

**An Analysis of the Protection of Selected Civil and Political Rights under the  
Zimbabwe Constitution 2013**

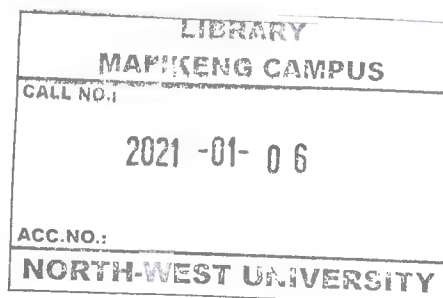
A dissertation submitted in fulfillment of the requirements for the degree of Master of  
Laws at the Mafikeng campus of the North-West University

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November 2015



## DECLARATION

I hereby declare that thesis entitled:

.....

is my own work and that all the sources that I have used or quoted have been indicated and acknowledged by

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Signed at .....this.....day of ..... 20.....

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## **ACKNOWLEDGEMENTS**

Writing this research has been a great learning experience and significant academic challenge. This study would never have been completed without the support, patience and guidance of my Supervisor Dr H Chitimira and my co-supervisor Dr L Muswaka. I owe them my deepest gratitude. I would like to thank my family for allowing me to study for my masters.

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## **DEDICATION**

Lord you have never failed me. Thank you for your Grace.

## **ABSTRACT**

This study analyses the protection of selected civil and political rights under the Zimbabwe Constitution 2013. For the purpose of this research the following civil and political rights are discussed: the right to life, the right to human dignity, right to freedom from torture, right to freedom of assembly and association, the right to freedom to demonstrate and petition, the right to freedom of expression and the right to free and fair elections. This analysis is informed by the fact that despite the protection of civil and political rights under the Zimbabwe Constitution 2013 there are a number of challenges with regard to their enforcement. These rights are violated through the use of specific legislative provisions such as Public Order and Security Act, Access to Information and Privacy Act and Private Voluntary Organisations Act, the use of law enforcement officers and through political interference by the government in different human rights institutions. The aim of this research is to analyse whether the Zimbabwe Constitution 2013 has consistently provided for the protection of selected civil and political rights in line with regional and international standards. This research is to show what measures need to be taken for the adequate protection and enforcement of civil and political rights in Zimbabwe.

**Keywords:** Protection, Civil and political rights, Zimbabwe Constitution 2013, Political interference, Human rights institutions.

## **LIST OF ABBREVIATIONS**

<b>AIPPA</b>	<b>Access to Information and Protection of Privacy Act</b>
<b>ICCPR</b>	<b>International Covenant on Civil and Political Rights</b>
<b>ICESCR</b>	<b>International Covenant on Economic, Social and Cultural Rights</b>
<b>MDC</b>	<b>Movement for Democratic Change</b>
<b>POSA</b>	<b>Public Order and Security Act</b>
<b>SADC</b>	<b>Southern African Development Community</b>
<b>SARPPCO</b>	<b>Southern African Regional Police Chiefs Cooperation Organisation</b>
<b>UDHR</b>	<b>Universal Declaration of Human Rights</b>
<b>UNCAT</b>	<b>United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment</b>
<b>ZANU-PF</b>	<b>Zimbabwe African National Union–Patriotic Front</b>
<b>ZLHR</b>	<b>Zimbabwe Lawyers for Human Rights</b>
<b>ZHRC</b>	<b>Zimbabwe Human Rights Commission</b>
<b>ZRP</b>	<b>Zimbabwe Republic Police</b>

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## CHAPTER ONE: RESEARCH OUTLINE AND CONTEXT

### 1.1 Introduction

Civil and political rights protect individuals' freedom from interference or abuse of power by others.<sup>1</sup> Civil and political rights allow all persons to take part in the political life of the society without being discriminated against.<sup>2</sup> The enjoyment of civil and political rights enables people to participate in decision-making without fear and to seek redress for violation of their rights.<sup>3</sup> For the purposes of this research the following civil and political rights will be discussed: The right to life,<sup>4</sup> the right to human dignity,<sup>5</sup> the right to freedom from torture,<sup>6</sup> the right to freedom of assembly and association,<sup>7</sup> the right to freedom to demonstrate and petition,<sup>8</sup> the right to freedom of expression<sup>9</sup> and the right to free and fair elections.<sup>10</sup> These rights were selected because they affect a wider cross-section of ordinary people whose rights are usually violated by the Zimbabwe Republic Police (ZRP) and other agencies of the state in Zimbabwe. Civil and political rights are also discussed in this dissertation because the effective protection of these rights give rise to the enjoyment of other class of rights such as socio-economic rights. These rights are enshrined in chapter four of the Zimbabwe Constitution 2013. The protection of these fundamental rights is constitutionally assigned to the government.<sup>11</sup>

The Zimbabwe Constitution 2013 is influenced in part by accepted international human rights standards and principles which are the foundation of an open and democratic society. Zimbabwe is a member of the United Nations (UN) and has complied with the

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<sup>1</sup> Social Report 2010 *Civil and political rights* <http://socialreport.msd.govt.nz/2009/civil-political-rights/> [date of use 12 November 2015] 1.

<sup>2</sup> Law Teacher date unknown *Economic rights take priority over civil* <http://www.lawteacher.net/free-law-essays/international-law/should-economic-rights-take-priority-over-civil-and-political-rights-international-law-essay.php> [date of use 12 November 2015] 2.

<sup>3</sup> Social Report 2010 [socialreport.msd.govt.nz/civil-political-rights/](http://socialreport.msd.govt.nz/civil-political-rights/) [date of use 12 November 2015] 1.

<sup>4</sup> Section 48 of the Zimbabwe Constitution Amendment (no 20) 2013. Hereinafter referred to as the Zimbabwe Constitution 2013.

<sup>5</sup> Section 51 of the Zimbabwe Constitution 2013.

<sup>6</sup> Section 53 of the Zimbabwe Constitution 2013.

<sup>7</sup> Section 58 of the Zimbabwe Constitution 2013.

<sup>8</sup> Section 59 of the Zimbabwe Constitution 2013.

<sup>9</sup> Section 61 of the Zimbabwe Constitution 2013.

<sup>10</sup> Section 67 of the Zimbabwe Constitution 2013.

<sup>11</sup> Chapter 4 of the Zimbabwe Constitution 2013.

relevant international best practices by entrenching a Declaration of Rights in its Constitution.<sup>12</sup> These rights are further protected by several international and regional instruments that are acceded to or ratified by Zimbabwe.<sup>13</sup> Such international instruments include the International Covenant on Civil and Political Rights (ICCPR),<sup>14</sup> and Freedom of Association and Protection of the Right to Organise Convention.<sup>15</sup> The regional instruments include the African Charter on Human and Peoples' Rights (ACHPR)<sup>16</sup> and the African Charter on the Rights and Welfare of the Child (ACRWC).<sup>17</sup>

While Zimbabwe is one of the countries that constitutionally protect civil and political rights, there are still some challenges on the enforcement of these rights by the state. Consequently, this research will investigate whether the enforcement of civil and political rights in Zimbabwe complies with the regional and international standards.

## 1.2 Background of Research



One of the main responsibilities of a state is to protect fundamental rights of its citizens.<sup>18</sup> The duty to protect which is imposed on the state ensures that fundamental rights are respected, protected, promoted and fulfilled in any country.<sup>19</sup> In a democratic country, the government not only has the duty to react to fundamental rights violations but also to prevent human rights violation.<sup>20</sup> Zimbabwe Constitution 2013 obliges the government and every institution and agency of the government to protect and respect

<sup>12</sup> Shava F.M.M date unknown *Permanent mission of Zimbabwe to the United Nations* <https://www.un.int/zimbabwe/> [date of use 30 August 2015] 1.

