligations.⁴⁴ This common law position appears to have been codified in and expanded upon by the Constitution.

3.3.2 The Principle of Consistent Interpretation

Apart from directing courts to “take international law into account” when interpreting the DoRs, most states usually require judicial officers to construe legislation in a manner that is consistent with their international obligations. This can be an essential method for ensuring that international law becomes ‘the law of the land’ even if it is not incorporated into domestic law. Thus, international law may still have a huge impact on the domestic legal system if local judicial officers interpret domestic legislation by drawing heavily on international human rights law.⁴⁵ Consistent with the notion of systemic interpretation, the Constitution protects a legal construct which may broadly be termed the ‘principle of consistent interpretation’. Under this approach to statutory or constitutional interpretation, the incorporation of international norms is not the sole means by which international law enters the municipal legal order. Accordingly, while international law which has not been incorporated into the domestic legal system does not form

<<http://www.Southernafricalitigationcentre.org/1/wp-content/uploads/2014/12/8.pdf>> (accessed 6 December 2015).

⁴² 1996 1 BHRC 52 (CC).

⁴³ At 65H-66A.

⁴⁴ See generally *Maynard v. The Field Cornet of Pretoria* (1894) SAR 214; *S v. Penrose* 1966 1 SA 5 (N) at 11E-F

⁴⁵ J. D. Aspremont and F. Dopagne, ‘Kadi: the ECJ’s Reminder of The Abiding Divide Between Legal Orders’, *5 International Organizations Law Review* (2008) 371.

part of the land, it may still have the effects of an incorporated treaty if local judges interpret national law by drawing heavily on international law.⁴⁶

The Constitution instructs local courts to construe domestic law in a manner that is consistent with the country's international obligations. This is made possible by the principle of consistent interpretation, a principle in terms of which domestic courts are obliged to interpret domestic law in a manner consistent with international law. As D'Aspremont would argue:

[D]omestic courts are obliged to interpret domestic law in a manner consistent with international law. As a result, they necessarily heed international law and give weight to it in the domestic legal order. As such, the application of the principle of consistent interpretation does not endow international law with a self-executing character in domestic law – the question of the self-executing character of an international legal instrument being chiefly a question of international law rather than a question of domestic law. However, the role that international law can play through interpretation is far from negligible and it surely gives it an indirect effect in domestic law. The principle of consistent interpretation is sometimes a means to bypass missing requirements of incorporation and apply international law short of any measure of incorporation.⁴⁷

The principle of consistent interpretation places on judges a general duty to ensure that they seriously take heed of international law and pay due regard to it in the interpretation of constitutional and statutory provisions under the domestic legal order. As briefly stipulated above, the principle does not only call upon courts to interpret domestic law in a manner consistent with international law, but also to pay heed and give effect to international law. However, the principle of consistent interpretation does not confer on the instrument in question self-executing characteristics of some international treaties, but ensures that international human rights law performs a pivotal role and takes centre stage in the interpretation of domestic legislation affecting the enjoyment of human rights. In addition, the principle may also prove to be useful where counsel or the court wishes to bypass the legal requirements of incorporation and ensure that international law influences the interpretation of domestic legislation without any measure of incorporation.

An accurate reading of the Constitution demonstrates that incorporation is not the 'all or nothing' procedure required for the application of international law in domestic courts. For purposes of the principle of consistent interpretation, there are two relevant constitutional provisions addressing the role of international law in the interpretation of legislation. First, section 326(2) stipulates that "[w]hen interpreting legislation, every court and tribunal must adopt any reasonable interpretation of the legislation that is consistent with customary international law applicable in Zimbabwe, *in preference to an alternative interpretation inconsistent with that law*". Second, section 327(6) follows this injunction by providing, in the context of the application of treaty law, that "[w]hen interpreting legislation, every court and tribunal must adopt any reasonable interpretation of the legislation that is consistent with any international convention, treaty or agreement which is binding on Zimbabwe, *in preference to an alternative interpretation inconsistent with that convention, treaty or agreement*".

There is no doubt that these provisions codify and reinforce the principle of consistent interpretation of legislation in line with principles of customary international law and the treaties

⁴⁶ See generally R. G. Steinhardt, 'The Role of International Law as a Canon of Domestic Statutory Construction', 43 *Vanderbilt Law Review* (1990) 1103 and J. Turley, 'Dualistic Values in an Age of International Legispudence', 44 *Hastings Law Journal* (1993) 185.

⁴⁷ J. D'Aspremont 'The systemic integration of international law by domestic courts: Domestic judges as architects of the consistency of the international legal order', in Fauchald and Nollkaemper, *supra* note 5, 141, 143–144. See also the House of Lords' decision in: *A (FC) v. Secretary of State for the Home Department (Conjoined Appeals)* (2005) UKHL 7 and, for Canadian experiences, R. Provost, 'Judging in Splendid Isolation', 56 *American Journal of Comparative Law* (2008) 125.

or conventions that are binding on Zimbabwe. The phrase ‘any international convention, treaty or agreement which is binding on Zimbabwe’ must be interpreted to mean all conventions and treaties that have been duly ratified by the country since these are already binding on the country, at least at the international plane, regardless of whether or not they have been domesticated.

The principle of consistent interpretation enshrined in sections 326(2) and 327(6) of the Constitution imposes an obligatory duty on the courts to follow the dictates of international law even in circumstances where there is another reasonably feasible interpretation that is inconsistent with international law. In other words, the courts may not depart from the interpretation that is consistent with international law, in favour of an interpretation that is not. Thus, the discretion to choose which interpretation to follow is taken away from the sitting judge in favour of an approach that is more in line with international human rights instruments. More importantly, however, the two provisions are seemingly targeted at ‘forcing’ conservative and nationalistic judges to consider perspectives given by the international legal system or community and to avoid being combative when the application of international law is in issue. This helps orientate judicial officers, particularly in dualist legal systems, away from interpretations and remedies that dominate the domestic sphere to those that are developed at the international level.

The two provisions referred to above also amount to more than a mere common law presumption. A common law presumption that the legislature would not make laws that are inconsistent with international law is subject to rebuttal by the litigant against whom the presumption is being invoked. Thus, if one of the two alternative interpretations of legislation is inconsistent with international law, the other interpretation would normally be preferred, but it does not have to be the preferred interpretation if the interpretation that is inconsistent with international law seems to be more appropriate in the context of the legislation in question. Section 327(6) requires more than this because it mandates the courts to prefer an interpretation which is consistent with international law provided the interpretation is reasonable, even if the other possible interpretation makes more sense within the context of the particular statute^{.48} Given that the Constitution itself was adopted in the form of an Act of Parliament, it is arguable that the rules entrenched in sections 326(2) and 327(6) must equally apply to the interpretation of constitutional provisions, particularly those entrenching fundamental rights and freedoms.

3.3.3 The Application of International Law as a Result of the Rise of Worldly Judges

Incorporation and consistent interpretation aside, the developing influence of international law in the national legal system seems to arise from the general amenability of local judges towards the international legal system, regardless of whether the applicable rules of international law are strictly binding on the sitting judge. There is an emerging or developing tendency for judges to view the national legal and human rights systems not as islands unto themselves, but as an intrinsic part or offshoot of the international legal order. Behind this tendency is a subtle rise of ‘worldly judges’ who view themselves as agents of the international legal order and cherish the steady influence of international law on the content of domestic court decisions.⁴⁹ Local judges consider themselves to be guardians of the international legal system, but the emerging accommodativeness of the courts is not based on a sense of a legal obligation imposed on them by the domestic legal system, but is rather predominantly grounded on the persuasive value of international law. This creates room for domestic deliberation and engagement with international law without necessarily giving the impression that judges are legally bound to follow international

⁴⁸ See A. Oshea (ed) *International law and the Bill of Rights* (2004) 7A-8, para. 7A2.

⁴⁹ K. Young, ‘The World through the Judge’s Eye’, 28 *AustYBIL* 27, 42.

law.⁵⁰ Under such an approach to the interpretive role of international law, local courts are inclined to take ownership of the processes through which international law creeps into the legal system and to own the outcome or consequences of making decisions based on it.

In the Zimbabwean context, domestic courts have consistently referred to international law without necessarily referring to constitutional provisions governing incorporation of international treaties, the principle of consistent principle or the positive duty to consider international law when interpreting rights provisions in the DoRs. While this is a promising development for the harmonisation of domestic and international norms and standards, the analysis is rarely done in a systematic fashion. Thus, the majority of judges do refer to international law only when it is convenient for them to do so and rarely refer to how the Constitution anticipates the application of international law to domestic legal problems. In essence, the courts' failure to invoke the provisions of the interpretation clause does not necessarily negatively affect the role of international instruments in resolving domestic legal issues as such instruments are usually applied anyway. However, non-reference to the interpretation clause makes it look like the courts are inventing some mechanism which is not foreseen by the supreme law of the land when in fact they are required to do so by the very same law. Thus, the rise of 'worldly judges' should complement the current constitutional regulatory framework for the application of international law in the domestic courts and not act as the only natural catalyst for inclusive approach to international law in the domestic courts.

3.4 The Peremptory Obligation to Pay Due Regard to All the Provisions of This Constitution, in Particular the Principles and Objectives Set out in Chapter 2 of the Constitution

Section 46(1)(d) of the Constitution creates two related obligatory duties: first, the duty to pay due regard to all the provisions of the Constitution, and, second, to pay specific attention to the principles and objectives set out in Chapter 2 of the Constitution. These duties are related in that Chapter 2 is part of all the provisions of the Constitution which are referred to in the first leg of the analysis, and therefore reference to the principles and objectives does not create an entirely separate duty to consider anything entirely new within the framework of the relevant provisions. Below is an explanation of what each of these related duties requires of the government.

3.4.1 Paying Due Regard to All Constitutional Provisions

This provision entrenches systematic and contextual interpretation. Though context encompasses aspects such as legal history and drafting history, section 46(1)(d) of the Constitution restricts context to textual context. Thus, provisions of the Constitution must and are often understood in relation to and in light of one another (especially when they are associated) and of other components of more encompassing instrument of which they form part, drawing on the system or logic or scheme of the written text as a whole. In *Mudzuru and Anor v. Minister of Justice, Legal and Parliamentary Affairs & Others*, section 78 of the Constitution, which protects marriage rights for heterosexuals, was interpreted within the context of sections 81 and 44 of the Constitution.⁵² Section 81 protects, in a broad way, the rights of the child and the principle of the best interests of the child. Section 44 imposes on state- and non-state actors the duty to respect, protect, promote and fulfil the rights and freedoms set out in the DoRs. The Court then concluded that section 22 of the Marriage Act was inconsistent with the Constitution as it promoted child marriages which the Constitution seeks to suppress. Similarly, in *S v. Makwanyane and Another*,⁵¹

⁵⁰ E. Benvenisti and G. W. Downs, 'National Courts, Domestic Democracy, and the Evolution of International Law', 20 *European Journal of International Law* (1009) 59–72.

⁵¹ 1995 (3) SA 391 (CC).

section 11(2) of the Interim Constitution of South Africa which prohibited cruel, inhuman or degrading treatment punishment was interpreted within the context of other provisions of the Constitution such as the rights to equality and human dignity. Chaskalson, P proceeded as follows:

[S]ection 11(2) of the Constitution must not be construed in isolation, but in its context, which includes ... other provisions of the Constitution itself and, in particular, the provisions of Chapter Three of which it is part. It must also be construed in a way which secures for “individuals the full measure” of its protection. Rights with which section 11(2) is associated ... which are of particular importance to a decision on the constitutionality of the death penalty are ... the right to life, the right to respect for and protection of his or her dignity, and ... the right to equality before the law and to equal protection of the law. Punishment must meet the requirements of [these rights] and this is so, whether these sections are treated as giving meaning to Section 11(2) or as prescribing separate and independent standards with which all punishments must comply.⁵²

It is evident from the case of *S v. Makwanyane* that rights are interdependent and mutually reinforcing. This explains the approach prescribed in the Constitution which requires courts to derive the meaning of rights from the constitutional provisions that surround them. If rights and freedoms are to bear their full potential, they should not be treated as discrete silos, but as different parts of a continuum. To achieve this end, the Constitution requires courts, when interpreting fundamental rights or freedoms, to pay due regard to all the provisions of the Constitution. Reading the Constitution as a single whole enables courts to consider the broad context within which the interpretation of rights must take place. This affirms the claim that rights cannot be enjoyed in a vacuum, but in a particular textual context which either broadens or limits the enjoyment of rights. For example, the provisions regulating the limitation or rights and derogation from rights during emergencies tend to suggest that a court may not limit rights at the point of interpretation. Similarly, a close look at these provisions helps the reader identify both the rights which may not be limited or derogated from under any circumstances and also identify the criteria that governs circumstances under which rights may be justifiably and reasonably limited. By reading all the relevant provisions together, a court is more likely to come to an appropriate interpretation of a right than it would if it had not paid due regard to other constitutional provisions.

There is one more point to emphasise in relation to the command to the courts to ‘pay due regard to all the provisions of the Constitution’. It is that if this phrase is read in its immediate context, it requires the state to ensure that the meaning given to a right is generally consistent with that which is given to many other rights. Comparing the terms ‘pay due regard’ in section 46(1)(d) and ‘take into account’ in section 46(1)(c), it appears evident that the former term creates more concrete legal obligations than the latter. As stipulated above, the duty to take international law into account does not strictly impose on the courts the duty to follow international law. On the contrary, the duty to ‘pay due regard’ to all the provisions of the Constitution, suggests that a court is duty-bound to interpret and apply human rights in a manner that fulfils the broad vision, purpose and object of the Constitution as a whole. Construed widely, this duty could also amount to a reproduction of generous and purposive interpretation of constitutional provisions.

3.4.2 Paying Due Regard to the Principles and Objectives Set out in the Constitution

Entrenched in Chapter 2 of the Constitution, national objectives form part of the guiding principles of constitutional interpretation. It is essential to realise that national objectives are *prima facie* not enforceable, but our Constitution appears to give them a special status than they have been given under comparative constitutions such as that of India. Yet, they must be accorded due respect when interpreting a provision in the DoRs. When interpreting the rights

⁵² Para. 10.

and freedoms in the DoRs, courts and other forums are bound to “pay due regard to the principles and objectives set out in” Chapter 2. Similarly, section 8(2) of the Constitution provides that “[r]egard must be had to the objectives set out in this Chapter when interpreting the state’s obligations under this Constitution and any other law”. As part of Chapter 2 of the Constitution, section 8(2) states one of the objectives referred to in the interpretation clause. By stipulating that regard must be had to national objectives when interpreting the state’s obligations under the Constitution, section 8(2) of the Constitution emphasises the idea that national objectives play a central role in the interpretation of the fundamental rights and freedoms enshrined in the DoRs.

By requiring courts to ‘pay due regard’ to the national objectives, section 46(1)(d) has indirectly incorporated the whole of Chapter 2 into the analytical framework of the interpretation clause. Where there is an enforceable constitutional right that is intended to protect the same interests as those protected by the applicable national objective, it is important for the courts to consider the scope of both the right and the objective when interpreting the former. For instance gender balance in section 17 of the Constitution should guide the courts in interpreting the equality clause (section 56(1)–(6) of the Constitution), and the province of culture in section 16 of the Constitution must be reflected when the courts interpret section 63 of the Constitution. It can therefore become clear that the Constitution should be understood in its entirety, from national objectives to human rights guarantees and other constitutional provisions.

3.5 The Discretion to Consider Foreign Law

In paragraph (e) courts “may consider relevant foreign law”. This includes case law and statutes from other countries. This is however a discretionary provision and courts are allowed to exercise discretion on whether to take into account foreign law or not. In *S v. Makwanyane*, foreign comparative laws were taken into account.⁵⁵ The Court managed to compare the attitudes of countries on the death penalty. In its findings, many countries including neighbouring countries like Namibia, Mozambique and Angola had abolished the death penalty. By referring to foreign law, courts can have an informed understanding about how a certain matter has been dealt with by other countries and, if persuaded, import findings of foreign courts into our domestic legal landscape. It is important to underline that courts are at liberty not to refer to foreign court judgments or law. This is because of the use of the word ‘may’ which indicates that the consideration of foreign law is at the discretion of the sitting judge. With respect to foreign law, it is patent that such law performs a purely persuasive function in our domestic courts and the courts will not be at fault if they do not refer to it at all.

3.6 Interpretive Guidelines Given to Courts When Interpreting Legislation or When Developing the Common Law or Customary Law

3.6.1 The Obligatory Duty to Promote the Spirit of the DoRs

Section 46(2) of the Constitution provides that when interpreting legislation “and when developing the common law or customary law, every court, tribunal, forum or body must promote and be guided by the spirit and objectives of this Chapter”. The interpretive role of the objectives of Chapter 4 is dealt with below. For now, it should be underlined that the spirit of the DoRs is to be found in the matrix and totality of rights and values embodied in them. Section 46(2) is therefore a source of the indirect application of the DoRs. While the objectives of the DoRs are generally written down, that is through the letter of the DoRs, the spirit of the same cannot be reduced to writing and needs to be discerned from the whole of Chapter 4 of the Constitution and in a manner that does not do violence to the purpose of other provisions of the

Constitution. The spirit of the DoRs is invisible and entitles the courts to second-guess the legislature and come up with a credible and constitutionally compliant interpretation of legislation or development of the common law or customary law.

When the constitutionality of legislation is considered, the spirit and objectives may also be promoted by applying the rule that a reasonable interpretation must be followed that conforms to the DoRs rather than an interpretation that is inconsistent with the DoRs. This is also referred to as interpretation in conformity with the Constitution. It can also be observed that the courts should adopt a purposive approach to statutory interpretation. This is indicated by the phrase ‘spirit and objectives’ of the DoRs. Also, in determining whether or not customary law or common law should be developed, the courts must promote the spirit and objectives of the Constitution. This provision applies at all times when interpreting legislation and when determining the compliance of rules of the common law and customary law with the provisions of the Constitution. Developing customary law or common law includes a possibility that a court may attach new meanings to common law or customary law, without necessarily declaring the relevant rules to be inconsistent with the Constitution and therefore invalid.

3.6.2 The Obligatory Duty to Promote the Objectives of the DoRs

When interpreting legislation or developing customary law or the common law, every court must promote the objectives of the DoRs. The objectives of the DoRs are not explicitly stated, but it is suggested that the first port of call in identifying such objectives is section 44 of the Constitution. Section 44 provides that “[t]he State and every person, including juristic persons, and every institution and agency of the government at every level must respect, protect, promote and fulfil the rights and freedoms set out in this Chapter”. ‘This Chapter’ refers to the entire DoRs. Thus, the overall objective of the DoRs is to ensure that state and non-state actors respect, protect, promote and fulfil fundamental rights and freedoms. Accordingly, the courts should interpret legislation and develop the common law or customary law in a manner that ensures that the rights in the DoRs are respected, protected, promoted and fulfilled. The obligatory duty to promote the objectives of the DoRs serves to remind courts that even when dealing with matters that are purely regulated by legislation, the common law or customary law, the goals set to be achieved by protecting rights in the Constitution should not be ignored or neglected. This reinforces the idea of a single unitary legal system drawing inspiration from and controlled by the Constitution. As observed by the Constitutional Court of South Africa in *Pharmaceutical Manufacturers Association of South Africa: In re: exparte President of the Republic of South Africa*:⁵³

There are not two systems of law, each dealing with the same subject matter, each having similar requirements, each operating in its own field with its own highest court. There is only one system of law. It is shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control.⁵⁴

These remarks, and our Constitution, speak of a unitary legal system in which even the interpretation of statutory provisions should broaden the enjoyment of fundamental human rights and freedoms. One of the objectives of the DoRs is to ensure that everyone is afforded the rights and freedoms protected in the Constitution, without discrimination based on prohibited grounds. This implies that customs, laws and practices which seek to undermine this goal are likely declared to be inconsistent with the objectives of the Constitution and therefore invalid. Thus, all statutory provisions that unjustifiably limit the enjoyment of constitutional rights and civil liberties should be adapted to the demands of the Constitution which requires pro-human rights approaches to matters regulated by statute law.

⁵³ 2000 (2) SA 674 (CC).

⁵⁴ Para. 44.

4 Conclusion

The discussion above demonstrates that the interpretation clause fits a number of theoretical models of interpretation into the constitutional interpretive framework. First, by requiring courts to give full effect to the fundamental rights guaranteed in the DoRs, the Constitution echoes the elements of a generous interpretation of the constitutional provisions that is influenced by ideas relating to the interdependence, interrelatedness and mutually reinforcing nature of human rights. Second, the Constitution requires courts to “promote the values and principles that underlie a democratic society” based on founding and other social values; thereby authorising courts to invoke value-based or purposive interpretation of the provisions entrenching fundamental human rights and freedoms. In most instances, this approach requires courts to go beyond grammatical interpretation and literalism towards an approach that finds a place for the unwritten in the written constitution. When courts make decisions that are inconsistent with these values and principles, such decisions ought to be disregarded for want of consistency with the Constitution.

Courts also have the peremptory obligation to take into account international law and all treaties and conventions to which Zimbabwe is a party. Section 46(1)(c) of the Constitution also indirectly imposes on practising lawyers an ethical duty to refer to all applicable laws to ensure that the court is acquainted with the relevant international norms when locating the meaning and scope of the constitutional provision or right in question. Given that there are limited, if any, sections of the DoRs which do not have corresponding provisions at the international level, it is highly likely that the interpretation of constitutional rights almost invariably requires the consideration of equivalent provisions in international law. Accordingly, courts should always endeavour to interpret fundamental human rights and freedoms in a manner that does not create breaches of international law. In addition, the principle of consistent interpretation enshrined in the Constitution imposes on courts the obligatory duty to follow the dictates of international law even in circumstances where there is another reasonably feasible interpretation that is inconsistent with international law. Thus, the courts may not easily depart from the interpretation that is consistent with international law, in favour of an interpretation that is not consistent with international law.

The duty to consider all provisions of the Constitution implies that the provisions of the Constitution must and are often understood in relation to and in light of one another (especially when they are associated) and of other components of the more encompassing instrument of which they form part, drawing on the system or logic or scheme of the written text as a whole. This imperative echoes tremors of both systematic and contextual interpretation. It also emphasises the idea that rights are not discrete silos and that citizens get adequate protection if the meaning of rights is derived from the broad textual context of the Constitution. Reading the Constitution as a single whole enables courts to consider the broad context within which the interpretation of rights must take place. In addition, by requiring courts to pay due regard to national objectives, section 46(1)(d) of the Constitution has indirectly incorporated the whole of Chapter 2 into the analytical framework of the interpretation clause. When there is an enforceable constitutional right that is intended to protect the same interests as those protected by the applicable national objective, it is important for the court to consider the scope of both the right and the objective when interpreting the former.

In the context of interpreting legislation, courts have the duty to promote the spirit and objectives of the DoRs. The spirit of the DoRs is to be found in the matrix and totality of rights and values embodied in the DoRs. While the objectives of the DoRs are generally written down, that is through the letter of the DoRs, the spirit of the same cannot be reduced to writing and needs to be ‘discerned’ from the whole of Chapter 4 of the Constitution. The spirit of the DoRs

is invisible and empowers the courts to second-guess the legislature and come up with a credible and constitutionally compliant interpretation of legislation or development of the common law or customary law. One of the objectives of the DoRs is to ensure that everyone is afforded the rights and freedoms protected in the Constitution, without discrimination based on prohibited grounds. Accordingly, customs, laws and practices which seek to undermine this goal are likely to be declared to be inconsistent with the objectives of the Constitution and therefore invalid.

The Constitutional and Legal Frameworks for the Protection of Women against Violence in Zimbabwe

Pamela Machakanja, Deliah Jeranyama** and Eunice Bere****

1 Introduction

Violence against women is one of the most direct expressions of the power imbalances between men and women. As Kofi Annan once said, “[v]iolence against women is perhaps the most shameful human rights violation. And it is perhaps the most pervasive. It knows no boundaries of geography, culture or wealth. As long as it continues, we cannot claim to be making real progress towards equality, development and peace.”

Besides being a fundamental violation of human rights, violence against women represents one of the most critical security challenges and is a major factor contributing to poverty; thus reducing violence against women is key to achieving the Sustainable Development Goals in particular goals number 1, 3, 5, 10 and 16. According to the Zimbabwe National Statistics Agency (Zimstats) Quarterly Digest of Statistics for the fourth quarter of 2016, 8,069 women were raped in 2016; 7,752 cases of rape were reported in 2015, 7,000 cases in 2014, 5,717 cases in 2013, 5,412 cases in 2012, 5,446 cases in 2011, 4,450 in 2010.¹ This translates to 22 women being raped daily or an equivalent of one woman being abused every 75 minutes and an average of 646 women being sexually abused monthly. Findings by Zimstats and the United Nations Children’s Educational Fund (UNICEF) also indicate that one in three girls is raped or sexually assaulted before they reach the age of 18. These gross violations of women and children’s rights come against the backdrop of the government of Zimbabwe having enacted the Domestic Violence Act [Chapter 5:16] in 2007, initially viewed as the most progressive law aimed at protecting women against gender-based violence.

2 Background

Zimbabwe is signatory to the international human rights frameworks for women’s rights. Zimbabwe ratified the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) in 1991 which is considered as the women’s bill of rights. Under this Convention states have the obligation to review their legal systems in order to end discrimination and to establish institutions that protect women. As part of the obligations, CEDAW allows for the monitoring of compliance and receives complaints from the signatory states. However, Zimbabwe is not yet a party to the CEDAW’s Optional Protocol of 2000 which allows the CEDAW Committee to receive and consider complaints from individuals or groups from member states. Zimbabwe is also a signatory to the Beijing Declaration of 1995, the Protocol to the African Charter on Women’s Rights of 2003 and the SADC Protocol on Gender and Development of 2008.

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¹ ‘One rape per hour – Zimstat’, *Zimbabwe Situation*, 30 April 30 2017, <<http://www.zimbabwesituation.com/news/zimsit-m-one-rape-per-hour-zimstat/>>.

3 Objectives and Research Questions

The objectives of this study are to:

- analyse the existing constitutional provisions and legal frameworks for the protection and enforcement of women's rights in Zimbabwe;
- review the constitutional and legal gaps in the implementation of laws aimed at preventing and eliminating violence against women; and
- suggest intervention strategies to empower and eliminate violence against women.

The research was guided by the following questions:

- What are the existing constitutional provisions and legal frameworks that allow for the protection and enforcement of women's rights in Zimbabwe?
- What are the constitutional and legal gaps that infringe on the prevention and elimination of violence against women?
- What strategies can be adopted to empower and eliminate violence against women?

4 Significance of the Study

The study provides a major academic contribution to the debates on the justification or validation of women's rights both from a theoretical and practical point of view. The study is a significant step in analysing the role of courts or law enforcement agencies in the effective implementation of laws that protect women and girls from all forms of violence as enshrined in the Constitution of Zimbabwe. The study also provides deeper insights in promoting awareness on the protection and enforcement of women's rights by recommending remedies to flaws in the prevailing legislative laws in Zimbabwe in four areas, namely:

- a) by making reference to comparative and international best practice;
- b) by providing evidence that shows that the protection of women's rights is imperative to the improvement of women's status, their respect and dignity, and eradication of poverty;
- c) that the law is an essential instrument to ensure the enforcement of women's rights as most of these criminal acts take place behind closed doors, and victims are often reluctant to report incidents because of shame, fear of appraisal or because of lack of visible alternatives to their prevailing situation; and
- d) that there is always need for legislative and judiciary reforms aimed at better protecting women's rights and recognition of the inherent dignity and worth of each human being.

The increased knowledge on legal rights and service providers also brings long term benefits to women for responding to gender-based violence as their constitutional right. The study also contributes to the notion of transformative constitutionalism that provides for new or alternative policy perspectives thereby contributing to the work of both civil society and government engagement in efforts towards effective promotion of women's rights and gender equality in Zimbabwe. Of significance, the study provides policy recommendations to strengthen women's capacities for peacebuilding which include ending violence and discrimination and opportunities to secure appropriate redress where rights relating to gender have been violated. Thus, taking into account the importance of pursuing both curative and preventive strategies, the research study underlines the need for multi-sectoral, multi-level and multi-actor approaches, thereby strengthening the capacity of organisations that defend and enforce policy implementation towards zero tolerance of gender-based violence in Zimbabwe.

5 Conceptual and Theoretical Framework

The novelty and necessity of this research is in the sense that it is informed by the theory of transformative constitutionalism. In the context of this research, transformative constitutionalism is to be understood as the provision of dynamic changes founded on historical processes of women's suffrage and the fight for women's rights as human rights and justice. The transformative nature of the 2013 Constitution is highlighted in the fact that it is founded on the values and principles that recognise the inherent dignity, equality and worth of human beings, which provides a concrete theoretical foundation upon which the promotion and protection of women's rights can be practically implemented and enforced through institutional and societal systemic changes. For example, the judicial system and legislative laws in Zimbabwe recognise women's rights as human rights and the promotion of equality for all through creating a conducive environment for peace, coexistence and development opportunities for all, irrespective of sex, race, ethnicity, class, religion or belief.

Central to the goal of the proposed transformative constitutionalism is bridging the gap between past injustices and today's realities in women's lives in a liberated contemporary Zimbabwe. This also calls for change of mind-sets as well as attitudes and behaviour in the way women are treated in both the private and public spheres. This also implies bringing about changes in laws that oppress and dominate women and make them vulnerable, thereby perpetuating inequalities in society. Transformative constitutionalism and the process of constitution making becomes very critical in putting in place laws that can create new spaces for both men and women founded on the values and principles of human rights, dignity and equality. It also means giving voice to women and enabling them to access justice and ensuring that government puts in place appropriate measures for redress where women's rights are violated. The empowering nature of the transformative constitutionalism and constitution making process will help women have the power to reclaim their legitimacy as active participative agents of change within the private and public spaces as expected by society and traditional institutions in Zimbabwe. This transformative approach to the processes of constitution making and constitutionalism becomes imperative in the formation of knowledge, values, norms and practices that will empower women for sustainable gender equality and gender justice at both personal and societal levels.

6 Methodology

The research employed qualitative research methods which took into account the complex and contested cultural and contextual differences in the nature of causes and issues and narratives around violence against women. According to the UN Declaration on the Elimination of Violence Against Women, violence against women is "any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life"². Data was collected from organisations that work with women, human rights organisations, government institutions and agencies including legal institutions and associations that deal with women issues. Data was also collected from individual women who had experienced different forms of violence. Purposive sampling was utilised to identify relevant informants who have an understanding of the interpretation of the 2013 constitutional provisions in the context of women's rights and human rights. To complement primary data, secondary data was collected through analysis of the Zimbabwean Constitution, enacted laws, enforcement mechanisms and case analysis. Given the time constraints and limited resources, much of the research was done through literature review and document analysis highlighting the limitation of the study as different categories of vulnerable women would have strengthened the validity of the

² UN General Assembly, Declaration on the Elimination of Violence against Women (A/RES/48/104).

study. Presentation of results was based on themes derived from the research objectives, research questions and relevant emerging issues.

7 Findings

This section provides the findings that came out of the data collected from various organisations as well as analysis of the frameworks that aim at protecting women against violence in Zimbabwe. Findings are presented in themes which were derived from the research objectives as well as other emerging issues that were selected from the study findings.

7.1 Constitutional Provisions and Supporting Legal Frameworks

Zimbabwe's commitment towards the participation and empowerment of women has been explicitly expressed through the constitution making process of 2013. The 2013 Constitution was created on the founding values and principles of fundamental human rights and freedoms and gender equality among many others. The current transformative Constitution provides better protection and visibility to women's rights than the previous Constitution. The specific provisions for the promotion, protection and enforcement of women's rights in Zimbabwe include the following:

- Section 17 is dedicated to gender and urges the state to promote the full participation of women in all spheres on the basis of equality with men. The section addresses access to resources, elimination of gender based discrimination in policy, law and practice, the protection of women and girls from domestic violence, as well as protection of girls from marriage. The section also provides that both genders must be equally represented in all institutions and agencies of government and women must constitute half of all members of established commissions. The government is currently working on rationalising all commissions since most of them are male dominated.
- Section 80 focuses on the rights of women and highlights the provision for equal opportunities, in political, social and economic activities. It also grants women the same rights as men regarding custody and guardianship of children. Previously, the Guardianship of Minors Act³ was biased towards women, granting automatic custody rights to women, whilst men were restricted to guardianship and access rights. The section also provides that all customs, traditions and cultural practices that infringe the rights of women are void. Women have been vulnerable to all sorts of harmful traditional practices such as early child marriages, forced marriages and genital mutilation.
- Section 85 buttresses the enforcement of fundamental human rights and freedoms by the courts, and granting of appropriate relief and compensation where one's rights have been infringed.
- Section 78 of the Constitution is on marriage rights. It provides that every person who has attained the age of 18 years has a right to found a family and that no person can be compelled to enter into a marriage against their will. Women have often been forced into marriage and this section prohibits that.
- Section 245 calls for the establishment of the Gender Commission whose mandate is to ensure gender equality, investigate violations and take action. Section 246 mandates the Commission to conduct research into issues relating to gender and social justice and recommend changes to laws and practices which lead to discrimination based on gender.

³ Guardianship of Minors Act [Chapter 5:08] (14/2002).