<sup>13</sup> International Covenant on Civil and Political Rights, Freedom of Association and Protection of the Right to Organise Convention, the African Charter on Human and Peoples' Rights and the African Charter on the Rights and Welfare of the Child.

<sup>14</sup> International Covenant on Civil and Political Rights was adopted and opened for signature by General Assembly resolution 2200A (XXI) of December 16, 1966. Hereinafter referred to as the ICCPR.

<sup>15</sup> (ILO No. 87) 1950 entered into force July 4, 1950. Hereinafter referred to as Freedom of Association and Protection of the Right to Organise Convention.

<sup>16</sup> African Charter on Human and Peoples' Rights entry into force 3 January 1976. Hereinafter referred to as the ACHPR.

<sup>17</sup> Was adopted in 1990, and entered into force on 29 November 1999. Hereinafter referred to as the ACRWC.

<sup>18</sup> Miller D 2006 *The responsibility to protect human rights* [https://www.princeton.edu/~pcglobal/conferences/.../Session6\\_Miller.pdf](https://www.princeton.edu/~pcglobal/conferences/.../Session6_Miller.pdf) [date of use 27 July 2015] 1.

<sup>19</sup> Gumede S "The African Union and the responsibility to protect" 2010 *African Human Rights Law Journal* 135-160.

<sup>20</sup> Gumede 2010 *African Human Rights Law Journal* 8.



the fundamental human rights in it.<sup>21</sup> While this is a positive move, human rights defenders have sometimes reported various civil and political rights violations by the government of Zimbabwe.<sup>22</sup>

It is submitted that since 1890, human rights violations have been part of Zimbabwe's history.<sup>23</sup> The white minority government denied the black native people of Zimbabwe the right to vote or stand for parliament.<sup>24</sup> The native black people were only allowed to do manual work.<sup>25</sup> During the colonial era the Southern Rhodesian Constitution<sup>26</sup> was the only Constitution that contained the Declaration of Rights which protected amongst other rights the right to freedom of expression, right to life, right to freedom from torture, right to personal liberty and right to assembly and association.<sup>27</sup> Nevertheless, these civil and political rights were not realised in practice.<sup>28</sup> The rights granted by the Southern Rhodesian Constitution were subject to a number of exceptions that made the Declaration of Rights to be seen as having provided freedom with one hand and taking it with the other.<sup>29</sup> The Declaration of Rights that was constituted in the Southern Rhodesian Constitution did not provide for the protection of some basic rights as adopted in international conventions, for example, the right to human dignity, freedom to demonstrate and petition and political rights.<sup>30</sup> The government limited these rights to silence black people so that they can stay in power and control them.<sup>31</sup>

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<sup>21</sup> Section 44 of the Zimbabwe Constitution 2013.

<sup>22</sup> International Bar Association 2013 *Partisan policing: An obstacle to human rights and democracy in Zimbabwe* [www.ibanet.org/Document/Default.aspx?DocumentUid=e4d35d9f...](http://www.ibanet.org/Document/Default.aspx?DocumentUid=e4d35d9f...) [date of use 27 July 2015] 49.

<sup>23</sup> Kaarsholm P 1992 *The past as battlefield in Rhodesia and Zimbabwe: the struggle of competing nationalisms over history from colonization to independence* [space.sas.ac.uk/.../Preben\\_Kaarsholm\\_-\\_The\\_past\\_as\\_battlefield\\_in\\_..](http://space.sas.ac.uk/.../Preben_Kaarsholm_-_The_past_as_battlefield_in_..) [date of use 26 July 2015] 1.

<sup>24</sup> Crisis in Zimbabwe Coalition 2015 *World directory of minorities and indigenous peoples - Zimbabwe* <http://www.refworld.org/docid/4954ce4123.html> [date of use 14 November 2015] 1.

<sup>25</sup> Crisis in Zimbabwe Coalition 2015 *World directory of minorities and indigenous peoples - Zimbabwe* <http://www.refworld.org/docid/4954ce4123.html> [date of use 14 November 2015] 1.

<sup>26</sup> 1961. Hereinafter referred to as Southern Rhodesian Constitution.

<sup>27</sup> Ndawana D *The role of the Judiciary in Protecting the Right to Freedom of Expression in Difficult Political Environments: a case study of Zimbabwe* (LL.M-Thesis University of Fort Hare 2008) 57.

<sup>28</sup> While the right to human dignity, right to demonstrate and petition, political rights and right to personal security were not protected in the Southern Rhodesian Constitution of 1961.

<sup>29</sup> Ndawana D *The role of the Judiciary in Protecting the Right to Freedom of Expression in Difficult Political Environments: a case study of Zimbabwe* 57.

<sup>30</sup> See Appendix 2 of Southern Rhodesia Constitution 1961.

<sup>31</sup> Mapuva J and Muyengwa L "A Critique of the key Legislative Framework Guiding Civil Liberties in Zimbabwe" 2012 *PER* 125-164.

The human rights abuses of the colonial period were a major motivation for the liberation struggles that culminated Zimbabwe's independence in 1980.<sup>32</sup> From 1980 until 2013, Zimbabwe was governed by the Lancaster House Constitution.<sup>33</sup> This Constitution was designed to end undemocratic rule that prevailed during the colonial era.<sup>34</sup> Thereafter Zimbabwe signed Universal Declaration of Human Rights (UDHR),<sup>35</sup> the ICCPR, and the ACHRP in an attempt to protect her citizen's civil and political rights in accordance with international law.<sup>36</sup> As a full member of the international community, Zimbabwe accepted the responsibility to act in compliance with international human rights law.<sup>37</sup>

Stability during the early years of independence was followed by violence of the Ndebele ethnic in the 1980s.<sup>38</sup> Economic decline in the 1990s, political violence, land grabbing and electoral disputes, also occurred in Zimbabwe between 1980 and 2013.<sup>39</sup> Consequently, the right to freedom from torture, the right to personal liberty, right to freedom of expression and the right to free and fair elections of all persons of Zimbabwe were negatively affected. This led to an increased demand for further constitutional reforms by the civil society that sought to engage the state towards the realisation of and respect for civil liberties in the mid-1990s.<sup>40</sup> The constitutional reforms have resulted in the adoption of a new Constitution known as Zimbabwe Constitution

<sup>32</sup> Davidson L and Purohit R "The Zimbabwean Human Rights Crisis: a Collaborative Approach to International Advocacy" 2004 *Yale Human Rights & Development Law Journal* 108-131.

<sup>33</sup> 1979. Lancaster House Constitution.

<sup>34</sup> Nyabeze N.T 2015 *Progressive reform in the New Constitution of Zimbabwe* www.kas.de › Welcome › Publications › Country Reports [date of use 01 September 2015] 1.

<sup>35</sup> 1948. Universal Declaration of Human Rights was adopted by General Assembly Resolution 217 Article (III) of 10 December 1948. Hereinafter referred to as UDHR.

<sup>36</sup> Convention on the Elimination of All Forms of Discrimination Against Women 1979, International Covenant on Civil and Political Rights, United Nations International Convention on the Elimination of All Forms of Racial Discrimination 1965, United Nations International Covenant on Economic, Social and Cultural Rights, United Nations Convention on the Rights of the Child 1989, African Charter on Human and Peoples' Rights.