Due to the acknowledgement that women and girls are often victims of social and economic injustice, it was imperative that legal frameworks and policies be enacted to ensure their protection. These constitutional provisions have been promulgated in various subsidiary legislation, which include the following:

i. Domestic Violence Act [Chapter 5:16]

This is an Act to make provision for the protection and relief of victims of domestic violence. The definition of domestic violence, under the Act, is very wide and includes abuse derived from any cultural or customary rites or practices that discriminate against or degrade women, such as forced virginity testing, female genital mutilation, pledging of women and girls for purposes of appeasing spirits, abduction, child marriages, forced marriages, forced wife inheritance and other such practices.

ii. Marriage Act [Chapter 5:11]

The Act provides for laws relating to solemnisation of civil marriages. Section 20 provides for the circumstances under which a minor may marry and section 21 states that the marriage of a minor without consent is voidable. Section 22 states that no boy under the age of 18 years and no girl under the age of 16 years shall be capable of contracting a valid marriage except with the written consent of the minister. This means that a girl may marry at 16 or less and a boy at 18 or less provided that the minister has consented. The Act goes on further in section 22(2) to state that if a girl or boy goes on to contract a marriage without the consent of the minister, such marriage can be considered as desirable and in the interests of the parties and the minister may validate it in writing. In other words, the minister may retroactively validate a marriage of minors. These sections have been fuelling child marriages.

iii. Termination of Pregnancy Act [Chapter 15:10]

The Act provides for laws relating to abortion and defines circumstances in which a pregnancy may be terminated which are: where the continuation of the pregnancy so endangers the life of the woman concerned or constitutes a serious danger of permanent impairment of her physical health that the termination of the pregnancy is necessary to ensure her life or physical health; where there is serious risk that the child to be born will suffer from a physical or mental defect of such a nature that he will be seriously handicapped; and where there is reasonable possibility that the foetus is conceived as a result of unlawful intercourse.

iv. Customary Marriage Act [Chapter 5:07]

The Customary Marriage Act does not provide for age of marriage, thereby giving leeway for child marriages. Section 5 of the Act states that if the guardian of a woman withholds consent to marriage, a magistrate may be approached for consent. The basis of having a guardian is that an African woman prior to the Legal Age of Majority Act of 1982 was viewed as a perpetual minor needing a guardian all her life. Section 5(1)(b) states that the magistrate may fix marriage consideration in consultation with the guardian of the woman. Section 3(1) states that for a customary law marriage to be considered valid, it has to be solemnised. This has placed many women married under customary law in a difficult position because not all marriages contracted under customary law have been

solemnised. This causes problems especially at the termination of the unregistered customary law union (UCLU). Courts have used the principles of unjust enrichment or tacit universal partnership to distribute property acquired in an UCLU.⁴ The courts will only resort to using any one of the two principles if the plaintiff proves that despite being married under customary law, their case should be determined using general law. This necessitates the invoking of the choice of law process as laid out in the Customary Law and Local Courts Act Chapter 7:05. At the magistrate court level, some magistrates are erroneously using the Matrimonial Causes Act to distribute property in UCLUs. The Matrimonial Causes Act does not apply to an UCLU since it is not solemnised. The correct procedure is to invoke the choice of law process and if a determination is made that the case should be dealt with using general law, the next issue would be whether or not the property to be distributed falls within the monetary jurisdiction of the magistrate's court. If it does, the court should then use either the principle of tacit universal partnership or unjust enrichment to distribute the property. If it falls outside the monetary jurisdiction of the magistrate's court, such case has to be heard at the High Court which has inherent jurisdiction. Several judges have called for an amendment to the laws of Zimbabwe to deal with this anomaly. For all intents and purposes a wife in an UCLU is no different from one with a marriage certificate but she faces prejudice by virtue of the fact that her UCLU is not solemnised.

v. Criminal Law (Codification and Reform) Act [Chapter 9:23]

Section 70 of the Criminal Law (Codification and Reform) Act provides that any person, who has sexual intercourse with a person below the age of 16 years with or without their consent shall be charged with rape or aggravated indecent assault or indecent assault. The law differentiates between consensual and non-consensual sexual activity with a child. The crimes of rape, aggravated indecent assault and indecent assault cover non-consensual sexual assaults upon a child, but the law provides that a child under 12 is deemed incapable of consenting to sexual activity for the purposes of these crimes. There is an inconsistency in the Criminal Law Codification and Reform Act relating to the age of consent.

vi. Children's Act [Chapter 5:06]

The Children's Act was enacted to provide for the general welfare of children. Among other issues, the Act provides for the protection of children from physical and mental violence, neglect, injury, abuse and maltreatment, in line with the requirements of the Charter. The Children's Act is currently under review and a Draft Bill is in place.

vii. Married Persons Property Act [Chapter 5:12]

The marriage regime in Zimbabwe is currently that of out of community of property, except for marriages entered into before the 1 January 1929. For those who wish to enter into in-community of property marriages, the major impediment is that of the excessive marital power that is bestowed to a husband during the subsistence of a marriage. A husband can alienate property, encumber it or sell it and the wife has no recourse. It would seem prudent to specifically provide that the marital power is excluded from an in-

⁴ *Mandava v. Chasweka* HH-42-08; *Ntini v. Masuku* HB-69-03; *Muchapondvu v. Madake* HH-32-06; *Feremba v. Matika* HH-33-07; *Kazvura v. Dube* H9-119-10; *Matibiri v. Kumire* 2000(1) ZLR 492; *Jengwa v. Jengwa* 1991(1) ZLR 121; *Chapeyama v Matende and another* 1999(1) ZLR 534; *Marange v. Chiroodza* HH-130-02; *Chikavanga v. Kuyeri and another* HH-319-12. See also WLSA position paper on harmonisation of marriage laws and equality in marriage.

community of property marriage so as to encourage those who want to enter into such a marriage to do so. This would mean that both wife and husband have equal power over their assets during the subsistence of a marriage. Even in instances where there is marriage out of community, courts have stated that the notion of a husband or wife selling immovable property during the subsistence of a marriage just because it is registered in their sole name is untenable.⁵

viii. Deceased Estates Succession Act [Chapter 6:02] and Administration of Estates Act [Chapter 6:01]

Inheritance of immovable property falls under either customary law as governed by the Administration of Estates Act as amended or general law as governed by the Deceased Estates Succession Act. Section 3A of the Deceased Estates Succession Act states as follows: “The surviving spouse of every person who dies wholly or partially intestate shall be entitled to receive from the free residue of the estate, the house or other domestic premises in which the surviving spouse as the case maybe lived immediately before the person’s death.”

In the Administration of Estates Act, due to the fact that under customary law a man may have more than one spouse, the legal position is that the surviving spouse(s) is entitled to the following: “Where they live in separate houses, each wife should get ownership of or if that is impracticable, a usufruct over, the house she lived in at the time of the deceased’s person’s death, together with all household goods in that house”,⁶ or “Where the wives live together in one house at the time of the deceased person’s death, they should get joint ownership of or; if that is impracticable, a joint usufruct over the house and the household goods in that house.”⁷

If a deceased person had one wife then she will be entitled to the following: “Ownership of or, if that is impracticable, a usufruct over the house in which the spouse lived at the time of the deceased person’s death, together with all household goods in that house.”⁸ The phrases “lived immediately before the person’s death” and “lived in at the time of the deceased person’s death” have created challenges in implementation to the extent that women are losing their right to inherit the house because they were not living in the house at the time of the death of the deceased. However, due to the changing family dynamics, there are numerous situations that now exist due to migration. Due to the nature of Zimbabwe’s patriarchal society, it is not uncommon to find a woman living the larger part of her married life in the rural areas especially during the planting and harvesting season. She may go to the urban home on occasion. Assuming that her husband dies whilst she is in the rural area, a restrictive interpretation of the law may mean that she was not living at the urban home at the time of death and therefore that particular home will not be inherited by her. This situation may also affect women in polygamous unions who may both be predominantly staying in the rural areas but going to the urban home occasionally, usually in turns. Suppose wife A is at the urban home at the time of death and wife B is in the rural areas, a restrictive interpretation will mean that wife B was not living at the urban home immediately before death and thus would stand to lose. And yet another scenario is where lodgers live in the urban home whilst a husband and wife stay in the rural area and survive on the rentals. Should one spouse die,

⁵ *Muswore v. Makanzga* HH-16-05.

⁶ Section 68F (2)(c)(i).

⁷ Section 68F (2)(c)(ii).

⁸ Section 68(d)(i).

again it would mean that they do not qualify to inherit the immovable property by virtue of the interpretation of the legal provisions.

ix. Guardianship of Minors Act [Chapter 5:08]

This Act covers custody and access in addition to guardianship. It covers parental rights and responsibilities in respect of these issues. Section 3 of the Act effectively provides that the father of children born in wedlock is their guardian. This offends against the equality provision in the Constitution as well as international human rights which require that men and women have equal rights and responsibilities over their children. Section 5(1) of the Act also violates the constitutional provisions on equality and the need to consider the best interests of the child. It provides that “where either of the parents of a minor leaves the other and such parents commence to live apart, the mother of that minor shall have the sole custody of that minor until an order regulating the custody of that minor is made” by the Court. These sections need to be amended to give equal rights and responsibilities to the father and mother of a child with the overriding consideration of the best interests of the child.

x. Deceased Persons Family Maintenance Act [Chapter 6:03]

The Deceased Persons Family Maintenance Act provides some protection for the needs of the family of the deceased who may be disadvantaged by the laws on intestate and testate succession. It applies to the estates of all people regardless of their type of marriage. The Act then provides that any dependent of the deceased may make an application for an award of maintenance from the net estate of the deceased.⁹ The Act gives a definition for net estate which means all the property after paying off creditors.¹⁰ This includes the matrimonial house and household goods which the Administration of Estates Amendment Act and the Deceased Estates Succession Act in some cases stipulate that they should be inherited by the surviving spouse.

xi. Maintenance Act [Chapter 5:09]

The Maintenance Act provides for the making of orders for maintenance of dependent persons and for the enforcement of those orders. Parents are primarily and jointly responsible for the maintenance of their children until the children attain the age of majority or become self-supporting. Where the parent(s) are deceased, the children are to be maintained from the estate of their parent(s) in line with the Deceased Persons Family Maintenance Act [Chapter 6:03]. This includes adopted children and children born out of wedlock.

7.2 Forms of Violence against Women

Having identified the constitutional provisions and legal instruments that Zimbabwe has put in place to curtail violence against women as well as improve women’s access to justice, it was very critical for this study to also identify the most common issues that have continued to affect both rural and urban women and girls across Zimbabwe thereby resulting in the development of the above instruments. Data collected from organisations that deal with women’s issues revealed that while efforts are continuously made to curb violence against women’s social, economic, cultural and political rights and ensure access to justice, cases are still brought up to their attention. These

⁹ Section 3(1).

¹⁰ See section 2 (1).

include cases of sexual abuse, maintenance issues, birth registration, child custody, as well inheritance issues.

7.2.1 Sexual and Physical Abuse

An interview with the Justice for Children Trust revealed that although there are various well-drafted legal frameworks, abuse is still on the increase both towards women and girls, with 164 cases reported through their Harare offices in 2014. This concern was also raised by the director of the Zimbabwe Women's Bureau who further indicated that women are facing sexual abuse at work places, churches and institutions of higher learning. Of importance to note is the reality that in many cases sexual transactions are requested by either male bosses for contract renewal in return, spiritual fathers who are better known as *papas* in some religious circles or lecturers who threaten to fail female students if they turn down the request. The intensity of this form of abuse was also confirmed by statistics compiled and presented by Musasa Project at an All Stakeholders Conference on 25 November 2016 in which 42, 40, 37 and 94 rape cases were reportedly brought through the organisation's Bulawayo, Chiredzi, Gweru and Harare offices respectively implicating those entrusted with authority and power who take advantage of some women because of the dire circumstances they may find themselves in and just due to fear and limited knowledge about their rights.

Despite having the Domestic Violence Act in place, findings revealed that many women and girls continue to experience physical abuse in the form of harassment and beatings from family members and partners for trivial reasons or as a way of some men wanting to exercise their power over women. In many cases, as indicated by a member of the Zimbabwe Women's Lawyers Association, the patriarchal nature of our culture still influences how men relate to women, and this has played a part in the rise of sexual and physical abuses and violence against women. This has continued to happen to such an extent that society has not only almost legitimised such acts by dressing them up as common misunderstandings which every woman should get used to but has seen family support structures, particularly aunts and uncles, even covering up for their relatives or threatening victims when they decide to speak up and seek legal action or redress. Because many women remain dependent on men economically, this further compromises their ability to challenge such men, opting to remain in abusive relationships for survival or for the sake of their children.

7.2.2 Birth Registration

While section 81(b) of the Zimbabwe Constitution emphasises that every child has the right to be given a name and a family name, some women have literally failed to access birth certificates for their children, particularly the single mothers. As it is biologically true that "every child has a father", there are trends of the non-fulfilment of this reality. An interview with an organisation whose mandate is to protect and fight for the rights of women through assisting them in accessing birth registration reported an increase in such cases. While stressing an example of the cases that come through the organisation's desk, polygamous marriages have also contributed to women failing to attain certificates for their children. Sharing an experience in an interview, it was revealed that the organisation was in the process of acquiring birth certificates for the remaining 20 children whose father has six wives and 48 children.

7.2.3 Maintenance Issues

Women have often suffered from the demands of single parenthood whenever maintenance issues are of concern. While it takes two to create a child, women and often young girls are left to

look after babies whenever the fathers of the children choose to deny responsibility or abandon them. Difficulties emerge when the needs of the child need to be taken care of by the single parent. While such issues are taken lightly by others, Justice for Children Trust has recorded a total of 2,900 cases that were brought to its attention in 2014 while Musasa Project has also recorded a total of 1,836 cases: Bulawayo 930, Chiredzi 216, Gweru 537 and Harare 153. The slight difference in the total numbers of cases confirms the prevalence of violence against women despite the provisions of the Domestic Violence Act. This indicates how women in Zimbabwe are still disadvantaged despite the Maintenance Act which is operational.

7.2.4 Economic Vulnerability

The informality of the Zimbabwean economy has reportedly seen several women becoming economically vulnerable. This is due to the reality that it is the women who are mostly engaged in informal street trading or vending in order to take care of their families or supplement the husband's income. In an interview with one of the informants, concern was raised that women had been negatively affected by the recently held *Tajamuka* demonstrations which resulted in many street vendors, who are often women, losing their items and never able to regain their wares after they were either confiscated by law enforcement agencies or vandalised. It was indicated that at most these demonstrations resulted in serious damage to property, displacement of street vendors from their vending points as well as looting of vendors' goods. Although such kinds of destabilisations are never specifically targeting women, the disruptions have proved to be one of the forms of violence that continue to face the Zimbabwean women. Further, this kind of violence often goes unreported since the victims often cannot identify any specific offender.

Another silent but disempowering consequence of economic vulnerability is the lack of confidence in oneself which further results in women not coming out to possess critical positions when opportunities are presented to them. In many instances, women find themselves being spectators whose decisions are dictated to them by those in strong financial positions. This has resulted in very low esteem in women who therefore continue to lag behind and are unable to drive change or transform their lives.

7.3 Existing Legal Instrument Inconsistencies and Gaps

Another critical step that is important whenever laws and policies are put in place is implementation. For the Constitution to be effective and possibly yield success stories there should be no antagonistic policies or legal frameworks; thus the need for alignment whenever inconsistencies are noted becomes imperative. This is to ensure that no inconsistencies exist as contradictions in interpretation of policy or legislation create misunderstandings which cause implementation to become disjointed or contested where a certain law is overridden by the Constitution as it is the supreme law. This has also been the centre of discussion by Dziva and Mazambani¹¹ who note how some legal frameworks protect girls from marrying boys without considering how the same frameworks expose the girl child to manipulation. Some of the notable inconsistencies which have also blocked both social and economic justice include:

7.3.1 Marriage Act, Children's Act and Criminal Law [Codification and Reform] Act

Section 78 of the Zimbabwe Constitution has set the age of marriage at 18 years. This is inconsistent with the Marriage Act which has set the age of marriage at 16 for girls and 18 for boys, which further discriminates against women. Section 70 of the Criminal Law (Codification

¹¹ C. Dziva and D. Mazambani, 'The Constitutional Court Ruling against Child Marriages in Zimbabwe: A Landmark Decision for Advancing the Rights of the Girl Child', 33 *Eastern Africa Social Science Research Review* (2007) 73.

and Reform) Act provides that any person who has sexual intercourse with a person below the age of 16 years with or without their consent shall be charged with rape or aggravated indecent assault or indecent assault. The law differentiates between consensual and non-consensual sexual activity with a child. The crimes of rape, aggravated indecent assault and indecent assault cover non-consensual sexual assaults upon a child, but the law provides that a child under 12 is deemed incapable of consenting to sexual activity for the purposes of these crimes. There is an inconsistency in the Criminal Law Codification and Reform Act relating to the age of consent. Section 64 provides that the crimes of rape, aggravated indecent assault or indecent assault are committed if the victim is of or under the age of 12 whereas section 70 says that these crimes are committed if the victim is below the age of 12.

The table below explains the current Zimbabwean age of sexual consent in detail:

Age	Provision in terms of the law
Girls under the age of 12	In terms of section 63(2) of the Criminal Law Code, sexual intercourse with a girl below the age of 12 constitutes a crime of rape.
Girls between the ages of 12 and 14	Subsection (2) of section 64 provides that a person accused of engaging in sexual intercourse with a girl of above the age of 12 but below 14 years shall be charged with rape unless there is evidence that the girl was capable of giving consent to the sexual intercourse and gave her consent thereto (in this case the perpetrator faces a lesser charge of having sexual intercourse with a young person).
Girls between the ages of 14 and 16	Sexual intercourse with a girl of between the ages of 14 and 16 with her consent constitutes the crime of having sexual intercourse with a young person.
Girls between the ages 16 and 18	Currently it is not an offence to have sexual intercourse with a girl of 16, with her consent.

7.3.2 Sexual Consent and Marital Consent

Section 64 of the Criminal Code provides that a person accused of engaging in sexual intercourse with a girl of above the age of 12 but below 14 years shall be charged with rape unless there is evidence that the girl was capable of giving consent to the sexual intercourse and gave her consent thereto. This therefore means that the age of sexual consent in Zimbabwe is 12 years. According to the same Act, it is not an offence to have sexual intercourse with a person above the age of 16 years with his or her consent. On the other hand, by virtue of section 78 of the Constitution, consent to marriage is pegged at 18 years. This means that young people are allowed at law to indulge in sex at ages as early as 12 years, but are prohibited from getting married until they are 18 years of age. There is need for a review of the age of sexual consent in Zimbabwe, taking into consideration global trends. Equating the age of sexual consent to the age of consent to marriage can be tantamount to turning a blind eye to the reality that children are indulging in sexual activities early. Yet, setting the age of sexual consent too low might leave children vulnerable to sexual predators and paedophiles.