<sup>37</sup> Mude T "The History of International Human Rights Law in Zimbabwe" 2014 *Journal of Social Welfare and Human Rights* 53-86.

<sup>38</sup> Petrovic V 2012 *In Zimbabwe, democracy must be driven from below* <https://freedomhouse.org/.../zimbabwe-democracy-must-be-driven-belo> [date of use 12 November 2015] 1.

<sup>39</sup> Davidson and Purohit 2004 *Yale Human Rights & Development Law Journal* 4.

<sup>40</sup> Mapuva and Muyengwa 2012 *PER* 3.

Amendment (no 20) of 2013. Zimbabwe Constitution Amendment (no 20) of 2013 has replaced the Lancaster House Constitution of 1979.

However, the enjoyment of civil and political rights had been limited over the years by constant amendments and the passing of repressive legislation,<sup>41</sup> most of which are still enforceable up to today contrary to the Zimbabwe Constitution 2013. The constant amendments to the Lancaster House Constitution and the enactment of repressive legislation contributed enormously to the abuse of human rights in Zimbabwe.<sup>42</sup> Certain provisions of the Public Order and Security Act (POSA),<sup>43</sup> and the Access to Information and Protection of Privacy Act (AIPPA)<sup>44</sup> have been used by the government to harass and silence those perceived to be critical of its policies.<sup>45</sup> The parliament to date has failed to amend or repeal these repressive laws.<sup>46</sup>

From the above discussion it can be concluded that there are challenges towards the constitutional protection of civil and political rights. It is for this reason that this study attempts to critically analyse whether their enforcement by government complies with the Constitution and international standards.

### **1.3 Statement of the Problem**

While Zimbabwe is one of the countries that constitutionally protect civil and political rights, there are still some challenges affecting the enforcement of these rights in Zimbabwe. Over the years, laws have been enacted to protect citizens of Zimbabwe, but some of these laws were enacted to limit rights and their protection.<sup>47</sup> For instance, the unlawful and selective enforcement of some of the provisions of the POSA and the AIPPA are used to restrict the right to freedom of expression and the right to association

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<sup>41</sup> Examples of such laws are the Public Order and Security Act of 2002, Broadcasting Services Act of 2000, Access to Information and Protection of Privacy Act (AIPPA) of 2002 and the Criminal law (Codification and Reform) Act chapter 9:23 amongst many others.

<sup>42</sup> Gwinyayi A.D 2012 *Zimbabwe's constitutional reform process: challenges and prospects* [www.ijr.org.za/.../IJR%20Zimbabwe%20Constitutional%20Reform%20O](http://www.ijr.org.za/.../IJR%20Zimbabwe%20Constitutional%20Reform%20O) [date of use 24 July 2015] 2.

<sup>43</sup> [Chapter 11:17] of 2002. Hereinafter referred to as POSA.

<sup>44</sup> 2002. Hereinafter referred to as AIPPA.

<sup>45</sup> Act Now 2011 *Will Zimbabwe pass the international human rights examination today?* <https://akcampaign.wordpress.com/tag/public-order-and-security-act/> [date of use 03 April 2015] 3.

<sup>46</sup> Human Rights Watch *World Report 2013: Events of 2012* (Seven Stories Press 2013) 162.

<sup>47</sup> Mapuva and Muyengwa 2012 *PER* 129.



and assembly.<sup>48</sup> This legislation also fails to comply with international law on the rights to freedom of expression, association and assembly, in particular because it places unreasonable limitations on the enjoyment of these freedoms.<sup>49</sup> The POSA has been used by the law enforcement authorities in Zimbabwe to arbitrarily arrest hundreds of opposition supporters, independent media workers and human rights defenders.<sup>50</sup> This targeted use of the POSA has resulted in the violations of the right to freely assemble, criticise the government policy and to engage in, advocate or organise acts of peaceful civil demonstrations.<sup>51</sup> These pieces of legislation have suppressed civil and political rights and freedom in Zimbabwe, rights and freedom which are the cornerstones of democracy.<sup>52</sup>

For the purposes of this study, the following specific matters will be discussed:

(a) The unlawful and selective enforcement of some provisions of the POSA as well as the provisions of the AIPPA will be outlined. This approach has resulted in the violations of rights such as the right to freely assemble and associate, advocate, or organise peaceful demonstrations in Zimbabwe.<sup>53</sup> Accordingly, this research seeks to expose how the government has used the POSA and the AIPPA to violate the civil and political rights of ordinary citizens in Zimbabwe.

(b) The gaps and flaws in the protection of selected civil and political rights under the Zimbabwe Constitution 2013 will be discussed.

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<sup>48</sup> Human Rights Watch 2015 *World report 2015: Zimbabwe events of 2014* <https://www.hrw.org/world-report/2015/country-chapters/zimbabwe> [date of use 09 August 2015] 1.

<sup>49</sup> The African Commission Resolution on the Right to Freedom of Association makes specific reference to the limits of any restriction on the right to freedom of association:

(a) The competent authorities should not override constitutional provisions or undermine fundamental rights guaranteed by the constitution and international standards;

(b) In regulating the use of this right, the competent authorities should not enact provisions which would limit the exercise of this freedom;

(c) The regulation of the exercise of the right to freedom of association should be consistent with State's obligations under the African Charter on Human and Peoples' Rights.

<sup>50</sup> Refugee Review Tribunal 2005 *Country research section of the Refugee Review Tribunal (RRT)* [reliefweb.int/.../2F0AB284831BBE9D49256FFD000D5C65-ai-zwe-10m](https://reliefweb.int/.../2F0AB284831BBE9D49256FFD000D5C65-ai-zwe-10m) [date of use 28 July 2015] 4.

<sup>51</sup> Human rights watch 2006 *You will be thoroughly beaten the brutal suppression of dissent in Zimbabwe* <https://www.hrw.org/report/2006/11/01/you-will-be-thoroughly-beaten/brutal-suppression-dissent-zimbabwe> [date of use 29 August 2015] 4.

<sup>52</sup> Section 3(c) of the Zimbabwe Constitution 2013.



## **1.4 The Aim and Objectives**

### **1.4.1 Aim**

The aim of this research is to analyse whether the Zimbabwe Constitution 2013 has adequately provided for the protection of civil and political rights in line with regional and international standards.

### **1.4.2 Objectives**

In order to achieve the broad aim of this research, the researcher will:

- (a) investigate the adequacy of the civil and political rights provisions that are contained in the Zimbabwe Constitution 2013;
- (b) investigate the extent at which Zimbabwe complies with the international law in relation to the protection of civil and political rights;
- (c) investigate the responsibility of government in protecting and enforcing civil and political rights in Zimbabwe.

## **1.5 Rationale of the Study**

It is hoped that this research will contribute towards the protection and enforcement of civil and political rights in Zimbabwe. This research contributes to the protection of civil and political rights in Zimbabwe by recommending measures need to be taken to adequately protect these rights. Moreover to establish other measures that can be taken to address the human rights issues in Zimbabwe.

## **1.6 Limitation of study**

This research only discusses the right to life,<sup>54</sup> the right to human dignity,<sup>55</sup> the right to freedom from torture,<sup>56</sup> the right to freedom of assembly and association,<sup>57</sup> the right to

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<sup>54</sup> Section 48 of the Zimbabwe Constitution 2013.

<sup>55</sup> Section 51 of the Zimbabwe Constitution 2013.

<sup>56</sup> Section 53 of the Zimbabwe Constitution 2013.

<sup>57</sup> Section 58 of the Zimbabwe Constitution 2013.

freedom to demonstrate and petition,<sup>58</sup> the right to freedom of expression<sup>59</sup> and the right to free and fair elections.<sup>60</sup> These rights are selected because they affect a wider cross-section of ordinary people whose human rights are violated in Zimbabwe.<sup>61</sup> The protection and enforcement of these rights at the national level should be in line with international instruments. This research discusses whether civil and political rights are constitutionally and adequately protected in Zimbabwe. In other words, the protection and enforcement of civil and political rights in Zimbabwe will be discussed.

Although the researcher acknowledges that socio-economic rights are equally important, however, this research will only focus on civil and political rights because without the protection of civil and political rights, people are not able to enjoy their socio-economic rights.<sup>62</sup> Moreover, despite the fact that few cases have been successfully reported, the researcher will only discuss cases, legislation and legislative instruments that are relevant to the topic. The researcher will not do fieldwork or quantitative research in Zimbabwe as some of the victims of violation of these rights have moved to other countries, and some victims are afraid to talk about their human rights problems. This research is limited to the protection of civil and political rights in Zimbabwe during the period between 1980 and 2015.



Moreover, the researcher will not do comparative study in a specific jurisdiction. However, the research will examine whether Zimbabwe complies with international instruments that it ratified. The researcher did not choose a specific jurisdiction or country for comparative study because the human rights situation in Zimbabwe is peculiar to Zimbabwe. Moreover, most constitutions in Africa such as Uganda, Kenya and Rwanda, apart from the South African Constitution 1996 have relatively poor provisions on the protection and enforcement of civil and political rights. In light of this, the researcher acknowledges that the South African Constitution 1996 is fairly

<sup>58</sup> Section 59 of the Zimbabwe Constitution 2013.

<sup>59</sup> Section 61 of the Zimbabwe Constitution 2013.

<sup>60</sup> Section 67 of the Zimbabwe Constitution 2013.

<sup>61</sup> Alemi R 2012 *Sanctioning Iranian Women* <http://www.niacinsight.com/category/human-rights-in-iran/> [date of use 14 November 2015] 1.

<sup>62</sup> Geraldine van B *Freedom from poverty as a human right: law's duty to the poor* (UNESCO Publishing France 2010) 29.

comparable to the international best practices. Be that as it may, this research will not embark on a comparative study with South Africa because the Zimbabwe Constitution 2013 was relatively modeled upon the South African Constitution 1996. Therefore, if the researcher compares the South African Constitution 1996 with Zimbabwe Constitution 2013 it will largely amount to repetition of the same approaches on the protection and enforcement of civil and political rights.

### **1.7    *Research methodology***

For the purposes of this research, the following methods will be used:

#### **i.        Primary and secondary sources**

Primary sources are sources on which secondary sources are based meaning they are the original sources. On the other hand secondary sources discuss, comment on, evaluate interpret some primary sources. Relevant sources such as the Zimbabwe Constitution 2013, legislation, journals, reports, and textbooks are referred to in this research. It is important to refer to these sources to make sure that the arguments that are made also are backed up by sound evidence and also to build the background knowledge relevant to research.

#### **ii.       Case law**

Relevant case law from Zimbabwe and elsewhere will be referred to in this dissertation. Case law will be used to look at how the courts have dealt with violations of fundamental human rights and/or civil and political rights in Zimbabwe.

### iii. Internet sources

Electronic sources will be referred to in this dissertation. Internet sources are referred to in this research because past and recent publications such as electronic articles, journals and websites are easily available on the internet.

### iv. Library

A library is a collection of sources of information made accessible to people for borrowing sources such as books or for reference. It provides access to physical or internet sources. The library is used in this dissertation because it contains relevant materials to this research such as books, casebook, journals and newspapers.

## **1.8 *Structure of the dissertation***

This dissertation has five chapters as indicated below:

Chapter One deals with the general research context. It outlines the aims, objectives, statement of the problem, the rationale of the study as well as the methodology of the study.

Chapter Two outlines the historical background of the protection of civil and political rights in Zimbabwe. Consequently, a historical analysis is included to expose the protection of civil and political rights in Zimbabwe prior to the 2013 Constitution. The chapter also discusses how international human rights law has influenced the protection of civil and political rights in the Zimbabwe.

Chapter Three analyses the present position set by the Zimbabwe Constitution 2013 giving the status of selected civil and political rights.

Chapter Four outlines instances of civil and political rights abuses in Zimbabwe. It also discusses the role of the government in enforcing civil and political rights in Zimbabwe. This chapter also highlights the strengths and weaknesses of the protection and enforcement of civil and political rights in Zimbabwe.

Chapter Five provides conclusions and recommendations on what the state can do to enhance the protection of selected civil and political rights in Zimbabwe.



## CHAPTER TWO: HISTORICAL OVERVIEW OF THE PROTECTION OF CIVIL AND POLITICAL RIGHTS IN ZIMBABWE

### 2.1 Introduction

The duty to protect civil and political rights is entrusted to the state through the international, regional and national instruments.<sup>63</sup> Zimbabwe is no exception as it has signed the Universal Declaration of Human Rights,<sup>64</sup> International Covenant on Civil and Political rights (ICCPR)<sup>65</sup> and African Charter on Human and Peoples' Rights (ACHPR).<sup>66</sup> These international instruments stipulate that by becoming parties to international treaties, States assume obligations and duties under international law to respect, protect, promote and to fulfil human rights.<sup>67</sup> The following rights were included in the Lancaster House Constitution:<sup>68</sup> right to life,<sup>69</sup> the right to freedom from torture,<sup>70</sup> the right to freedom of assembly and association,<sup>71</sup> and the right to freedom of expression.<sup>72</sup> All these rights are included under the above international instruments because Zimbabwe accepted the call made by the international community to states, to protect human rights.

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<sup>63</sup> Universal Declaration of Human Rights was adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948. International Covenant on Civil and Political rights adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976. African Charter on Human and Peoples' Rights entry into force 3 January 1976.

<sup>64</sup> Hereinafter referred to as the UDHR

<sup>65</sup> Hereinafter referred to as the ICCPR.

<sup>66</sup> Hereinafter referred to as the ACHPR. See National Commissions for UNESCO of France and Germany 2010 *Claiming Human Rights - in Zimbabwe* <http://www.claiminghumanrights.org/zimbabwe.html> [date of use 11 November 2015] 1.

<sup>67</sup> United Nations Human Rights date unknown *International Human Rights Law* <http://www.ohchr.org/EN/ProfessionalInterest/Pages/InternationalLaw.aspx> [date of use 11 August 2015] 2.

<sup>68</sup> 1979. Hereinafter referred to as the Lancaster House Constitution.

<sup>69</sup> Section 12 of the Lancaster House Constitution.

<sup>70</sup> Section 15 of the Lancaster House Constitution.

<sup>71</sup> Section 21 of the Lancaster House Constitution.

<sup>72</sup> Section 20 of the Lancaster House Constitution.