A topical case that raised so much concern is a Beitbridge man who went after young girls below 16 years and stayed and had sexual intercourse with them until they turned 16 years or more before releasing them. Due to the absence of a law that could be used to convict him since they were consenting to sex, the man was instead charged with kidnapping and sentenced to four years, a verdict which was later nullified by another female magistrate. Further the criminal law does not criminalise some customary practises that promote child marriages such as *kuzvarira*,¹² *kuripa ngozi*¹³ and *chimutsamafihwa*.¹⁴ Again, the Customary Marriage Act is silent on the age of consent and marriage. Women are therefore vulnerable to early and forced marriages, in contravention of the Constitution which prohibits these harmful cultural practices in section 80(3). While cultural values and practices are important and should be promoted and preserved at every level, the transformative context of the current Constitution advocates the promotion of cultural values and practices that enhance the dignity, respect, well-being and equality of all citizens including women and children.

7.3.3 Marriage Rights

Zimbabwe recognises three types of marriages which are civil law union covered under the Marriage Act [Chapter 5:11] and the registered and unregistered law unions covered under the Customary Marriage Act [Chapter 5:07], although the country offers limited recognition to unregistered customary law unions. Despite recognition of these marriage types, the civil law union seems to be more recognised especially in the event of dissolution of the marriage through death of a spouse or death. This leaves women in registered and UCLUs at a disadvantage with the law. Section 3(1) of the Customary Marriage Act states that for a customary law marriage to be considered valid, it has to be solemnised. This has placed many women married under customary law in a difficult position because not all marriages contracted under customary law have been solemnised. This causes problems especially at the termination of the unregistered customary law union. One of the major clauses that was referred to by informants of this study is the clause in the Children's Act [Chapter 5:06] where 'guardian' is defined as including even the husband of the girl who would have married below the age of 18 years. This does not only seemingly legalise the marriage of children under the age of 18, but also presents the perpetrator as a guardian of the married child.

7.3.4 Married Persons Property Act and Matrimonial Causes Act

There are some notable inconsistencies between the two Acts. While Section 26 of the Constitution makes provision for equality in and at dissolution of marriage by providing for a formula for distribution of property upon divorce, there is no universality in how courts have distributed property particularly when one of the spouses had made non-monetary contributions. In some cases such as *Muswere v. Makanzha*,¹⁵ the court ruled that the husband had the right to sell the property without the consent of the wife unless she could have provided evidence that she had directly/indirectly contributed to the acquisition of the property.

¹² This is as practice in which parents pledge their daughters soon after birth although they bring her up until marriage age.

¹³ This is a spiritual appeasement practice in which a virgin is given away as compensation for a murdered person by the perpetrator.

¹⁴ This describes a girl who is given away to her aunt's (father's sister) husband after the death of the aunt.

¹⁵ *Muswere v. Makanzha* 2004 (2) ZLR 262(H).

7.3.5 Enforcement

Although the state has enacted the Domestic Violence Act, there still exist challenges in the enforcement. The study revealed that in the process of delivering protection order papers, perpetrators tend to escape reception of the paper work, and this defeats the interim order which should protect the complainant up until the dates of court hearing. Legally, once the accused receives the protection order papers, the interim order which is meant to protect the complainant until the court judgement is heard becomes valid. A given example is that of a man who hid his identity from the police officer who had come to serve him with protection order papers. His wife heard him deny his identity but could not come out and confirm her husband's identity to the police officer. This resulted in the man escaping reception of the paper work, and thereby blocking the whole process of the protection order application. This therefore implies that once the perpetrator escapes reception of the protection order paper, the complainant will be at greater risk of being accused even more since the former (perpetrator) will be aware of the intentions of the latter (complainant).

7.3.6 Termination of Pregnancy and Reproductive Rights Regulatory Issues

It is illegal to terminate a pregnancy in Zimbabwe, except as provided by the Termination of Pregnancy Act which permits it only in the case of rape, extreme deformity and incest. Despite the clear exceptions, a gap was identified in the response rate of pregnancy termination following rape. Termination is only permitted after all evidence to prove the rape has been produced and meticulously verified. During the fact finding and verification process, the pregnancy will be growing beyond termination stage. One unique case that has been recorded is the *Mildred Mapingure* case of 2006 in which she eventually gave birth to a child she conceived through rape owing to the failure to ensure timely termination of the pregnancy. In her case, no contraceptive drug was administered to Mapingure let alone advice on alternative means to access the drug, which is a sign of negligence. She had to sue the justice system for damages for the delays which hampered termination of her pregnancy. However, social class plays a very big role in influencing the speed at which a reported rape case gets a judgement. What this means is that those who are poor and merely rely on the course of justice processes sometimes have their cases silenced without any justice rendered.

7.4 Barriers Infringing on the Protection of Women's Rights

7.4.1 Corruption

Corruption is one of the cancerous challenges that continue to directly undermine efforts to protect women from all forms of violence as well as access to economic and social justice. In this study, corruption was identified as one of the day-to-day realities that is creating barricades on women protection and access to economic and social justice despite the availability of legal instruments that have been in place. Examples that were raised during data collection were how women who own pieces of land sometimes have their land invaded and still fail to have the invaders evicted despite having been granted an eviction order by the courts. In such incidents, the police are often implicated in getting bribes for them to relax and ignore the need for assistance to evict the invaders. Again, there are incidents of disappearance of evidence or paper work from the court records, especially when a case involves a highly positioned person in society or those holding positions of authority. Most commonly, this often happens in relation to rape or domestic violence cases where in some cases informants narrate cases of intimidation or further victimisation. This was reported as a factor which does not only block women from accessing justice but also kills their confidence in the justice system. In a different revealed case,

informants narrated that women have also been the subject of injustice when they have their goods for sale raided by the municipal police, in particular fruit and vegetables whose shelf life is very short. They will then be asked to recover them at the municipal offices. However, upon getting there, one would be told that the items cannot be located, or that the one who confiscated the items is off duty. This seemingly subjects women to financial losses which some have not been able to recover from; hence they see themselves drowned in the cycle of poverty again. Although, the women accepted that they are aware of the municipal by-laws which prohibit them from selling in the street, they argued that because of poverty they are left with limited options as most of them are single parents who need to fend for their children with the hope of giving them a descent or life.

7.4.2 Cultural Norms and Patriarchy

Section 16 of the current Constitution refers to culture as an important aspect of Zimbabwe's heritage which should always be promoted and preserved as it shapes our identity and character as a people. While cherishing our cultural heritage, values, customs and traditional institutions culture can be one of the sharp-edged elements that does not only defeat women's and girls' efforts to accessing both social and economic justice in many aspects but also exposes them to verbal abuse and eventually psychological abuse. Research revealed that to a large extent in many cultures within Zimbabwe, there are some family support figures whose responsibilities are to provide mutual support, mould families and resolve family conflicts being guided by cultural norms and values. As such, when issues that include domestic violence are brought to their attention, they give advice because all traditional institutions have a mandate to promote social cohesion, co-existence and prosperity for all people. However, it was observed that despite these cherished cultural traditions, some of the cultural values have for a long time stood in the way of justice for some women. For instance, when a wife gets beaten by her husband, the parents, sisters, uncles and aunts (both her and the husband's maternal and paternal relations) often persuade or block the wife from reporting the matter to the police. This has contributed to the large numbers of domestic violence case withdrawals as indicated in a presentation made by a representative of Katswe Sisterhood during an all stakeholders' meeting organised by the Zimbabwe Gender Commission on 25 November 2016. This was also confirmed by a ZWLA member who further indicated that women who step up and report domestic violence are often subjected to verbal abuse by their husband's relatives. In some cases the manner in which conservative patriarchal societies interpret assault or beating of women by their husbands is that the only reason a wife gets beaten would be that she has done some wrong. As a result this perception instils a sense of guilt within the victim who then feels that indeed they were wrong even though at times it might have been a misunderstanding which could have been settled amicably without one party resorting to violence.

Nevertheless, it is important to note that withdrawals can no longer be made at the police stations, but instead reasons for wanting to withdraw are presented to the magistrate at the court, and they will be considered during judgement. While this was a good step to reduce withdrawals and render justice, the same factor has further subdued women into thinking that reporting domestic violence is not an option if there are chances of them wanting to withdraw the case later on. The transformative context of the current Constitution requires that both men and women respect each other as enshrined in the customary laws of Zimbabwe's traditional institutions and values that advocate for the respect of women. As one informant said: "*mai havarohwi*, implying that historically women have always been regarded as the bedrock of any family and should never be beaten but be respected at all times.

However, because of the economic challenges and evolving nature of cultural values, culture has also influenced the manner in which women are perceived and has also negatively infringed on

women's access to resources that include land and mine claims. It was revealed that in most cases women are often requested to form clusters in order to access mine claims, a requirement which is not usually applied to men. This alone in the view of some women implies that women are still looked down upon as not strong enough to stand as individuals and succeed in business. It was revealed that possibly because of how culture has associated women with domestic chores, there is an assumption that what one man can do requires a group of women to successfully achieve the same task. While working in groups can enhance social networking it was the perception of some women that women continue to get smaller allocations of agricultural land than men. In spite of these divergent viewpoints, the study applauded government's efforts to uplift the lives of women through empowerment and protection of women's rights by instituting transformative legislative frameworks in accordance with the current Constitution.

7.4.3 Tedious Paper Work with Financial Implications

In many cases, as indicated by a member of the Zimbabwe Women's Lawyers Association (ZWLA), when women repeatedly face physical abuse they are left with no other option but to apply for protection orders. Although organisations such as ZWLA have taken the responsibility to interpret and assist victims to complete the voluminous application forms required for filing for a protection order, financial costs have also been a barrier. For instance, to apply for a protection order, one requires four sets of application forms which are not readily available for free at any office. These application forms are accompanied by commissioned affidavits, a process which costs an extra USD 4 in addition to the USD 5 cost of filing the application.

Form	No. of pages	Total cost
Application for a protection order DV3	6	10×6=60 cents
Interim protection order DV6	5	10×5=50 cents
Affidavit	1	10 cents
Protection order DV7	5	10×5=50 cents
Total cost per set		USD 1.70
Total cost for the required 4 sets		USD 6.80

This means that for one to file a protection order, they should part with USD 15.80, an amount which many are unable to provide. Further, the DV3, DV6 and DV7 forms do not only have monetary implications but also have too many pages to be fully completed. Section 31 of the Constitution provides that the state must take all practical measures, within the limits of the resources available to it, to provide legal representation in civil and criminal cases for people who need it and are unable to afford legal practitioners of their choice. The Legal Aid Act provides for representation of indigent persons. The Legal Aid Directorate was established to give life to both the Constitution and the Act. However, because of lack of resources, the Legal Aid Directorate has not been performing its mandate to the fullest. This is an avenue that indigent women could use, if the department was capacitated enough. Also related to this is the concern raised by the director of the Zimbabwe Women's Bureau who reported that the organisation has engaged the Zimbabwe Revenue Authority (ZIMRA) and the Ministry of Women's Affairs, Gender and Community Development in a forum whose objective was to assist cross-border traders so that they can equally engage in entrepreneurial ventures. Having raised a concern over Statutory Instrument 64 of 2016 which put women out of the informal trading industry, particularly the cross borders, it was made clear that the Statutory Instrument was never going to be reformed. Instead women were advised to apply for permits in compliance with the current government policy to which many are realised positive gains through entrepreneurship and creation of jobs thereby improving the quality of personal lives and those of their families. However, while most

women informants appreciated the efforts taken by government in trying to protect local products, they indicated that the permits cost USD 30 for a product, a cost which many said they could not afford. This was where the problem intensified due to the reality that most of the women cannot afford the required amount. Instead some have resorted to becoming irregular economic migrants, while others have shifted their focus in terms of what they are now importing.

7.4.4 Language Barriers

While the Constitution together with subsidiary legislation aim at protecting women and ensuring their access to justice, most of the paperwork which they are required to complete has non-simplified legal terms that the general citizenry is not familiar with. This challenges the efforts of women who would have turned to the law for justice. Further, English is the only language that is used on any application form. Despite having the liberty to present their issues in any vernacular language to legal practitioners, all applications can only be done in English as there are no translated versions of the forms into any of the languages used in Zimbabwe. This does not only scare both rural and urban women off but also instils a feeling of inferiority, particularly when one fails to adequately express themselves because they cannot understand the required language of communication.

7.4.5 Persons with Disabilities

Whenever a concern of language barrier is raised, many often connect it to dialects. However, a number of critical concerns were revealed by this study. Research findings revealed that persons with disabilities (PWDs) continue to experience gender-based violence of different forms despite the current Constitution clearly stipulating their rights in Chapter 2, section 22. According to this section, the government of Zimbabwe recognises the rights of persons with disabilities in particular their right to be treated with respect and dignity, and that all institutions and agencies at every level must develop programmes for the welfare of persons with disabilities, encourage the development of suitable communication, avail adequate resources and ensure that buildings and amenities are accessible to all persons with disabilities. However, research findings revealed that most institutions that deal with gender based violence or with person with disabilities are not adequately equipped to assist the persons with disabilities due to a number of reasons. The major reason was change of mind-set and attitude towards persons with disabilities, political will and commitment to mobilise adequate resources and offer them opportunities that will improve the quality of their lives as well as lack of holistic approaches to awareness and advocacy regarding the plight and/or potential that people living with disabilities have. As such, this constituency is systematically left out due to the assumption that all humans are able bodied and the misperceptions and stereotypes regarding people living with disabilities.

7.4.6 Restricted Working Schedules

The study found that the ZWLA that provide legal services has established mobile legal clinics through which they offer free legal advice to women. However, mobile legal clinics cannot provide adequate services in situations of rape or sexual abuse. Such cases will have to be referred to the police. In that regard, the Victim Friendly Unit (VFU) was established in 1996 with the aim to render support to victims and also make the environment conducive, private and friendly. Despite such efforts, the VFU, which is housed under the Zimbabwe Republic Police, does not operate on a 24 hour basis as intended upon its establishment. This implies that a woman or girl who has been sexually abused and is in need of the VFU services cannot access them after

normal working hours (1700 hrs). This increases the chances of post-rape psychological disturbances and depression which have contributed to young women committing suicide.

7.4.7 Female to Female Brutality

While women are often viewed as mere victims of all forms of violence, the study revealed that despite the establishment of the VFU within the Zimbabwe Republic Police and court sit-ins by lawyers, female- to-female brutality is still experienced. This was further confirmed in an interview with a member of the Zimbabwe Lawyers for Human Rights who reported that female officers sometimes call fellow female complainants by their cases. This would for instance result in a female complainant being referred to as “*mai vekuda maintenance*” which translates to the “lady who is after maintenance” or “*sisi vaya venyaya ye-rape*” which translates to “that sister who has brought forward a rape case”. This being done by fellow women has continued to contribute to women shying away from the justice system and its processes. The transformative context of the current Constitution requires that education becomes a priority for all women and men so as to eradicate ignorance and devaluing of each other as equals before the law, given that the current Constitution clearly indicates that no law may limit an individuals’ right to life, fair trial, human dignity, inhuman or degrading treatment or punishment or servitude (section 86:3a–f).

7.4.8 Poor Handling of Sexual Abuse Cases

Findings revealed that the general citizenry, particularly victims of sexual abuse, have no confidence in the police for they have in some instances proved to be stumbling blocks. This lack of confidence stems from the seemingly insensitive behind-the-counter arrangement that victims find themselves in when they present themselves at the police station to make a rape report. This was raised when another informant indicated that a victim makes their report while every other person in the station is welcome to listen to the report, yet the victim will be in a state of emotional hurt, confusion and possibly trauma. In addition, the language used by the police officers and prosecutors as well as the nature of questions asked to victims sometimes discourage and also traumatises women who would have otherwise confidently brought their cases to the attention of the police, hoping to get justice. For instance, when a girl walks into a police station to report a rape incident, the first set of insensitive questions she is likely to be asked would be whether or not she had cried or screamed, whether she had any physical bruises, how she fought back, and all sort of questions that require her to recount the horrific incident when she needs to be assured of safety before anything else.

Lack of confidence in the police has always trickled down to the justice system. According to one of the key informants, this is true in regard to public prosecutors as well as the members of the police force. In a case referred to during the interview, a victim of rape walked out of the court room crying that the public prosecutor had asked her questions which did not only make her uncomfortable but even devalued her position. This has left many women feeling unrepresented during court cases without realising that the public prosecutor should in fact be their technical representative.

8 Conclusions

Drawing from the findings of the study, the 2013 Constitution of Zimbabwe is transformative as it was drafted with gender consciousness and has therefore been empowering for women. Its provisions do not only call for the protection of women but further provides possible means of ensuring adequate enforcement of related legal frameworks and the setting up of supporting gender and human rights institutions to ensure effective and efficient implementation of the

legislative provisions. However, despite the visible efforts put by the government of Zimbabwe and other stakeholders whose responsibility is to ensure the implementation of the legal frameworks, enforcement of the legal frameworks has been challenged by inconsistencies and gaps that have been noted in the legal frameworks. It is also safe to conclude that constitutional provisions and legal frameworks are evidently not well aligned as they should be to ensure adequate protection of women from gender-based violence; yet both instruments should complement each other to achieve the best transformative results. If unresolved, this discord and inconsistencies will continue to cripple the otherwise empowering transformative Constitution which should ideally influence, inform and guard the supporting frameworks.

9 Recommendations

Based on the issues that were unpacked by the study, the following recommendations are made:

1. Alignment of legal frameworks for the protection of women and improved access to justice with the Constitution

The Constitution should inform the legal frameworks for the protection of women and improved access to justice. Here all subsidiary legislation should be aligned to the new Constitution, which is not the case today. Without necessary alignments, women's rights will continue to be abused on the ground. A case in point is the recent constitutional ruling banning child marriages, whereby, with effect from 20 January 2016, "no person may enter into any marriage, including an unregistered customary law union or any other union including one arising out of religion or religious rite, before attaining the age of 18 years".¹⁶ Although this ruling is there, the girl child is still getting married below the age of 18, since the Marriage Act and the Customary Marriage Act have not been aligned to the ruling and the Constitution. This is something which needs to be given attention and addressed with gender lenses in line with the transformative intentions of the current Constitution.