International instruments, constitutions and Acts of parliament recognise civil and political rights and provide the machinery for their protection and enforcement.<sup>73</sup> The mere fact that a state has a Declaration of Rights in its Constitution, no matter how well drafted, does not guarantee the enjoyment of, or respect of civil and political rights.<sup>74</sup> The government and state institutions must be able to enforce civil and political rights.<sup>75</sup>

The state must respect, protect, promote and fulfil all civil and political rights.<sup>76</sup> The duty to respect means that government must refrain from interfering with or limit the enjoyment of human rights.<sup>77</sup> The obligation to protect requires the government to protect all people against human rights abuses.<sup>78</sup> The obligation to promote human rights means that the government should adopt policies that promote human rights both domestically and internationally.<sup>79</sup> On the other hand the obligation to fulfil human rights means that the government should take positive action to enable all people to enjoy exercising their rights.<sup>80</sup> However, Zimbabwe has sometimes neglected its duties to respect, protect, promote and fulfil human rights due to external conflicts such as politics, culture and religion and internal conflicts such as resources and finance.<sup>81</sup> For

<sup>73</sup> Gubbay AR "The Protection and Enforcement of Fundamental Human Rights: The Zimbabwean Experience" 1997 *Human Rights Quarterly* 227-254.

<sup>74</sup> Gubbay 1997 *Human Rights Quarterly* 229.

<sup>75</sup> Gubbay 1997 *Human Rights Quarterly* 229.

<sup>76</sup> United Nations Human Rights date unknown  
<http://www.ohchr.org/EN/ProfessionalInterest/Pages/InternationalLaw.aspx> [date of use 11 August 2015] 2.

<sup>77</sup> United Nations Human Rights date unknown  
<http://www.ohchr.org/EN/ProfessionalInterest/Pages/InternationalLaw.aspx> [date of use 11 August 2015] 2.

<sup>78</sup> United Nations Human Rights date unknown  
<http://www.ohchr.org/EN/ProfessionalInterest/Pages/InternationalLaw.aspx> [date of use 11 August 2015] 2.

<sup>79</sup> For example, educating people about human rights. See United Nations Human Rights date unknown  
<http://www.ohchr.org/EN/ProfessionalInterest/Pages/InternationalLaw.aspx> [date of use 11 August 2015] 2.

<sup>80</sup> United Nations Human Rights date unknown  
<http://www.ohchr.org/EN/ProfessionalInterest/Pages/InternationalLaw.aspx> [date of use 11 August 2015] 2.

For instance euthanasia is illegal because of cultural and religious believes. See Mawere M "The Shona Conception of Euthanasia: A Quest to Depart from Zimbabwe Tradition" 2009 *The Journal of Pan African Studies* 4. See also Amnesty International 2013 *Walk the Talk: Zimbabwe must Respect and Protect Fundamental Freedoms during the 2013 Harmonized Elections* [www.polity.org.za/.../walk-the-talk-zimbabwe-must-respect-and-protect](http://www.polity.org.za/.../walk-the-talk-zimbabwe-must-respect-and-protect) [date of use 01 September 2015] 10, 12 and 13.



instance, in 1984 the government used the Zimbabwe Republic Police (ZRP)<sup>82</sup> and the Zimbabwe Defence Force (ZDF)<sup>83</sup> to violate human rights during civil war (*Gukurahundi*) where thousands of individuals were killed, raped and tortured by the ZDF's Fifth Brigade for alleged dissident activities.<sup>84</sup> Perpetrators of such inhumane acts were not prosecuted as they were granted amnesty.<sup>85</sup> This caused some citizens to relocate to other countries and some investors withdrew from investing in Zimbabwe because of constant violation of human rights by the government.<sup>86</sup>

This chapter seeks to provide understanding of the past in order to give a basis for the present study concerning human rights challenges in Zimbabwe.<sup>87</sup> Talking about the importance of history in a presentation before the Truth and Reconciliation Commission in South Africa, Archbishop Desmond Tutu, made the following comment about the past:

“ . . . those who forgot the past are doomed to repeat it, are the words emblazoned at the entrance to the museum in the former concentration camp of Dachau. They are words we would do well to keep ever in mind. However painful the experience, the wounds of the past must not be allowed to fester...we also need to know about the past so that we can renew our resolve and commitments that never again will such violations take place. We need to know the past in order to establish a culture of respect for human rights. It is only by accounting for the past that we can become accountable for the future. . . ”<sup>88</sup>

The protection of civil and political rights in Zimbabwe is characterised by a series of challenges which, at different turning points, manifest themselves through violent conflicts.<sup>89</sup> Since the independence of Zimbabwe, the issue of achieving sustainable

<sup>82</sup> Hereinafter referred to as the ZRP.

<sup>83</sup> Hereinafter referred to as the ZDF.

<sup>84</sup> The Redress Trust 2005 *Torture in Zimbabwe, past and present prevention, punishment, reparation?* [www.redress.org/downloads/publications/Amani2005.pdf](http://www.redress.org/downloads/publications/Amani2005.pdf) [date of use 11 August 2015] 4.

<sup>85</sup> The Redress Trust 2005 [www.redress.org/downloads/publications/Amani2005.pdf](http://www.redress.org/downloads/publications/Amani2005.pdf) [date of use 11 August 2015] 8.

<sup>86</sup> Cross 2014 *Why investors don't invest in Zimbabwe* <http://www.newzimbabwe.com/business-14999-Why+investors+dont+invest+in+Zimbabwe/business.aspx> [date of use 25 June 2015] 1.

<sup>87</sup> Zimbabwe Human Rights Non-Governmental Organisation Forum 2005 *Zimbabwe facts and fictions* [hrforumzim.org/.../SR23-Zimbabwe-Facts-and-Fictions-An-Audit-of-the...](http://hrforumzim.org/.../SR23-Zimbabwe-Facts-and-Fictions-An-Audit-of-the...) [date of use 02 September 2015] 1.

<sup>88</sup> Hayner P “Unspeakable Truths: Confronting State Terror and Atrocity” 2001 *The South Africa Law Journal* 615-624.

<sup>89</sup> Bruce D et al *Policing and Human Rights Assessing Southern African Countries Compliance with the SARPPCO Code of Conduct for Police Officials* (African Minds Publishers Cape Town 2012) 185-186.



peace and development has remained a challenge due to a lack of effective mechanisms on issues of human rights violations.<sup>90</sup> Understanding the historical evolution of the concept of human rights in Zimbabwe is essential to understand the debates and problems that surround it.<sup>91</sup> Given this background, it is now important to provide a brief history of civil and political rights protection in Zimbabwe in order to understand some of the problems that are associated with the practical enforcement of these rights. This chapter also examines the domestication of the relevant international law in Zimbabwe.

## 2.2 Historical aspects of the protection of civil and political rights in Zimbabwe

### 2.2.1 The history of international human rights law in Zimbabwe

The origin of human rights law in Zimbabwe began with the first British settlement in the country.<sup>92</sup> Human rights law formed part of the British system that came into being in the 16th century.<sup>93</sup> The origin of this system of law was rooted in the British belief that they were superior to blacks. The British gave little recognition to the political system of Africa.<sup>94</sup> Before white people came to Zimbabwe, human rights law was not known to black people.<sup>95</sup> Many of the branches of international legal system were not in existence or at least were not recognised in Zimbabwe before the British settlement in Zimbabwe.<sup>96</sup>



Zimbabwe was colonised in 1890 by the British South African Company led by Cecil Rhodes.<sup>97</sup> However, the rise of the African consciousness in the 1950-s led to the struggle for self-rule, which culminated in the Second Chimurenga (the war for

<sup>90</sup> Ndawana *The Role of the Judiciary in Protecting the Right to Freedom of Expression in Difficult Political Environments: a case study of Zimbabwe* 1.

<sup>91</sup> Ndavvana *The Role of the Judiciary in Protecting the Right to Freedom of Expression in Difficult Political Environments: a case study of Zimbabwe* 1.

<sup>92</sup> Mude T "The History of International Human Rights law in Zimbabwe" 2014 *Journal of Social Welfare and Human Rights* 53-86.

<sup>93</sup> Mude 2014 *Journal of Social Welfare and Human Rights* 56.

<sup>94</sup> Mude 2014 *Journal of Social Welfare and Human Rights* 56.

<sup>95</sup> Mude 2014 *Journal of Social Welfare and Human Rights* 56.

<sup>96</sup> Mude 2014 *Journal of Social Welfare and Human Rights* 56.

<sup>97</sup> Electoral Institute for Sustainable Democracy in Africa 2007 *Zimbabwe: British South Africa Company rule (1890-1923)* [www.content.eisa.org.za/.../zimbabwe-british-south-africa-company-rule](http://www.content.eisa.org.za/.../zimbabwe-british-south-africa-company-rule) [date of use 23 August 2015] 1.

independence) in the 1970 in Zimbabwe.<sup>98</sup> The war for independence led to the signing of the Lancaster House Agreement in 1979 which led in a new post-independence Constitution.<sup>99</sup> After 1979 Zimbabwe committed itself to the International Bill of Human Rights,<sup>100</sup> which covers three covenants: the UDHR, ICCPR and International Covenant on Economic, Social and Cultural Rights (ICESCR).<sup>101</sup> Zimbabwe signed the ICCPR and ICESCR as part of her fulfilment of the responsibility to protect citizens which is a general rule in international law.<sup>102</sup> Zimbabwe accepted the responsibility to respect and protect human rights as required by international human rights law.<sup>103</sup> International human rights law is designed to promote and protect lives, health and dignity of individuals globally.<sup>104</sup>

The domestication of international and regional law in Zimbabwe was based on a dualist approach.<sup>105</sup> The dualist consider international law and national law as different legal systems and distinct in nature.<sup>106</sup> Dualist states consider that international law is not directly applicable under national legal system, it must therefore be translated into national legislation before it can be applied by the national courts.<sup>107</sup> In other words, a state's ratification of international and regional treaties is not enough, a relevant national legislation must be enacted before it can be applied and enforced.<sup>108</sup> The incorporation of international and regional obligations was performed in terms of the Constitution of

<sup>98</sup> Chung F *Re-living the Second Chimurenga Memories from the Liberation Struggle in Zimbabwe* (The Nordic Africa Institute Sweden 2006) 74.

<sup>99</sup> Chung *Re-living the Second Chimurenga* 242.

<sup>100</sup> Chikwanha AB 2009 *The trajectory of human rights violations in Zimbabwe* mercury.ethz.ch/serviceengine/Files/ISN/111691/...5f5a.../P202 [date of use 12 November 2015] 2.

<sup>101</sup> Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966. Entry into force 3 January 1976. Hereinafter referred to as ICESCR. See Chikwanha 2009 mercury.ethz.ch/serviceengine/Files/ISN/111691/...5f5a.../P202 [date of use 12 November 2015] 2.

<sup>102</sup> Dugard J *International Law: A South African Perspective* (Juta South Africa Pretoria 2007).

<sup>103</sup> Mude 2014 *Journal of Social Welfare and Human Rights* 57.

<sup>104</sup> Mude 2014 *Journal of Social Welfare and Human Rights* 57.

<sup>105</sup> AIDS and Human Rights Research Unit *Human rights protected?: nine Southern African country reports on HIV, AIDS and the law* (Pretoria University Law Press South Africa 2007) 359.

<sup>106</sup> Ndimurwimo LA *Human Rights Violations in Burundi: A case study in Post-Conflict Reconciliation and Transitional Justice* (LLD-thesis North West University 2014) 74.

<sup>107</sup> Ndimurwimo *Human Rights Violations in Burundi: A Case Study in Post-Conflict Reconciliation and Transitional Justice* 74.

<sup>108</sup> Ndimurwimo *Human Rights Violations in Burundi: A Case Study in Post-Conflict Reconciliation and Transitional Justice* 74.

Zimbabwe 1996.<sup>109</sup> The Constitution of Zimbabwe 1996 states that any convention, treaty or agreement acceded to, concluded or executed by or under the authority of the president with foreign states or organisations;

- a) is subject to approval by parliament; and
- b) shall not form part of our law unless it has been incorporated into the law by or under an Act of parliament.<sup>110</sup>

This means that Zimbabwe is not bound by international law and customary international law unless such law was incorporated into local statutes by the parliament of Zimbabwe. Signing any treaty or convention is not enough to give binding effect in Zimbabwe, what is needed is the domestication of the treaty into domestic legislation.<sup>111</sup> The Constitution of Zimbabwe 1996 was the supreme law and made no mention of customary international law, or international treaty law, apart from setting out the mechanisms for the accession to and incorporation of treaties. The government of Zimbabwe refused to be bound by international treaties as Zimbabwe did not incorporate international treaties in their domestic laws.<sup>112</sup>

### *2.2.2 Protection of selected civil and political rights under the Lancaster House Constitution Amendment 19 of 2008*

The Lancaster House Constitution protected the right to life.<sup>113</sup> However, it also provided exceptions in which a person can be killed lawfully. The first exception was where a court sentenced a person to death penalty in respect of a criminal offence of which he has been convicted.<sup>114</sup> Other instances where killing intentionally was allowed was in order to effect a lawful arrest or to prevent the escape of a person lawfully

<sup>109</sup> Amendment (No.14) Act, 1996. Hereinafter referred to as Constitution of Zimbabwe 1996.

<sup>110</sup> Section 111B of the Constitution of Zimbabwe 1996.

<sup>111</sup> International Business Publications *Zimbabwe business law handbook: strategic information and laws* (International Business Publications USA 2013) 64.

<sup>112</sup> Saki O and Chiware T 2007 *The Law in Zimbabwe* <http://www.nyulawglobal.org/globalex/Zimbabwe.html> [date of use 25 September 2015] 17.

<sup>113</sup> Section 12.

<sup>114</sup> Section 12(1) of the Lancaster House Constitution.



detained,<sup>115</sup> for the purpose of suppressing a riot or of dispersing an unlawful gathering<sup>116</sup> or in order to prevent the commission of a criminal offence.<sup>117</sup> The exclusions under the right to life were inconsistent with the provisions of the International Covenant on Civil and Political Rights.<sup>118</sup> This international instrument provides that killing can only be allowed:

- “(a) on people convicted of murder . . . ;
- (b) on people older than 18;
- (c) the courts have discretionary powers over whether or not to impose death penalty.”

This right to life is not adequately protected because death penalty could still be imposed on the offenders. The General Assembly of the United Nations held that “there is no conclusive evidence of the deterrent value of the death penalty.”<sup>119</sup> Unlike prison sentences, when a person is sentenced to death penalty he or she dies for ever and his or her life cannot be replaced.<sup>120</sup> Moreover, death penalty violates the right to life which is one of the most important human rights.<sup>121</sup>

Although the right to life was protected many people were killed during the *Gukurahundi* tribal conflicts which were initiated by the Zimbabwe government and almost 20 000 people were killed.<sup>122</sup> Human Rights Watch has documented excessive force and unlawful killings by the ZRP, particularly, in relation to human rights activists and members of opposition parties during 2008 elections and in the months immediately

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<sup>115</sup> Section 12(2)(b) of the Lancaster House Constitution.

<sup>116</sup> Section 12(2)(c) of the Lancaster House Constitution.

<sup>117</sup> Section 12(2)(d) of the Lancaster House Constitution.

<sup>118</sup> Article 6 of the ICCPR.

<sup>119</sup> General Assembly of the United Nations (UNGA Resolution 65/206).