2. Adoption of a holistic approach to gender issues

There is a need for a more holistic approach to the handling of gender-based violence, including everyone who finds themselves in the chain of injustice. This can be done through intensive training for public service providers, which include the police, all those who handle and give support to victims as well as the public prosecutors and magistrates. The respective public and private agencies must continue and intensify the promotion of public awareness of the current Constitution by making it mandatory for all educational institutions from preschool up to university level to understand the basic tenets enshrined in the Constitution in particular with regard to the promotion of gender equality and promotion of fundamental human rights and freedoms in recognition of the inherent dignity and worth of each human being.

3. Stakeholder coordination and engagement

For best practices, there is need for concrete coordination and engagement among all stakeholders that work with and for the rights of women and the relevant policy makers as well as the Zimbabwe Gender Commission, Human Rights Commission and traditional institutions so that culturally relevant solutions are drawn from stakeholders

¹⁶ *Mudzuru and Tsopodzi v. Minister of Justice, Legal and Parliamentary Affairs, Minister of Women's Affairs, Gender and Community Development and Attorney General of Zimbabwe* CCZ 12/2015.

who work closely with the intended beneficiaries of the instruments that have been designed to complement the transformative Constitution.

4. Ensure balance of awareness information to rural and urban women

There is a bold assumption that it is the rural women who have not been able to access information and this has resulted in much focus being put on the rural communities, leaving out the urban communities. Instead, there will always be an imbalance of information with urban women having limited information. This calls for inclusive, holistic and Afro-centric approaches sensitive to the various needs of different categories of women, men, youth and children.

5. Interpretation of legal frameworks to all citizens

Although information is available, most of the available information has not been adequately interpreted to the general citizenry. It is often taken for granted that everyone understands how legal systems function yet only those who work within the systems have the understanding and can interpret legal documents with ease. To cover the gaps, there is a need for mechanisms to ensure access to information about the operationalisation of the legal systems and how one can access and follow-up on the developments within the legal spheres. There is need for more bottom-up and participatory approaches which are inclusive and responsive to some of the assumed knowledge about women's rights and gender-based violence.

6. Addressing gender equality issues

There is also need to address the issue of gender equality in all Commissions as stipulated in section 17 of the Constitution.

7. Maternity leave

Section 67 of the Constitution guarantees an unlimited right to maternity leave to all female employees, but section 18(1) (3) of the Labour Act and section 39 (1), (3) and (4) of the Public Service Regulations set conditions for the enjoyment of the right thereby discriminating against newly employed women. Section 65(7) of the Constitution provides that women employees have a right to fully paid maternity leave for a period of at least three months. The provisions in the Labour Act and the Public Service Regulations are therefore unconstitutional and must be reviewed because they breach the women's right to reproductive decisions.

8. Quota system in Parliament

Section 124(4) of the new Constitution provides for "an additional sixty women members, six from each of the provinces into which Zimbabwe is divided, elected through a system of proportional representation based on the votes cast for candidates representing political parties in a general election for constituency members in the provinces." Though only valid for the life of the first two Parliaments after coming into effect, this has resulted in a significant increase in the percentage of women representation in Parliament from 19 per cent in the previous Parliament to 31 per cent after the 2013 elections. This adoption of the women's quota system by Zimbabwe is in line with relevant international instruments relating to full political rights for women.

Such laws include the Universal Declaration of Human Rights, Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), and the Convention on the Political Rights of Women. However, in as much as this gender quota system is expected to influence the Parliament of Zimbabwe towards achieving a 50/50 representation, there is still a lot to be done as there are still disparities in the number of women parliamentarians compared to their male counterparts.

9. Support for the Anti-Domestic Violence Council

The Anti-Domestic Violence Council was put in place to monitor the implementation of the Domestic Violence Act. The Council has a critical role to play in ensuring that as a nation, policies and laws which address gender-based violence are enacted and implemented. However, due to non-allocation of resources by Treasury, it has been very difficult for the Council to fulfil its critical mandate. This Council is established in terms of section 16 of the Domestic Violence Act. The functions of the Anti-Domestic Violence Council include dissemination of information, research and provision of services necessary to deal with all aspects of domestic violence and promotion of the establishment of safe houses for the purposes of sheltering victims of domestic violence including the children pending the outcome of court proceedings under this Act.

10 Areas for Further Research

Whilst this research has highlighted some critical efforts regarding the constitutional and legal frameworks that have been put in place to address the continued violence against women, there is scope for further research in developing an educational framework of best practice that will be useful to all stakeholders as they engage systematically and consistently with the serious human rights violations associated with violence against women and girls. This study may therefore be further developed by unpacking the following issues:

1. The need to explore in detail all factors that continue to inflame distrust in law-enforcing authorities regarding gender-based violence by the Zimbabwean citizenry. This should then lead to the identification and proposition of effective strategies that can be used to re-claim citizens' confidence in these authorities. If the Constitution is taught to all citizens in both formal and informal settings, people will have a better understanding and respect each other as human beings as well as respect the rule of law.
2. There is a need to research the unforeseen insecurities and injustices surrounding people with disabilities, such as speech dysfunction, visual impairments in the justice-seeking process and how these can be addressed to ensure equal access to justice by both able-bodied and PWDs. This study would also get into issues that challenge the proper handling of PWDs by exploring further as a way of gaining deeper understandings on how law-enforcing government agents and human rights agents respond to gender related issues brought before them by PWDs. It is only when laws are properly enforced and appropriate measures are taken to protect PWDs that advocacy work by civil society organisations and human rights agents can achieve their goals of providing adequate legal representation in line with the provisions provided for by the Zimbabwean Constitution.
3. Drawing from the concern over language barriers, it would be necessary to look into the policy issues around access to information for all. This would include issues to do with possible translations of all critical documents that include the Constitution, policies and instruments that have been put in place for the protection of women against violence and

any other forms of human rights abuse. While acknowledging efforts made by some gender focused line ministries, all other government agencies and human rights agencies should ensure that documents are written in a language that is easily accessible by all regarding gender-based violence and other gender empowerment and women's rights issues.

4. An assessment of the impact of existing legal frameworks in the advancement of women's rights and the promotion of gender equality in accordance with the Constitution of Zimbabwe and other regional and international instruments such as CEDAW and the United Nations Security Council Resolution 1325 and related resolutions should be done continuously as part and parcel of any programming work. Effective monitoring and evaluation of the existing legal frameworks will ensure availability of critical data and information that should always inform policy making processes.
5. In addition to the global, regional and national frameworks already in place, more research needs to be undertaken on how the Zimbabwean traditional cultures always celebrated women and/or protected women from gender-based violence. Such approaches need to be systematically documented as lessons learned in the contemporary society. Such research would affirm the transformative founding values and principles upon which the current Constitution was crafted regarding recognition of the inherent dignity and worth of each human being, gender equality, equality of all human beings and the rights of women and children in particular.
6. There is need for further research in documenting the success stories regarding the transformative nature of the current Constitution on women rights and identification of gaps that would need to be followed up and strengthened. Women from all levels of society should be able to share their experiences on how the current Constitution has transformed their lives and also what they think needs to be done to improve on the transformative trajectory that the government of Zimbabwe has taken regarding the improving the quality of women's lives instituting appropriate legislative frameworks. There is need to celebrate these achievements through action-oriented research that will in turn inform policy design regarding women's rights and the institution of just legislative frameworks against violence against women in particular, men and all people in general.

The Constitutional State and Traditionalism under the 2013 Zimbabwean Constitution: A Critique

*James Tsabora**

1 Introduction

The nature and system of political governance adopted by constitutional societies is central to the progress and development of such societies. Institutions created to drive systems of political governance become essential in achieving the primary social deliverables required for the stability of such societies. For most Western states, the system of national political governance has been anchored in the structural philosophy bequeathed by the Treaty of Westphalia, promulgated more than three centuries ago in Europe. Such a state system is ordinarily complemented by other unique institutional systems that are aimed at enhancing its social, political and economic functions. Inevitably, the Westphalia model of state has been inescapable for African states due in part to both colonial history and choice. This Eurocentric state model has, however, attempted to accommodate, to varying degrees, traditional institutional governance systems that were prominent prior to colonialism, albeit with necessary structural modifications. Pertinently, the relationship created between these reservoirs of traditional governance and the modern constitutional state system is curious. The conflicts and tensions inevitable in the resultant structural framework are even more interesting.

There is no doubt that the 2013 Constitution of Zimbabwe is a compromise between traditionalism and the new constitutionalism. It establishes the traditional institutional governance system under Chapter 15 of the Constitution, which in turn engenders opportunities for antagonism and adversity. For this reason, the nexus between the republican state and the governance system created by Chapter 15 demands scrutiny. The fact that 17 of the 18 chapters of the 2013 Constitution are reserved for the modern state system, with only one dedicated to traditional political institutions, seems to suggest the superiority of the modern state system. This leads to the major assumption that underpins this paper, that the structural relationship between the modern state system and the traditional political institutional system in the 2013 Constitution is shaped and influenced by the need to align the interests of traditional institutions with the national constitutional value system. Such a constitutional value system clearly and predominantly favours the modern state system. In interrogating issues around this assumption, a number of questions are raised. Inescapably, the first question relates to the recognition of traditional political institutions under the Constitution, and the status, relevance and contribution of traditional political institutions to national political governance. Does the very existence of the modern state, it is pondered, question the validity, relevance and sustainability of the traditional political system? Further, to what extent, does the structural relationships between the modern state system and the traditional political system have any implications on the dual nature of Zimbabwe's legal system, and how so?

The above questions will be explored and interrogated in three parts that make up this paper. The first part explores the pre-colonial, colonial and post-independent traditional political governance system as an indigenous value system that existed prior to, during and after colonialism. The main

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argument sustained in this part is that the interactive relationship between the modern state and traditional institutions is born out of Zimbabwe's political and social history, and is a necessary part of modern governance.

The second part analyses the place and role of the traditional institutions in the 2013 Constitution, and the extent that these institutions interact, relate and compete with those of the modern state system. This part thus evaluates the contribution of traditional political structures and customary legal regimes to the functions and responsibilities of modern government in general, and the arms of the state in particular.

The final part is an overview of the main findings from the analyses in the three parts. This is followed by a conclusion on the general implications of the relationship between the traditional political governance system and republican system of state and government given effect by the Constitution.

2 The Traditional Institutional Governance Framework

It is a difficult task to extensively conceptualise traditional political institutions and their evolution throughout the three epochs of the pre-colonial era, the colonial era and the post-colonial period. A summary of the main developments suffices for purposes of this paper. In essence, prior to colonialism, the prominence and ubiquity of these institutions was beyond doubt. There was simply no alternative governance system, nor a competing leadership paradigm, despite the existence of varying forms of kingships, chiefdoms and other community leadership systems. That is not to say that these institutions remained static, and resisted development and evolution. Indeed, the heterogeneity of communities and societies these institutions presided over necessitated constant changes, adaptation and gradual evolution. However, such changes did not threaten the very existence of the traditional governance system or its superiority as the governance system of choice.

The African traditional political system thus had political, judicial and social functions that included social regulation, political leadership and judicial administration. In essence, the traditional system was the pivot around which society revolved. Zimbabwe's customary and traditional institutional system can only be understood as part of the larger African system that existed on the continent. Consisting of kingdoms, chiefdoms, tribal headman, village heads, kraal heads and other traditional political structures, the system had communitarian judicial, legislative and executive features usually centred in the chiefs and their traditional advisory councils.

Colonialism, however, changed the nature and form of traditional political systems drastically. In this vein, Bennett notes as follows:

The chieftaincy too has changed. Admittedly this institution proved to be remarkably resilient to colonialism; but the tribal authorities were deliberately co-opted to colonial government in terms of the policy of indirect rule. And, later, independent African governments found it impossible to dispense with the services of chiefs. However, this does not mean that the institution is the same as its pre-colonial forbear. Throughout Africa colonial administrations intervened in the indigenous forms of government to appoint and depose chiefs, to divide or create new tribes, and to change powers of competence. The 'traditional' authorities were moulded into a cadre of local government officials compliant with the requirements of state ... As a result they often lack any traditional basis of legitimacy. Instead of the support of their people, chiefs can now rely on the power of the state, and with state sanction they can now afford to rule autocratically.¹

¹ T. W. Bennet, 'Human Rights and the African Cultural Tradition', *Transformation* (1993) p. 35.

Indeed, the coming of European colonialism signalled a revolutionary moment in relation to the nature, shape, form and relevance of traditional political systems. Juma notes that the consolidation of colonial administration set out on a two-pronged mission, firstly “to create a system of administration that would be capable of adopting the traditional institutions of governance into its ranks”, and secondly “to *reinvest* African custom and tradition, drain it of all the regenerative and adaptive qualities, and reduce its rigid concepts and rules so that it could be administered by the colonial judicial system”.²

It is very clear that colonialism represented a serious threat to the African value system and its traditional political infrastructure. The European colonial regimes superimposed not only alien political and economic institutions on pre-existing African structures but also introduced a powerful social system that actively undermined the foundations of African social systems and cultural institutions. African socio-legal institutions were dealt a body blow, and could not withstand this superimposition. However, the objective of the colonial strategy was not to annihilate the traditional political governance system but, as Makoā argues, to incorporate them into colonial administration and use it to “control and govern the colonized population”.³

Eventually, these indigenous legal systems were under compulsion to transform in one way or another. Transformation meant the creation of a puppet traditional political system that was at the beck and call of the colonial political administrators. Whether this was necessary for the survival of the African system remains in doubt, but a clear outcome of this is that this puppet system inevitably diminished the amount of respect and dignity that resided in the African traditional political system, and thus eroded its legitimacy. Thus, the end of colonialism saw an African society unable to identify with the cultural and institutional system that had for millennia presided over it, whilst at the same time unable to relate to and accept the colonial administration system as the legitimate governance mechanism.

It can therefore be argued that the rise of the modern state system brought by colonialism, and based as it is on a Western liberalistic framework, undermined the legitimacy that had resided in the African value system for centuries. The African traditional system suffered a crisis of legitimacy, and its ability to justify extant social institutions and norms was put under serious strain. Additionally, its ability to legitimate the power and authority that was located in traditional political and social systems was eroded by a nascent colonial agenda. As one author observes, the rise and existence of the modern state in Africa questioned the very existence and legitimacy of the African value system itself.⁴

2.1 The Post-Independent State and the Traditional Customary System

The dawn of independence did not signal any significant resurrection of the African customary and traditional system. Indeed, independence did not elevate this system to the same level as the liberal constitutional governance and administrative systems now pursued by the post-colonial state and government. In fact, the Zimbabwean government immediately moved to strip chiefs and other traditional political institutional systems of their powers,⁵ making them irrelevant in the

² L. Juma ‘The Laws of Lerotholi: Role and Status of Codified Rules of Custom in the Kingdom of Lesotho’, *23 Pace International Law Review* (2011) p. 19.

³ F. K. Makoā, ‘Electoral Reform and Political Stability in Lesotho’, available at <<http://www.acco rd.org.za/ajcr-issues/electoral-reform-and-political-stability-in-lesotho/>> (accessed on 21 September 2017).

⁴ Juma, *supra* note 3.

⁵ This policy had been experimented with in Ghana, Guinea and most famously by Julius Nyerere in Tanzania. See P. Lal, ‘African Socialism in Post-Colonial Tanzania’, *CUP* (2015) p. 46.

new order.⁶ Although this policy was later abandoned, the indifferent approach by government meant that the indigenous customary value system continued to play second fiddle to the modern state and government system.⁷

A generational disdain of the African system had taken root especially within urban and semi-urban contexts, and in view of this the new African managers of the African state elected to pay only lip service to the domestic moral and social value system especially in its competition and contests with the modern state system.⁸ There were no points of convergence to be sought between the African traditional political system and the infrastructure of the modern state. Similarly, and most importantly, there was no attempt at insisting for constant negotiation between the African cultural normative system and the liberalistic constitutional normative system introduced after 1980.

In clear terms, this illustrates the fact that the immediate post-independence state and government clearly struggled to meaningfully accommodate this traditional system under the wings of the new constitutional system. Legitimacy of power and authority had long ceased to be derived or sought from African socio-legal norms and customary traditional institutions, due to there being a new *grundnorm*, namely, the Constitution. This *grundnorm* had become the validator and all-important *legitimator* of power and authority in the modern state.

2.2 The Constitutional Value System and the Modern State

It is relevant to explore the value system adopted or preferred by the 2013 Constitution and check the implications of that value system to the relationship between the modern state system and the traditional political governance system. The Constitution of Zimbabwe is largely a human rights-centred document. Its main features, principles, institutions and substantive values are derived from international human rights law. Its preamble underscores desire for freedom, justice and equality and recognises the need for the rule of law, democracy and transparent political governance. It further reaffirms a commitment to “upholding and defending fundamental human rights and freedoms”. However, the preamble also celebrates “the vibrancy of our traditions and cultures”. This is critical in that the Constitution does not ignore the worth or relevance of the customary law system and its institutional structures. In essence, therefore, the Constitution affirms the values of a dual system, namely the traditional value system, with all its customary rules and institutions and the human rights value system as guiding the modern state system. It may be argued that by so doing the Constitution, though less openly, seems to suggest the existence of a pluralist legal system with essentially two legal systems, namely the general civil law system and the customary law system.