<sup>120</sup> Abammeli Human Rights Lawyers Network 2014 *Right to life under spotlight in Zim* <http://www.southerneye.co.zw/2014/09/01/right-life-spotlight-zim/> [date of use 27 September 2015] 2.

<sup>121</sup> Center for Constitutional Rights date unknown *The death penalty is a human rights violation* [ccrjustice.org/sites/default/files/CCR%20Death%20Penalty%20Factsheet.pdf](http://ccrjustice.org/sites/default/files/CCR%20Death%20Penalty%20Factsheet.pdf) [date of use 12 November 2015] 1.

<sup>122</sup> Black Diamonds 2014 *Mugabe: tyrant or revolutionary?* <http://www.blackdiamondsmag.co.za/mugabe-tyrant-revolutionary/> [date of use 15 August 2015] 3.

following the announcement of the 2011 elections.<sup>123</sup> This shows lack of political will by the government of Zimbabwe to obey the rule of law and respect people's human rights.<sup>124</sup>

Torture, inhuman or degrading punishment were prohibited by the Lancaster House Constitution.<sup>125</sup> Although torture was prohibited in the Constitution it was still practiced especially by law enforcement officers.<sup>126</sup> For instance, Jestina Mukoko a civil society leader, was abducted from her home and subjected to torture, inhuman and degrading treatment by the police.<sup>127</sup> Despite the court ruling that acts of torture had been committed, the court had no means to hold those responsible for the act accountable. Torture is not a crime in Zimbabwean law, hence there is no way that the police could be prosecuted.<sup>128</sup> During the *Gukurahundi* conflict, the government of Zimbabwe committed many gross human rights violations including torture.<sup>129</sup> Thousands of unarmed civilians died, while others were physically tortured by the ZRP and ZDF.<sup>130</sup> Torture took many forms such as beatings, rape and electric shocks. Torture was perpetrated by the ZRP, the ZDF, government militias, the Central Intelligence Organisation (CIO) and war veterans.<sup>131</sup> The provisions of the Convention on the Prevention and Punishment of the Crime of Genocide<sup>132</sup> did not deter the government of

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<sup>123</sup> Human Rights Watch 2011 *Zimbabwe: no justice for rampant killings, torture* <https://www.hrw.org/news/2011/03/08/zimbabwe-no-justice-rampant-killings-torture> [date of use 16 August 2015] 3.

<sup>124</sup> Zimbabwe Human Rights Non-Governmental Organisation Forum 2014 *Zimbabwe human rights, rule of law and democracy 2013 annual report* <http://www.hrforumzim.org/publications/annual-reports/zimbabwe-human-rights-rule-of-law-and-democracy-2013-annual-report/> [date of use 12 November 2015] 2.

<sup>125</sup> Section 15(1).

<sup>126</sup> The Redress Trust [www.redress.org/downloads/publications/Amani2005.pdf](http://www.redress.org/downloads/publications/Amani2005.pdf) [date of use 15 2015] 5.

<sup>127</sup> *Mukoko v Attorney-General and Others* [2012] ZWSC 11.

<sup>128</sup> Magaisa AT 2012 *A look at judgment in Jestina Mukoko torture case* <http://nehandaradio.com/2012/10/05/a-look-at-judgment-in-jestina-mukoko-torture-case/> [date of use 01 October 2014] 2.

<sup>129</sup> The Redress Trust [www.redress.org/downloads/publications/Amani2005.pdf](http://www.redress.org/downloads/publications/Amani2005.pdf) [date of use 15 2015] 5.

<sup>130</sup> The Redress Trust [www.redress.org/downloads/publications/Amani2005.pdf](http://www.redress.org/downloads/publications/Amani2005.pdf) [date of use 15 2015] 8.

<sup>131</sup> The Redress Trust [www.redress.org/downloads/publications/Amani2005.pdf](http://www.redress.org/downloads/publications/Amani2005.pdf) [date of use 15 2015] 8.

<sup>132</sup> Convention on the Prevention and Punishment of the Crime of Genocide Approved and proposed for signature and ratification or accession by General Assembly resolution 260 A (III) of 9 December 1948 entry into force 12 January 1951, in accordance with article XIII. Hereinafter referred to as CPPCG.



Zimbabwe from killing and causing serious bodily harm to its own people.<sup>133</sup> Although it is difficult to qualify what happened during *Gukurahundi* as genocide, people in Matabeleland and other southern province were killed, raped and tortured.

At the international law level, torture is prohibited and it gives rise to state responsibility as well as individual criminal liability.<sup>134</sup> Some of the things that caused high levels of torture were a lack of political will by the government of Zimbabwe to prohibit torture and its lack of respect for the rule of law.<sup>135</sup> People were not protected since there was no legislation in Zimbabwe which outlawed torture. This led the court in some cases to charge the accused with assault because there was no legislation that specifically outlawed torture.<sup>136</sup>

The right to speak your mind freely on important issues in the society and access information plays an important role in the development of any society.<sup>137</sup> The right to freedom of expression was explicitly recognised in the Lancaster House Constitution.<sup>138</sup> The right to freedom of expression was subject to limitations.<sup>139</sup> It was limited by, among others, public safety or public order to an extent which is reasonably justifiable in a democratic society.<sup>140</sup> The meaning of the term 'reasonably justifiable' in a democratic society was left to be interpreted by the courts.<sup>141</sup> The courts weigh competing and conflicting interests and values to determine if a limitation is reasonably justifiable.<sup>142</sup> In addition to the limitations in the Lancaster House Constitution, legislation was enacted which limited the enjoyment of right to freedom of expression. Examples of such

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<sup>133</sup> Chikwanha 2009 mercury.ethz.ch/serviceengine/Files/ISN/111691/...5f5a.../P202.pdf [date of use 03 July 2015] 4.

<sup>134</sup> Article 4 of CAT.

<sup>135</sup> Foreign and Commonwealth office *Corporate report Zimbabwe - Country of Concern* 2015 <https://www.gov.uk/government/publications/zimbabwe-country-of-concern/zimbabwe-country-of-concern#torture> [date of use 24 October 2015] 8.

<sup>136</sup> *S v Reza and Another* [2003] ZWHHC 219.

<sup>137</sup> Laura E 2014 *Freedom of Expression and Association* <http://www.tlcuganda.org/programmes/freedom-of-expression-and-association/> [date of use 24 August 2015] 2.

<sup>138</sup> Section 20.

<sup>139</sup> Section 20(2)(a) of the Lancaster House Constitution.

<sup>140</sup> Section 20(4)(a) and (b) of the Lancaster House Constitution.

<sup>141</sup> Ndawana *The Role of the Judiciary in Protecting the Right to Freedom of Expression in Difficult Political Environments: a case study of Zimbabwe* 3.