Various other provisions in the Constitution seek to entrench human rights either by creating necessary institutions for their promotion or outlining the substantive human rights concepts, principles, values and positions for the purposes of their protection. For instance, one very

⁶ See Report of the Economic Commission for Africa, *Relevance of African Traditional Institutions of Governance*, 23. According to the Report, Zimbabwe’s government later reversed its earlier policy of dismantling chieftaincy and created a Council of Chiefs in 1993, available at <<https://sustainabledevelopment.un.org/index.php?page=view&type=400&nr=442&menu=35>> (accessed on 21 March 2017).

⁷ For Nyerere, the reason for abolishing traditional political governance system was “to build a centralised territorial state and a common citizenship in the face of a colonial legacy defined by politically and legally enforced racial and tribal privilege”. See M. Mamdani, ‘Nation-state: Nyerere’s legacy’, *Mail and Guardian*, 15 March 2013, available at <<https://mg.co.za/article/2013-03-15-00-nation-state-nyereres-legacy>> (accessed on 15 September 2017).

⁸ H. K. Prempeh, ‘Africa’s Constitutionalism Revival: False Start or New Dawn?’, 5 *International Journal of Constitutional Law* (2007) p. 469.

important provision is section 3, entitled “Founding values and principles”. This section establishes, among others, a human rights and democratic value system that underpins the Constitution. It recognises various human rights principles and concepts such as rule of law, equality, dignity and gender equality. In addition, section 11 creates an obligation on the state “to take all practical measures to protect the fundamental rights and freedoms” in the Constitution and to promote their realisation and fulfilment. Further provisions in Chapter 2 of the Constitution are underscored by human rights discourse on children’s rights, persons with disabilities, gender, shelter, health, social welfare and education.

A critical component of human rights is found in the Declaration of Rights in Chapter 4. The rights in this Chapter are comprehensive, progressive and substantive. These rights can be classified under the three traditional categories of civil and political rights (first generation rights), socio-economic and cultural rights (second generation rights) and group/collective rights (third generation rights). It is important to note that there are some rights that were traditionally recognised as constitutional rights only, and not strictly human rights *per se*, such as right to access to information, right to administrative justice, media rights, political rights, labour rights and marriage rights. It could be argued that these rights are now recognised as human rights in Zimbabwe since they are situated in the human rights chapter. This expansion of human rights is welcome and provides an opportunity for the interpretation of such rights not only from a constitutional perspective but also from a human rights context.

It is also important to observe that the human rights entrenched in the Declaration of Rights echo and reflect the fundamental constitutional and human rights themes that have characterised Zimbabwe’s political and legal history since colonial times. Examples of these important thematic concerns include the need to address inequities and oppression created by a patriarchal society, the need to embrace international human rights standards from international human rights instruments and finally the need to create an open, equal, just and democratic society. In view of this, it can be argued that the main objective of the human rights directions embraced in the Zimbabwean constitutional system is the achievement of socio-economic justice, political justice and the attainment of an open, free, just and equal society. These objectives are a direct result of various factors that shape Zimbabwean socio-political and cultural history such as colonial racial oppression, economic disenfranchisement, gender discrimination, inequalities engendered by patriarchy and political oppression in general.

Apart from this, the outcome of the interpretation of the Declaration of Rights has to achieve a number of human rights and democratic objectives such as openness, justice, human dignity, equality, freedom, among others. In addition, such interpretation should be guided by the need to develop the common law and customary law. The import of this is that customary law development now has to proceed within the precincts of the Declaration of the Rights; customary rules can thus not be judicially developed independent of, or outside, the ambit of the Declaration of Rights.

In relation to custom, the 2013 Constitution clearly recognises custom and traditional cultural values in various sections. Firstly, custom is recognised as a part of the law to be administered in Zimbabwe on the day the Constitution came into force.⁹ Secondly, the constitutional supremacy clause reiterates the supremacy of the Constitution and the legal invalidity of any other law, practice, conduct, *custom* or conduct inconsistent with it.¹⁰ What this means is that custom, customary practices or rules of conduct or customary behaviour have to be consistent with the Constitution for their validity to stand. Thirdly, the Constitution recognises “the nation’s diverse

⁹ Section 192 Constitution of Zimbabwe Amendment (No. 20) Act 2013.

¹⁰ Section 2.

cultural, religious and traditional values” as a founding constitutional value underpinning the Constitution. The rights of ethnic, racial, cultural, linguistic and religious groups are envisaged as part of the broader understanding of the principle of good governance.

With specific reference to culture, the Constitution creates an obligation on the state and government “to promote and preserve cultural values and practises which enhance the dignity, well-being and equality of Zimbabweans”. Further, the same provisions call for the state and government to promote and preserve Zimbabwe’s heritage and take measures to ensure “due respect for the dignity of traditional institutions”.¹¹

Again, this can be interpreted as the call for the promotion of cultural values and practices that extend, promote and assist in the enjoyment of human rights. Cultural values are recognised in as far as they positively relate to human rights, and conversely those cultural behavioural practises that undermine dignity, equality and well-being are not recognised.

An important human right in the Declaration of Rights is the right to language and culture. In terms of section 63, every person has the right to use the language of their choice, and to participate in the cultural life of their choice. However, the limitation of this right is that the exercise of such rights must not be inconsistent with other rights in the Declaration of Rights. Quite clearly therefore the right to culture and language has to be exercised subject to other rights in the Declaration of Rights. To an extent, this is a massive internal limitation that undermines the right to culture. In essence, the import of this is that cultural practices and beliefs have to meet and comply with the general standards of constitutionalism and human rights for their legal validity to hold. Accordingly, the message from the Constitution is that the standards and values of human rights and constitutionalism entrenched in the Constitution take precedence over other value systems in society, and further that the human rights agenda can best be championed by the institutions and machinery of the modern state system and not any other seemingly contrasting political governance framework.

3 Traditional Institutions under the 2013 Constitution

As with its 1980 predecessor, the 2013 Constitution establishes a clear machinery for state and government based on the Western-oriented republican state system. Unmistakably, the major features include creating a state and government system based on the three arms, namely the executive, the legislature and the judiciary. The nature of political governance is unitary, meaning that there is less devolution of central government powers.¹² In this vein, the 2013 Constitution recognises and identifies a three tier government system based on the (i) national (central) government, (ii) provincial and metropolitan councils and (iii) local authorities, which includes urban and rural councils.

Other main features of the resultant republican system of government include establishing a civil service administrative system, national security apparatus, criminal justice institutions, democratic governance institutions and commissions supporting democracy. A novel feature in the 2013 Constitution is the establishment of a public administrative framework and its value system in Chapter 9, and a public financial management framework under Chapter 17. Traditional ‘leadership’ institutions are established in Chapter 15, and quite unsurprisingly not as another tier of government.

¹¹ Section 16.

¹² Chapter 14 of the 2013 Constitution, however, creates a substantive framework for devolution, which framework is to be implemented ‘whenever appropriate’ (see section 264 specifically).

An analysis of the institutions for the modern state and government established by the Constitution provides interesting perspectives that relate to the role and place of traditional institutions. Firstly, the Constitution is clear on the modern state and government; it establishes a sovereign republican system of government based on the three tiers of government being the executive, the legislature and the judiciary. Clearly, this three-tier framework reserves little room if any for the direct participation of traditional institutions in spaces meant for its manifestation. But what are these spaces, it may be queried.

Under Chapter 15 of the Constitution, the traditional political system is given the responsibility of performing cultural, customary and traditional functions of a chief, head person or village head for a community. These functions are listed and consist of a mix of dispute resolution, administration of communal land and environmental affairs and taking measures for the preservation and promotion of their cultural value systems.¹³

Another important part of Chapter 15 are the list of principles that the traditional political system must observe. These principles include the principle of legality, fair and equal treatment, impartiality, non-partisanship, no to be members of political parties, among others.¹⁴ Most importantly, traditional leaders are under an obligation not to violate the fundamental human rights and freedoms of any person. These principles are far reaching; they limit some of the rights that accrue to traditional leaders as persons in terms of the Declaration of Rights such as political rights. Curiously, these principles have a striking similarity to general principles that should be observed by members of the civil service. Such a similarity suggests that the Constitution implicitly regards traditional leaders as civil servants in the same manner as the colonial administration system had done or sought to do.¹⁵

This reality is also true with the traditional political system in various parts of Africa. Commenting on a similar structure, Juma observed this concerning the Lesotho chieftaincy system:¹⁶

Although the chiefs played such a prominent role in governance immediately after independence, their significance has slowly dwindled in subsequent years due to the rapid political and social change that the country has been through. While *chiefs are firmly entrenched in the civil service* of the state and rely on —their position [s] as [its] salaried functionaries, limitations on their powers are now explicit in many legislative regimes brought into force in the last three decades.

To echo this, the Constitution makes a call for an Act of Parliament to regulate the ‘conduct of traditional leaders’. Whether this can be interpreted as suggesting a form of code of conduct with a disciplinary system remains to be seen. Currently, no such Act exists and a Traditional Leaders Declaration is still in the early stages of debate and discussion in Parliament.

Another very important development in the Constitution is the incorporation of traditional leaders into Zimbabwe’s legislative system. In terms of section 120 of the Constitution, the Senate membership includes 16 chiefs, and also the president and deputy president of the National Council of Chiefs. This inclusion in the legislative arm of the state and government means that they take part in the main business of the legislature, namely initiating, preparing, debating and commenting on legislation. It is important to note that their double roles as traditional leaders on one hand and members of Senate on the other does not grant them special

¹³ Section 282.

¹⁴ Section 281.

¹⁵ This argument is generally proposed in reference to the relationship between the colonial administrators and the puppet traditional institutions. *See generally* Juma, *supra* note 3.

¹⁶ *Ibid.*

privileges in Parliament. They are thus treated as ordinary legislators, and lose or extend membership in similar terms as elected senators.

It can be argued that the co-optation of traditional leaders into the legislature has both symbolic and practical significance. The symbolism is in the respect that seemingly comes with incorporation of traditional institutions into the legislative structures of a modern state and government system. Indeed, the message this sends is that these institutions are not excluded from mainstream political and governmental activities carried out by the adopted government system that admittedly has superior organs and agencies for its administration. On the other hand, the practical significance is that by such co-optation, the traditional leaders in Parliament are exposed to modern constitutional processes of the day which constantly denounce and condemn patterns of social, cultural and political life that violate human rights, constitutional principles and the rule of law. Accordingly, the co-optation enables the chosen representatives of traditional leaders to appreciate human rights abuses committed in the name of culture and custom in their communities. To an extent, this exposure may be read, arguably though, as the opportunity for constant negotiation and renegotiation between the traditional political system and the constitutional legislative system.

Additionally, co-optation into a formal institution such as the legislature can also be interpreted on the basis that chiefs and village heads in traditional chieftaincies “constitute a forum where local interests are debated and articulated” and to that extent chiefs become “a valuable resource in informing the state about the interests of local communities they represent”.¹⁷ Thus the co-optation of the traditional political system in modern government enhances their representative roles and consequently the level of interaction between the modern state and local communities living in traditional settings and contexts.

Apart from the general advantages of co-optation, dangers lurk. There is a real risk that traditional institutions will be used as an instrument of state power and a conduit of the government in its various policies that might impact on human rights. This point needs further exemplification.

For the past decade, Zimbabwean politics has been characterised by attrition, vicious political contests and electoral mishaps that have tainted constitutional democracy.¹⁸ Unsurprisingly, various reports have emerged of political parties, led by the ruling party, making use of traditional institutions and leaders such as chiefs, village heads, kraal heads and other leaders for political purposes.¹⁹ Some reports have claimed that traditional institutions were central in vote buying,

¹⁷ T. von Trotha, ‘From Administrative to Civil Chieftaincy: Some Problems and Prospects of African Chieftaincy’ 37:38 *Journal of Legal Pluralism* (1996) pp. 79–108.

¹⁸ See generally B. M. Tendi, ‘Making History in Mugabe’s Zimbabwe’, *Politics, Intellectuals and the Media* (Lang, Germany, 2010).

¹⁹ See ‘Charumbira calls on chiefs to back Mugabe’, *Nensday*, available at <<https://www.dailynews.co.zw/articles/2017/10/31/charumbira-calls-on-chiefs-to-back-mugabe>> (accessed on 31 October 2017); ‘Chiefs endorse Pres Mugabe’s candidature’, *ZBC*, 28 October 2017; ‘Chiefs backs Amai Mugabe’s elevation’, *Herald*, 10 September 2014; ‘Chiefs appeal to President for power restoration’, *Herald*, available at <<http://www.herald.co.zw/chief-appeals-to-president-for-power-restoration/>> (accessed on 20 September 2017). ‘Chief empowered to prop ZANU PF’, *The Independent*, available at <<https://www.theindependent.co.zw/2005/01/07/chiefs-empowered-to-prop-up-zanu-pf/>> (accessed on 21 October 2016); ‘Chiefs now Mugabe’s auxiliaries’, *Daily News*, available at <<https://www.dailynews.co.zw/articles/2016/02/29/chiefs-now-mugabe-s-auxiliaries>> (accessed on 10 September 2016); ‘Zimbabwe ballot papers spark row’, *BBC News*, available at <<http://news.bbc.co.uk/2/hi/africa/7310544.stm>> (accessed on 13 September 2016); ‘Opposition leader says voters forced to choose Mugabe’, *CNN*, available at <<http://edition.cnn.com/2008/WORLD/africa/06/27/zimbabwe.vote/>> (accessed on 13 September 2016).

intimidation, hate speech, political manipulation, political campaigns, violence against supporters of political rivals, denial or withdrawal of benefits or privileges to people in their communities supporting certain political parties, espionage on behalf of political parties and various other misbehaviour.

A direct consequence of this has been that traditional institutions have descended onto the political space for their own survival, and in a manner that directly impacts on electoral freedom, freedom of speech, assembly, political rights, among other rights. Accordingly, there is no denying the conclusion that traditional institutions are generally regarded as a conduit of the government and an instrument to carry out or support political programmes of the government of the day.

4 General Overview

From a consideration of the various issues discussed above, certain fundamental themes and aspects of the constitutional system established by the 2013 Constitution emerge. The first observation that can be made is that the 2013 Constitution is clear on its constitutional objectives and priorities. It exalts the virtues of constitutionalism, constitutional supremacy, rule of law and human rights. The constitutional value system is anchored on these principles and the philosophy underpinning the whole constitutional document supports these values.

Secondly, the constitutional system is not apologetic of the modern state and government system it establishes; neither does it regret the fact that the existence of this modern state framework appears to question the validity of the continued existence of the traditional institutional system. To this extent, the constitutional system illustrates a desire to continuously and progressively develop the fundamental features of this modern state system, and not destroy them. Where there is need for any alterations or modifications of the modern state system, the constitutional system seems to suggest that this will not be in order to destroy the state system or subjugate it to the traditional institutional system. Indeed, there is nothing in the constitutional system that suggests that these two systems enjoy equality or will gradually attain that position in the foreseeable future. Inevitably, it can easily be observed that the traditional system established by the Constitution is decidedly subservient to the modern state machinery, and where these two systems conflict, the modern state system triumphs. Accordingly, the Constitution does not compel constant negotiation and renegotiation between the traditional institutional system and the constitutional democratic system for purposes of finding points of convergence.

Thirdly, the customary legal system preserved by the Constitution is recognised only to the extent it is consistent, hence compliant, with the Constitution. This means that whilst the conclusion that there exist a pluralist legal system in Zimbabwe's constitutional framework holds water in theory, the reality is that this is of no practical relevance considering the subservient status of the customary law system to the general system established by the Constitution. Customary practices, social behavioural patterns, cultural values and various other traditional value systems are only legally valid to the extent that they are permitted by or consistent with the Constitution.

Most certainly, a functional position that can be established is that the customary system is only recognised to the extent it seeks to advance and promote the objectives and values in the Constitution. Accordingly, it can be concluded that the philosophical orientation of Zimbabwe's constitutional framework is underpinned by the requirement that the customary law and traditional political system is established not as a competing legal system but for the purposes of complementing and promoting modern constitutional values and principles considerations in the interests of the modern state system.

Finally, the relationship between traditional institutions and the modern state created by the Constitution puts traditional institutions at risk of instrumentation by the government of the day. Traditional institutions are independent on paper only as they are likely to always be manipulated by the government of the day in its implementation of social and economic policies that impact rural and traditional livelihoods. The Constitution does not insulate traditional institutions from this risk, and indeed Zimbabwe's politics of the past 20 years has illustrated this sad reality.

5 Conclusion

The 2013 Constitution creates a modern state system that has very little room for traditional institutions. Further, the constitutional system has very limited space for legal pluralism, at least to the extent that this can be taken to mean existence of two legal systems competing at an equal level. The values of the modern state system and modern constitutional values are superior to those of the African value system. Indeed, there is very little support for the discourse or 'myth'²⁰ of harmonisation or unification²¹ of the traditional political system and the general modern state system given prominence by the Constitution.

In relation to the traditional political system, what the Constitution illustrates is the existence of a subservient traditional political institutional system whose validity, sustainability and continued existence depends on the discretion of the modern state system. Again, there is very little support for the substantive integration of the traditional political system within the modern state machinery in a manner that would elevate the relevance of traditional political systems. Thus, the traditional political institutional system can only be relevant to the extent that it advances the agendas not only of the modern state, but also of the constitutional value system in the 2013 Constitution such as democratic governance, constitutionalism, separation of powers and the rule of law. This means that the social, economic and political agendas to be advanced by the modern state system and enshrined in the 2013 Constitution are not imperilled by the conditional recognition of the traditional political framework. Indeed, the constitutional system seeks to ensure that the traditional institutions and customary legal system it creates promote the objectives of the modern state particularly where the agendas and objectives of the modern democratic state system lead to the consolidation of the state, its regeneration and its effectiveness.

²⁰ See M. Boodman, 'The Myth of Harmonization of Laws', *American Journal of Comparative Law* (1991) p. 699.

²¹ A. Allott, 'Towards the Unification of Laws in Africa', *International Comparative Law Quarterly* (1965) pp. 366–389.

An Analysis of Traditional Leadership, Customary Law and Access to Justice in Zimbabwe's Constitutional Framework

*Samukeliso Sibanda**

1 Introduction

Zimbabwe adopted a new Constitution in 2013,¹ which, among other things, recognises the role of traditional leadership institutions which operate alongside modern politics and judicial authority. The new Constitution draws the line for the traditional leaders with regards to the scope and extent of their duties. In a number of ways there exists a conflict between traditional forms of judicial authority and modern forms of judicial authority, and this contributes considerably to the significance of traditional leadership institutions and customary law towards the realisation of the right to access to justice. As such, this chapter is hinged on the role traditional leadership institutions and customary law play with regards to access of justice in Zimbabwe. Structurally, the paper is divided into four parts. The first part dwells on the contextual background, whilst the second part focuses on the right to access to justice. The third part interrogates the recognition of traditional leadership and customary law within the Zimbabwean Constitution. Finally, the fourth part discusses recommendations suggested by chiefs for the improvement of access to justice.

2 Contextual Background

The institution of traditional leadership has always been central to the governance of communities in Zimbabwe. For example, the structures and systems of the institution of leadership in Ndebele, Shona, Kalanga, Tonga and Venda ethnic communities have some remarkable differences even though they also depict certain similarities. Currently and generally, the institution of traditional leadership comprises of chiefs, headmen and village heads in order of hierarchy. Traditional leaders are the closest to the people and therefore interact more with the citizens in the rural areas. Prior to the colonisation of Zimbabwe, the institution of traditional leadership was the sole governing body with legitimacy to govern derived from tradition and culture.

Traditional leaders had fused 'governmental' powers and authority, that is, judicial, administrative and political powers, which is not the case with the modern state constitutional framework where there is strict adherence to the principle of separation of powers. Soon after colonisation in 1890, the colonial government dismantled, and in some places replaced, traditional governance structures with 'modern' state institutions.² It embarked on a number of measures that corrupted and eroded the institution of traditional leadership.³ Some of the powers of traditional leaders, such as the power to allocate land, were usurped by the European moguls.⁴ Chiefs became salaried government officials accountable to the colonial government. Thereafter, the role of the institution was under constant redefinition by the successive governments in the colonial period.⁵

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¹ Constitution of Zimbabwe Amendment No. 20 Act 2013.

² See T. Chigwata, 'The Role of Traditional Leaders in Zimbabwe: Are They Still Relevant?', 20 *Law, Democracy and Development* (2016).

³ *Ibid.*

⁴ *Ibid.*

⁵ *Ibid.*

Due to the constantly changing role of traditional chiefs, the chiefs themselves have perceived their role as dispute resolution personnel from a community and institutional perspective.

3 Access to Justice

The traditional role of chiefs in the dispute resolution framework can be appropriately understood from an access to justice perspective. The term ‘access to justice’ implies availability of the means of implementing the laws provided in the statutes of a given area (a state in this case) for purposes of promoting justice. According to the United States Institute of Peace (USIP):

[A]ccess to justice is defined as the ability of people to seek and obtain a remedy through formal or informal institutions of justice for grievances in compliance with human rights standards ... [T]here is no access to justice where citizens (especially marginalised groups) fear the system, see it as alien and do not access it, where the judicial system is financially inaccessible; where individuals have no lawyers, where they do not have information or knowledge of rights; or where there is a weak justice delivery system.⁶

In the Zimbabwean context, access to justice entails the ability for people to seek and obtain judicial remedies regardless of where they are as long as it is within the country. This is enshrined in Section 85(1) of the Constitution which is to the effect that everyone has the right to approach the courts alleging violation of fundamental rights. Section 85(3)(b) further makes directions to the limitation of formalities and procedures which might compromise individual access to courts. The availability of such remedies determines the effectiveness of the human rights standards set out in various conventions and statutes. Furthermore it seems access to justice encompasses the whole system which in turn involves the rules of evidence and the entire procedures. One may find out that the rules of procedure may be very prejudicial to a particular group of people, on particular issues. This is also stated in a Gender and Access to Justice Conference Report, wherein it was stated that “the rules of evidence also go against women, judges always ask for proof when women complain of having been beaten by their husbands, a medical certificate is the proof that they are expected to provide. Health centres most often refuse to provide them for fear that they would have to be witnesses.”⁷ From the above, it is safe to infer that the impact of inaccessibility of justice has gender-based negative results, among other adverse consequences. By virtue of women constituting the greater part of the rural populace, they are bound to suffer more in terms of injustice. As stated in the aforementioned report, “the grossly inadequate infrastructure for legal and judicial services entails costs that the poor rural populations and especially women can ill afford”.

In Zimbabwe, a number of laws have been promulgated in a bid to make justice accessible, for instance the Domestic Violence Act [Chapter 5:16]. The Act makes provision for the protection and relief of victims of domestic violence and provides for matters connected with or incidental to the foregoing. This Act is also a good example of such law that has been promulgated in an attempt to facilitate access to justice. It is unfortunate that these laws have been met up with an attitude that challenges effective implementation. The Domestic Violence Act has been regarded as a gendered piece of law and has been negated by marginalised women and viewed as unacceptably compromising with regards to access to justice, particularly for women.

In the case of *Deria Mupapa v. George Mandaya*⁸ Tsanga, J. averred thus:

⁶ United States Institute of Peace (USIP), Necessary conditions, Access to Justice, <usip.org/guiding-principles-stabilization-and-reconstruction-the-web-version/7-rule-law/access-justice> (accessed 25 October 2016).

⁷ See Royal Tropical Institute, *Gender and Access to Justice in Sub-Saharan Africa, Conference Report*, <bibalex.org/Search4Dev/files/305435/135298.pdf> (accessed 25 October 2016).

⁸ HH-443-14.

The State's role of promoting access to justice through widespread dissemination so as to create at the very least, knowledge of the law for accessing the courts remains minimal. Non-Governmental Organisations which often play this role more directly are equally hampered by financial constraints in terms of their geographical reach.

It is, hence, not enough for the state to merely promulgate laws. What is needed is the promotion of dissemination so as to facilitate a platform upon which the ordinary citizens can get to appreciate the fact that the courts are meant to be accessed by just anyone and that recourse can be sought without intimidation and a misinformed idea that courts are reserved for a chosen few. It is quite unfortunate that the state is less active in fulfilling the obligations it assumed in assenting to treaties like the Universal Declaration of Human Rights (UDHR) and the African Charter on Human and Peoples' Rights (ACHPR). Article 8 of the UDHR is to the effect 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 and the law. It thus remains the state's duty to facilitate the exercise of this right.

From an international perspective, the ACHPR states that every individual shall have the right to have his cause heard⁹. This comprises of:

- a) The right to an appeal to competent rational organs in respect to violations of fundamental rights as recognised and guaranteed by conventions, law, regulations and customs in force, and
- b) the right to be presumed innocent until proven guilty by a competent court of law.

Furthermore, Article 8 of the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa echoes the same sentiments.¹⁰

Section 31 of the Zimbabwean Constitution enjoins the state to take all practical measures within the limits of the resources available to it to provide legal representation in civil and criminal matters.¹¹ This provision creates an impression of the existence of legal aid and the assumed reality that people can get representation even in instances where they cannot afford it. The assumption could not be so far away from the truth because the lived reality reflects otherwise. Access to justice by ordinary citizens is either delayed, which in turn may render it ineffective as was reflected in the *Mildred Mapingure* case, or inaccessible, thus crippling the justice delivery system as a whole.¹²

4 Recognition of Customary Law in the Zimbabwean Constitution

There is significant recognition of customary law in the Constitution of Zimbabwe. Anything that has something to do with customs, culture, traditions, traditional leadership and chiefs is partly linked to customary law. Therefore those aspects will be of great importance in trying to find out the extent of recognition of customary law in Zimbabwe as stipulated in the

⁹ See Article 7(1). The African Charter on Human and Peoples' Rights (also known as the Banjul Charter) is an international human rights instrument that is intended to promote and protect human rights and basic freedoms in the African continent. Oversight and interpretation of the Charter is the task of the African Commission on Human and Peoples' Rights, which was set up in 1987 and is now headquartered in Banjul, Gambia. A protocol to the Charter was subsequently adopted in 1998 whereby an African Court on Human and Peoples' Rights was to be created. The Protocol came into effect on 25 January 2005.

¹⁰ The Article states thus: "Women and men are equal before the law and shall have the right to equal protection and benefit of the law. States Parties shall take all appropriate measures to ensure: effective access by women to judicial and legal services, including legal aid; support to local, national, regional and continental initiatives directed at providing women access to legal services, including legal aid; the establishment of adequate educational and other appropriate structures with particular attention to women and to sensitise everyone to the rights of women; that law enforcement organs at all levels are equipped to effectively interpret and enforce gender equality rights; that women are represented equally in the judiciary and law enforcement organs; reform of existing discriminatory laws and practices in order to promote and protect the rights of women."

Constitution. Firstly, the preamble of the Constitution acknowledges and celebrates the vibrancy of our traditions and cultures. This is an important confirmation of traditional institutions and the legitimacy of various cultural contexts in which such institutions can be understood.

It is important to mention that the supremacy of the Constitution¹¹ dictates that any customs, norms and traditions that are inconsistent and not reflective of the values and the principles that inform the Constitution are to be constitutionally invalid.¹² In as much as cultural values are to be protected and respected, which enhances the dignity, wellbeing and equality of Zimbabweans,¹³ they need to be in line with the dictates of the Constitution lest they become inconsistent. The Constitution also recognises the use of customary law, but the customs and traditions will be valid only to the extent of their consistency with the Constitution.

Chapter 15 of the Constitution specifically deals with traditional leaders and their functions. This Chapter further reiterates the fact that traditional leadership institutions which are the custodians of customary law are also a part of our constitutional system and command the same respect that any other judicial institution should command, albeit theoretically. There is further the recognition of traditional leaders in the equitable allocation of national resources and the participation of local communities in the determination of development priorities within their areas, and the Constitution directs that there be devolution of power and responsibilities to lower tiers of government in Zimbabwe.¹⁴ In general, this shows that the chiefs are bestowed with other powers since they are considered to be important and they also play an indispensable role within the justice system. The recognition of traditional leadership in Chapter 15 of the Constitution is a clear manifestation of how customary law is upheld in the local communities. The institution of traditional leadership is regulated and monitored within the parameters of the Constitution. The decisions which are to be passed by chiefs must be in accordance with the stipulations of the Constitution, and this is to safeguard the rights of individuals. Therefore there is now transparency within the application of customary law. The case of *Tsvangirai v. Nyikadzino*¹⁵ bears testimony to this, where it was held that traditional leaders should conduct themselves in the manner that is reflective of the decorum of the justice system, any action contrary to that would be an insult on the dignity of justice and everything else that the justice system represents.

The Constitution also recognises the use of customary law especially in section 46(1) which states that when interpreting the enactment and when developing common law and customary law, every court, tribunal, forum or body must promote and be guided by the spirit and objectives of this Chapter. This section is of much importance because it recognises the existence of customary law, but calls for its judicial development, not destruction. The Constitution also retains powers of the chiefs, and it ensures that there is a balanced representation of chiefs from all provinces in the Senate House of Parliament.¹⁶

¹¹ Section 2 of the Constitution.

¹² L. Madhuku, *An Introduction to Zimbabwean Law* (2010).

¹³ Section 16.

¹⁴ Section 264(1) of the Zimbabwean Constitution provides that “[w]henver appropriate, governmental powers and responsibilities must be devolved to provincial and metropolitan councils and local authorities which are competent to carry out those responsibilities efficiently and effectively”.

¹⁵ 2012 (1) ZLR 405.

¹⁶ Section 120(1) of the Constitution which deals with composition of Senate states that the Senate consists of 80 senators, of whom “(b) sixteen are Chiefs, of whom two are elected by the provincial assembly of Chiefs from each of the provinces, other than the metropolitan provinces, into which Zimbabwe is divided; (c) the President and Deputy President of the National Council of Chiefs.”

The 2013 Constitution also creates a hierarchical judicial system.¹⁷ The customary courts are also included, and this shows the recognition of the existence of customary law. However the customary courts are stuck near the bottom, and this must not be wrongly interpreted as to mean that customary law has less importance because most of the Zimbabwean population lives in rural areas and are mainly guided by customary law. In resolving disputes, chiefs are enjoined to do so in accordance with customary law.¹⁸ There are some assemblies which are meant to ensure that justice prevails, for example, the National Council and Provincial Chiefs Council which represent all chiefs in Zimbabwe.¹⁹ This was done to ensure that customs or other cultural practices which are evil or contrary to the Constitution do not penetrate into the system. There is now the supremacy of the Constitution and no one is above the law. The appointment of the chief president as well as the deputy is outlined in section 284(4). This was also an effort to ensure that the practice of customary law is properly regulated.

The duties of the chiefs are also outlined in the Constitution in section 280(2). This is to ensure that they do not overstep their duties and infringe on human rights. Section 281 further provides boundaries for what chiefs are permitted to do and what they are not. Since the chiefs are the guardians of customary law, it is to be expected that in the event that their conduct violates human rights, they will be held liable and accountable for that pursuant to the rule of law principle which is to the effect that no one is above the law. This ensures the maintenance of justice in customary law courts according to section 281(9).

4.1 Constitutional Provisions on Traditional Leadership: A Case Study of Chief Charumbira's Court

The institutions, status and role of traditional leaders are recognised under customary law. Traditional leaders are responsible for performing the cultural, customary and traditional functions of a chief, headperson or village head in their communities. The regulatory framework for traditional leaders in Zimbabwe is provided for by various Acts of Parliament, namely, the Traditional Leaders Act of 1998, the Customary Law and Local Courts Act and the national Constitution. In the Constitution of Zimbabwe Amendment (No. 20), (2013), section 282, traditional leaders have the following functions: to promote and uphold cultural values of their communities, and in particular to cement extended family relations, to take measures to preserve the cultural traditions, history and heritage of their community's sacred shrines. It is also the duty of traditional institutions to facilitate development in accordance with an Act of Parliament to administer land and protect the environment. Chiefs are also meant to resolve disputes amongst people in their communities according to government laws and exercise other functions imposed on them by an Act of Parliament.

Traditional leaders positively perceive their role as judicial organs as they employ a number of mechanisms including the well-known *Dare* among the Shona people, and *Inkundla* among the Ndebele people. The *Dare/Inkundla*²⁰ system is administered by traditional leaders with the assistance of a council of elders and members of the community in question as noted by

¹⁷ Judicial authority derives from the people of Zimbabwe and is vested in the courts, which comprise – (a) the Constitutional Court; (b) the Supreme Court; (c) the High Court (d) the Labour Court; (e) the Administrative Court (f) the magistrates courts; (g) the customary law courts; and (h) other courts established by or under an Act of Parliament. See section 162(a)–(h).

¹⁸ See section 5 of the Traditional Leaders Act and section 3 of the Customary Law and Local Courts Act Chapter 5:07.

¹⁹ Chief Charumbira is at the time of writing the current president of the National Council of Chiefs.

²⁰ A group of elders presiding over a case in assistance of a chief or headman.

Chigwata.²¹ Clark views African traditional institutions as effective as they ensure equal participation of all members of the communities in decision making and peace processes.²⁴ In the *Dare/Inkundla* the village head, headman or chief is only there as a presiding officer but the decision is determined by the community and the verdict by the council of elders. Mutisi also notes that the *Dare/Inkundla* can refer to a superior court case that they may deem beyond their jurisdiction as provided for by the Constitution of Zimbabwe. Due to this system the traditional leaders see themselves as more superior than the exogenous courts because they are closely linked to people and live with the people in their communities.

Customary law prioritises restorative justice in that it seeks to restore harmony within conflicting parties more than it seeks to punish wrongdoers. Traditional leaders have their own approach to solving conflicts such as negotiation at all levels, village to national, from family to the village court (*Dare*),²² from the *Dare* to the chief's court (*Dare ramambo*).²³ From there the exogenous methods can now come in, starting from the magistrate's court to the High Court then to the Supreme Court. This clearly shows that traditional methods need not be left out as they focus more on restoring relationships through negotiation, forgiveness and compensation if need be. Therefore this illuminates the point that chiefs perceive their role as the protectors of peace and security in the country as they are expected by the spirit of the Constitution.

In addition, traditional courts are more accessible and economical to rural communities than modern courts. When trying cases or resolving disputes, traditional leaders are assisted by advisors who are usually from the family of the ruling tribe, for example, the Venda tribe.²⁴ The chiefs do not solely rely on their personal knowledge but rather acquire some advice from the senior and older persons in the village because they are believed to be wiser as they have lived longer. These elders are described as sages by Mosima.²⁵ They tend to emphasise reconciliation rather than retribution to ensure harmony among neighbours, relatives and communities in rural areas. This is partially the reason why rural communities prefer traditional to modern courts. Because of this role, the traditional leaders see themselves as playing a crucially active role in deciding matters unlike the common law courts that rely on written laws. In other words, customary law upholds the doctrine of natural law unlike common law which adheres to legal positivism. Chiefs believe that they base their knowledge on the natural issues considering the day-to-day-lives of people and their decisions are stemmed from the roots of the matter.

Traditional leaders have tried to retain their powers through the way they conduct their meetings at their local courts. For example, at Chief Charumbira's court,²⁶ his entrance triggers ululations from the women and whistles from the men as a sign of respect and to praise the Chief. Chiefs see themselves as commanding respect and having power in the village. During or after the court session, usually people are offered food to eat which is rather mandatory at some chief's courts, for example, the late Chief Nyakunhuwa. They believe that food brings people closer and they accompany this by the Shona saying, "*ukama igasva hunozadziswa nekudya*".²⁷

At the chiefs' courts one may find that the courts are decorated with animal skins (*matehwe*). These skins are usually leopard skins, cattle skins and zebra skins. The skins usually symbolise the power a chief possesses. The type of skins show how powerful a chief is and the more skins of

²¹ See T. Chigwata 'The Role of Traditional Leaders in Zimbabwe: Are they Still Relevant?' 20 *Law, Democracy and Development* (2016).

²² 'Dare' is a Shona term which refers to a body of elders employed with the sole task of presiding over disputes.

²³ M. F. C. Bourdillon, *The Shona Peoples: Ethnography of the Contemporary Shona with Special Reference to Their Religion* (Mambo Press, Gweru, 1998).

²⁴ Venda is a Zimbabwean tribe found in the Matebeleland South Province.

²⁵ See P. M. P. Mosima, *Philosophic Sagacity and Intercultural Philosophy: Beyond Henry Odera Oruka*, African Studies Collection, vol. 62, African Studies Centre, Leiden.

²⁶ The court of the president of traditional leaders, located in Charumbira Village, Masvingo Province, Zimbabwe.

²⁷ This is a Shona idiom which means relationships are hardly complete unless you partake of a meal together.

bigger and scarier animals in the court, the more respected the chief is. A number of villagers praise their chief as a sign of respect and an acknowledgment of the chief's supremacy, for example Chief Charumbira,²⁸ Chief Nematombo in Hurungwe²⁹ as well as Chief Ngezi in Mhondoro.³⁰ The subjects would praise the chief through poems (*kudetemba*), in which they will be reciting the chief's totem and the chief's family lineage. The recitation of the totems and the lineages gets the chief into a good mood (*manyemwe*).³¹ In illustration, Chief Charumbira is referred to by his subjects as *Shumbaburu* (big lion).³²

The Customary Law and Local Courts Act³³ enacted under the previous constitutional order assigns judicial powers to traditional courts. The jurisdiction of these courts is limited to civil cases involving parties who reside within the area of the court's authority, and the content of the case has to be suited to trial by customary law. Thus traditional courts do not have the power to adjudicate on cases of a criminal nature, such as murder or rape. However, and flowing from tradition, in some cases traditional leaders do resolve disputes involving criminal matters of less serious natures such as theft and assault. Serious cases of a criminal nature are referred to the police for investigation. Despite this position, chiefs believe that they have the power to solve criminal cases such as theft of livestock although this type of crime is a criminal offence inscribed in the Criminal Code.

Village headman Bhilisa Dude, cited in *Lighting Our Way*,³⁴ commended the late Chief Masuku from Matabeleland for the manner the late Chief used to effectively reprimand wrongdoers. He surprised all by keeping aloof and yet he was close to the people he led. He had no friends but loved everybody. He always worked with respected kraal heads and headmen who formed his chieftaincy committee, yet this was the very committee that always stood against his excesses and always ensured that he acted within the bounds of sanity. The perceived role of the chief in this process of community-based decision making was to "reflect and discuss the opinions expressed in the village assembly and ultimately to suggest and publicly approve a decision of consensus, considering different opinions and interests of involved persons".³⁵ He was quite free to dismiss the council's ruling if it exhibited negative implications and could act as he thought best. However, this was only in theory, as acting against the advice given by the council could lead to his downfall. Therefore, it is plausible to argue that, in general, chiefs perceive their role as representing a democratic society whose communal aspirations and values are collectively expressed. Chiefs have a sense of what can be termed as 'grassroots democracy.'

The Constitution further provides that, "except as provided in an Act of Parliament, traditional leaders have authority, jurisdiction and control over the communal land or other areas for which they have been appointed, and over persons within those communal lands or areas".³⁶ The Traditional Leaders Act also assigns to chiefs the responsibility to: supervise headmen and village heads; oversee the collection of levies, taxes, rates and charges payable to rural local; and conserve the environment and natural resources. Further, chiefs have the responsibility to: notify local rural governments about the occurrence of natural disasters and the outbreak of epidemic diseases; publish public orders, directives or notices; protect public property; and promote the

²⁸ See *supra* note 26.

²⁹ A rural district in Zimbabwe.

³⁰ A rural district in Zimbabwe.

³¹ Shona meaning for zeal.

³² A Shona totem.

³³ Customary Law and Local Courts Act.

³⁴ B. Dude, *Lighting Our Way* (African Community Publishing and Development Trust, 2008).

³⁵ S. Dusing, *Traditional Leadership and Democratisation in Southern Africa: A Comparative Study of Botswana, Namibia and South Africa* (Transaction Publishers, London, 2001).

³⁶ Section 282(2) of the Constitution.

maintenance of good standards of health and education. Pursuant to the power vested in the chiefs by the government, the chiefs have upheld their role as protectors of the rights of people by ruling in line with the spirit of the Constitution of Zimbabwe which is enshrined within the Declaration of Rights in Chapter 4.

This role, however, is slowly being questioned in the light of a number of factors, including unethical and criminal conduct by some traditional leaders. In *S v. Manenji & Another*,³⁷ a village head was found guilty of murder with actual intent following a land ownership dispute that culminated in the death of a woman at the hands of this particular village head. This case indicates that some traditional leaders are involved in some grave acts of criminal conduct. The low educational levels of most traditional leaders and their inability to apply a consistent doctrine of precedent have also raised doubts about their competence and credibility as judicial officials. A study carried out by Rukuni³⁸ and others also revealed that some traditional leaders are failing to exercise impartiality when adjudicating cases, particularly with respect to politically sensitive matters and in cases where they have an interest, such as, boundary disputes or where relatives are involved.³⁹ However, it still remains a fact that traditional leaders play an important role as a dispute resolution mechanism in rural areas, thereby complementing the modern judicial system given its limited reach.

In a nutshell, traditional leaders see themselves (with reason) as more superior to the modern court officials because they have a closer attachment to the people. To maintain their power as judicial organs and guardians of human rights, they have tried very much to make their local courts accessible to people, even the most indigent of their communities. This is seen through praises from their subjects in the form of *kudetemba*, animal skins and the way they conduct their court proceedings, which is different from the modern courts as it encompasses everyone.

4.2 How Chiefs and Traditional Leaders Perceive Their Role as Judicial Organs and Protectors of Constitutional Rights

The institution of traditional leadership has always been central to the governance of communities in Africa in general and Zimbabwe in particular. It must be established beforehand that there may be differences in the manner disputes are resolved depending on each tribe. However, it is worth mentioning that despite these tribal differences, the traditional ‘dispute resolution’ system as well as the justice system is basically the same with only a few trivial differences.⁴⁰ The institution of traditional leadership comprises of chiefs, headmen and village heads, who are vested with ‘traditional’ judiciary authority. Village heads usually comprise of the minor courts called ‘*zunde raSabhuku*’, while the chiefs comprise of the community court to which appeals from the minor courts are forwarded. Since the advent of the colonial era, the recognition and appeal of traditional courts and chiefs has deteriorated. Subsequently, these legal bodies lost much of the influence and power that they previously had. For instance the Customary Law and Local Courts Act grants traditional chiefs limited jurisdiction in civil matters and none in criminal matters.⁴⁴ According to Chief Charumbira, the president of the Zimbabwe Council of Chiefs, this directly compromises the issue of access to justice in the sense that it limits the courts to merely deal with human rights violations that arise in civil matters, and they should not involve themselves at all with human rights violations that have to do with criminal law. This poses a great threat to the contribution of traditional courts in providing justice in the

³⁷ 13-HB-03.

³⁸ T. Rukuni *et al.*, *The Role of Traditional Leadership in Conflict Resolution and Peace Building in Zimbabwean Rural Communities: The Case of Bikita District* (2015).

³⁹ See the *Tsvangirai v. Nyikadzino* case, *supra* note 15.

⁴⁰ M. Ramose, *African Philosophy through Ubuntu* (Mond Books, Harare, 1999).

Zimbabwean society. At the same time this means the remedies available for the greater part of the rural populace in terms of criminal offences become less accessible thereby compromising access to justice and human rights.

It becomes imperative for one to notice that access to justice is gendered, and the implications are felt more on women than men. To begin with, according to a recent census there is an estimate of 13 million people in Zimbabwe.⁴¹ Further, according to the World Bank estimation 10,551,204 of the people live in the rural areas.⁴² This entails that traditional chiefs have jurisdiction over almost 75 per cent of the Zimbabwean population, as such limiting the jurisdiction of these traditional chiefs excessively (as is the position in Zimbabwe) compromises access to justice to 10,551,204 of the Zimbabwean population. In this respect, one would recommend that these traditional authorities be given adequate jurisdiction to give meaning to the right to access to justice for the majority of Zimbabweans. This means that even extension of their jurisdiction to criminal matters should be considered. Contrary to the traditional approach, the chiefs are required to be apolitical, as is required of any judicial officer;⁴³ such provisions are aimed at making access to justice impartial and available to anyone despite certain political affiliations. However according to Chief Munyikwa of Gutu Masvingo, despite the constitutional provision that enjoins chiefs to be apolitical, the greatest obstacle to access to justice is discrimination based on political differences, meaning that even though there are provisions to give meaning to access to justice, the reality on the ground is quite different as authorities might behave in a way that is contrary to what is expected of them.

5 Characteristics of the Traditional Legal System in Relation to Access to Justice

5.1 Location of the Courts

Traditional courts are found in all rural communities. This makes justice easily accessible as there are basically no transport costs. Nhlapo recognises the effect of social status on justice accessibility in courts.⁴⁴ Since the people who preside over cases in traditional courts (the chief and the assessors) are usually from the same tribes or clan, and their norms and values are the same, it is easy for one to feel that justice has been executed, regardless of whether s/he has lost or not in court. The importance of the location of traditional leaders and their courts is best supported by Madhuku when he says that it is not easy to define what justice is because what is just for one person may not be just for the other person obviously because of social, political and economic differences.⁴⁵ With the plaintiff and defendant or accused and the complainant coming from the same area and sharing common backgrounds, it is much probable that they are satisfied with whatever outcome of the court's ruling. In Madhuku's words, to say that the law must serve the ends of justice is to promote the view of justice shared by those whose perceptions dominate a given society.⁴⁶ The location of the traditional leaders' courts is thus an important factor as far as access to justice is concerned.

5.2 Costs

There is no need for people to travel long distances to magistrates' courts, which require transport costs, to access justice. Even if a villager does not stay near his chief's court, the

⁴¹ '13m in Zimbabwe, census reveals', *The Herald*, December 2013, <www.herald.co.zw/13m-in-zimbabwe-census-reveals> (accessed 23 November 2016).

⁴² See <data.worldbank.org/indicators/SP.RURTOTL>

⁴³ Section 163(f) as read together with section 165(4) of the Constitution of Zimbabwe.

⁴⁴ See T. Nhlapo, 'Customary Law in Post-Apartheid South Africa: Constitutional Confrontations in Culture, Gender and "Living Law"', 33:1 *South African Journal on Human Rights* (2017).

⁴⁵ Madhuku, *supra* note 12.

⁴⁶ *Ibid.*

transport cost is usually cheaper than that of travelling to district headquarters where magistrate courts are located. Besides transport costs, court levies in traditional courts are cheaper as they usually range around USD 20 which is also negotiable as one can pay in kind, for example, goats or chickens as levy fee. This is different from modern courts where one has to pay legal practitioners who charge huge fees to represent a person, and because of the complex and intimidating nature of the court process, it is highly probable that in most cases an unrepresented person loses the case. Even though there are legal aid forums, not every poor person gets access to them because of many reasons, one of them being ignorance of their existence. From this, it can be seen that justice is more accessible in traditional courts as they accommodate every person regardless of their economic background.

5.3 Flexible Procedural Standards

The procedure in traditional courts is flexible and simple. At Chief Charumbira's and Chief Sigola's courts, the plaintiff and the defendant each narrate to the court his/her version of what transpired up to the time the plaintiff reported the matter to the chief's court.⁵¹ After that, the witnesses from both sides are called to testify, provided they have first-hand information, and there is no hearsay. Later, the plaintiff and the defendant are given the chance to respond to what the witnesses would have said. After that, the floor is given to the *Dare* (the people who would be in court) to give their views concerning the matter. This is the standard procedure that gives both parties to a dispute an equal chance to be heard. Most people believe that in traditional courts there is no presumption of innocence but it is actually there. Traditional, community and customary justice systems have been described as informal, non-state, non-official or non-formal justice systems. For a long time, they have however operated at the periphery of the formal justice system. The informality makes these courts user-friendly for both the accused and plaintiff; for example, in Chief Thandi's and Chief Nyakunhuwa's courts the presiding officer does not persecute the accused even if it is clear that he is guilty like most people think traditional leaders do. The kind of questioning is not accusatorial in nature as followed in formal courts, but it is simple questioning which gets the defendant or accused to realise and appreciate his wrong doing.

5.4 Communication

Communication in traditional courts is easier compared to any other formal court communication. This is so because the language used is the same one the people involved use in their daily lives; this implies that the communication process is simple and less prone to ambiguity or misinterpretation. What the receiver understands is correlated with his own experience, and his language proficiency would influence the acceptance of the message, as stated by Dobra and Popescu.⁴⁷ The language used in traditional courts is local and understood by everyone, unlike in regular courts where the jargon used is usually technical and some words are Latin and only understood by legal practitioners and the judges. There is thus no need for an interpreter in traditional courts as s/he can distort the information such that justice would not be properly executed. The environment itself is also not a communication barrier as it is friendly. Though chiefs are the head of communities, they have time to interact with their people. This lead to the lower rank people not feeling intimidated by their chief, and the social status difference would not distort effective communication in courts.

⁴⁷ A. Dobra and A. Popescu, *Barriers in Verbal Communication* (2008).

5.5 *The Law Used*

Traditional courts use customary law principles, customs and customary practices in dispute resolution. However, traditional courts, like regular courts, are also making efforts to accommodate general law. In traditional courts some chiefs like Chief Charumbira recognise the Constitution and also use the Traditional Leaders Act in their courts. The traditional courts, unlike before, are now empowering women and giving them leadership posts in their villages. In Chief Charumbira's area, there are 21 female heads of villages (*sabhuku*). In this Chief's court, women also have a say in the proceedings of the court as assessors. They also play an advisory role to the Chief and their views are as important as those given by men.⁴⁸

However, not all traditional leaders recognise human rights as some chiefs are not aware of them. Local adjudicators and community members involved in alternative dispute resolution are often not aware of some human rights standards. A practical example is Chief Charumbira who is one of the chiefs who recognises the existence of the Constitution and Acts of law, but he concurred that applying human rights in some issues was controversial and a big challenge as it would lead to injustice. For example, he presided over a case which involved a 16 year old girl who had sexual intercourse with her boyfriend who was 20 years of age. Chief Charumbira acknowledged that he knows and respects the legal age of majority and the age of consent but the people he rules have a different view about the age of consent. In Shona customs, as long as a girl is not yet married, she has no right to consent to sexual intercourse or else the man would have to pay for seduction damages despite the age of the girl. In this case, the Chief made the 'boy' who was having sexual intercourse with the girl to pay for seduction damages to the girl's father despite the fact that the Zimbabwean Constitution stipulates that when a girl is 16 years old, she has the right to consent to sex.⁴⁹

6 Recommendations from Chiefs on Improving Access to Justice

The chiefs have suggested that a number of measures be implemented in order for them and other traditional leaders to be able to properly execute their constitutional mandate. Firstly, in as far as the enforcement of judgments is concerned, Chief Nyamande suggests that chief's messengers be entrusted with the authority to arrest those who do not obey judgments. He further suggests that chief's messengers be given some form of identification. Secondly, according to Chief Chiwara, the higher courts should be encouraged to respect judgments made by chiefs. He maintains that failure to do that would lead to further underestimation of traditional courts and their dispute resolution mechanisms. Another chief, Chief Chitsa, believes that judgments derived from their courts should not be assessed by the magistrates' courts, especially on the issue of *makunakuna* (incest). Chiefs further suggest that they be allowed to give final decisions as new judges and magistrates are not knowledgeable in traditional issues.

7 Conclusion

It has been made clear that traditional institutions that enforce and implement customary law play a critical role in the justice administration system in Zimbabwe. The fact that Zimbabwe's population is mainly rural necessitates the prominence of a judicial system that is accessible to all. Further, the added fact that customary law is active and affects daily lives of the rural population makes customary law important in dispute resolution in rural communities. A lot needs to be done in order to enhance the effectiveness of the customary justice system and ensure that it keeps pace with the rapid social, economic and political developments of the time.

⁴⁸ In Zimbabwe there are at the time of writing three female chiefs.

⁴⁹ See section 70(3) of the Criminal Law (Codification and Reform) Act [Chapter 9:23].

In addition, the value of participation in customary law courts implies that people should not be the passive recipients of decisions affecting them, whether by power-wielders, bureaucrats or experts, however well intentioned. Indeed, the administration of law scrupulously, without arbitrariness and according to rules and consequences that are known or can reasonably be known to the subjects of the law correspond to the most basic notions of justice.⁵⁰ In conclusion, the mentoring, strengthening and capacity building of chiefs and headmen is central to the realisation of the right to access to justice in Zimbabwe, especially for women and children often affected by patriarchal cultural values.

⁵⁰ See N. Rodley, 'Civil and Political Rights, in C. Krause and M. Scheinin (eds.), *International Protection of Human Rights: A Textbook* (Abo Akademi University Institute for Human Rights, 2012).