<sup>142</sup> Ndawana *The Role of the Judiciary in Protecting the Right to Freedom of Expression in Difficult Political Environments: a case study of Zimbabwe* 3.

legislation include the Access to Information and Protection of Privacy Act (AIPPA)<sup>143</sup> as well as the Official Secrets Act.<sup>144</sup> The AIPPA establishes compulsory licensing system for all individual journalists and media outlets and also imposes a number of restrictive content prohibitions.<sup>145</sup> The AIPPA established the Media Information Commission (MIC)<sup>146</sup> to *inter alia* process compulsory annual licence applications from journalists and media houses.<sup>147</sup> The MIC is government-controlled, with the Minister of Information and Publicity appointing its members.<sup>148</sup> The Minister of Information and Publicity has control over what journalists report on.<sup>149</sup> This implies that journalists can end up being puppets of the minister in order to retain their licences, in contravention of the ethics of their profession.<sup>150</sup> These ethics are further compromised in that the government can determine what should be reported or not reported by journalists.<sup>151</sup> The government has also used the AIPPA to deny prospective independent foreign newspapers and radio stations licenses to practice, arguing that the local media should not be owned by foreigners.<sup>152</sup> This is in breach of the right to freedom of expression of the Lancaster House Constitution.<sup>153</sup> AIPPA and POSA limit public debate as well as criticism of government decisions in Zimbabwe.<sup>154</sup>

Organisations of students, trade unionists and workers have sometimes expressed their discontent with the government through protest marches and demonstrations.<sup>155</sup>



<sup>143</sup> 2002. Hereinafter referred to as the AIPPA.

<sup>144</sup> Chapter 11:09 of 1970. Hereinafter referred to as Official Secrets Act.

<sup>145</sup> Section 38(1)(i) and (n) of the AIPPA.

<sup>146</sup> Hereinafter referred to as the MIC.

<sup>147</sup> Section 38 the AIPPA.

<sup>148</sup> Mapuva J and Muyengwa L "A Critique of the key Legislative Framework Guiding Civil Liberties in Zimbabwe" 2012 *PER* 127-164.

<sup>149</sup> See section 40(1),(2) and (3) of the AIPPA. Human Rights Watch *et al* 2007 *Zimbabwe: human rights in crisis Shadow report to the African Commission on Human and Peoples' Rights* [www.ibanet.org/Document/Default.aspx?DocumentUid=f8929fc0](http://www.ibanet.org/Document/Default.aspx?DocumentUid=f8929fc0) [date of use 20 August 2015] 43.

<sup>150</sup> Mapuva and Muyengwa 2012 *PER* 139.

<sup>151</sup> Mapuva and Muyengwa 2012 *PER* 139.

<sup>152</sup> Mapuva and Muyengwa 2012 *PER* 140.

<sup>153</sup> Section 20.

<sup>154</sup> Zimbabwe Human Rights Non-Governmental Organisation Forum 2011 *The right to freedom of expression, assembly and association in Zimbabwe* [www.hrforumzim.org/publications/.../right-to-freedom-of-expression-ass](http://www.hrforumzim.org/publications/.../right-to-freedom-of-expression-ass) [date of use 01 September 2015] 3.

<sup>155</sup> Davidson L and Purohit R 2014 "The Zimbabwean Human Rights Crisis: A Collaborative Approach to International Advocacy" *Yale Human Rights and Development Journal* 108-131.

Freedom of assembly and association are one of the most important civil and political rights. Zimbabwe Election Support Network has said that:

“... freedom of assembly is understood to be foundational for the life of a liberal democracy for two primary reasons. First, it helps create space for collective politics. This space for collective politics is crucial. While a single voice is likely to be drowned out in the political community, a collective voice is far more likely to get its message across. Secondly, assembly is essential for democratic politics because only through meeting and talking with fellow citizens can we critically explore the various beliefs and values which animate our political decisions. It is generally believed that the more we discuss the ideas we seek to put into practice, the better and the more legitimate our political decisions are likely to be”.<sup>156</sup>

The right to freedom of assembly and association was guaranteed in the Lancaster House Constitution.<sup>157</sup> The Lancaster House Constitution limited the right to freedom of assembly and association in the interests of defence, public safety, public order, public morality or public health.<sup>158</sup> Another limitation was that freedom of assembly and association could not be exercised in public places, including any road, street, lane, path, pavement, side-walk, thoroughfare or similar place that exists for the free passage of people or vehicles.<sup>159</sup> These limitations were probably made for the purpose of protecting the rights and freedoms of other persons. However, the right to assembly and association was abused as the government restricted the enjoyment of freedom of assembly and association in ways that were contrary to acceptable international standards.<sup>160</sup> For instance, police have routinely used excessive force to disperse peaceful demonstrations, including the use of live ammunition, which resulted in the death of Movement for Democratic Change (MDC)<sup>161</sup> supporter, Gift Tandare in

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<sup>156</sup> Zimbabwe Election Support Network 2012 *Analysis of Election-Related Provisions of the COPAC Draft Constitution* <http://www.hrforumzim.org/wp-content/uploads/2013/03/ANALYSIS-OF-ELECTION-RELATED-PROVISIONS-OF-THE-COPAC-DRAFT-CONSTITUTION.pdf> [date of use 12 November 2015] 10

<sup>157</sup> Section 21(1).

<sup>158</sup> Section 21(3).

<sup>159</sup> Section 21(4).

<sup>160</sup> Article 20(1) Universal Declaration of Human Rights, Articles 21 and 22 of International Covenant on Civil and Political Rights, Articles 10 and 11 of African charter on human and people's rights and Article 8 African Charter on the Rights and Welfare of the Child.

<sup>161</sup> Hereinafter referred to as MDC.



2007.<sup>162</sup> The ZANU-PF used the police to suppress public meetings, demonstrations and campaigns by opposition political parties.<sup>163</sup> The use of force during peaceful demonstrations has a negative impact on the right of individuals to assemble and association. With regard to freedom of association and petition, right to human dignity and political rights were not protected under the Lancaster House Constitution.<sup>164</sup>

In 1990 Zimbabweans were dissatisfied with the government and new forces for social change emerged.<sup>165</sup> Academics, the student union and the labour movement became increasingly critical of the continued use of repressive legislation, and the absence of respect for civil and political rights.<sup>166</sup> In relation to this, the National Constitutional Assembly was founded in May 1997 by a group of civil society organisations that pressed for public debate on constitutional reforms that would recognise and respect human rights.<sup>167</sup> ZANU-PF became uncomfortable with civil society's involvement in advocating for a new Constitution that would reflect the values and aspirations of Zimbabweans.<sup>168</sup> Given this background the civil society found it more difficult to operate in Zimbabwe.<sup>169</sup> In September 2008, the MDC and the ZANU-PF reached a power sharing agreement known as the Global Political Agreement (GPA).<sup>170</sup> The agreement stipulated that Zimbabwe must have a new Constitution. This agreement resulted in a new Constitution known as Zimbabwe Constitution 2013.<sup>171</sup> This Constitution therefore replaced the Lancaster House Constitution which had been

<sup>162</sup> Bruce *et al* *Policing and Human Rights Assessing southern African countries' compliance with the SARPCCO Code of Conduct for Police Officials* 186.

<sup>163</sup> Nqobani and Muchaneta 2013 *Safety and security rights in Southern Africa – The Zimbabwe Example* <http://www.freiheit.org/Hintergrundpapiere/414c25237i1p/index.html> [date of use 12 August 2015] 3.

<sup>164</sup> Chapter of the Lancaster House Constitution.

<sup>165</sup> Bertelsmann 2003 *Bertelsmann Transformation Index 2003* <http://bti2003.bertelsmann-transformation-index.de/77.0.html?&L=1> [date of use 21 August 2015] 2.

<sup>166</sup> Davidson and Purohit 2014 *Yale Human Rights and Development Journal* 111.

<sup>167</sup> Maseng JO *The State, Civil Society And Underdevelopment: The Case Of Zimbabwe* (Master's Thesis North-West University Vaal Triangle Campus 2010) 61.

<sup>168</sup> Davidson and Purohit 2014 *Yale Human Rights and Development Journal* 111.

<sup>169</sup> Maseng *The State, Civil Society and Underdevelopment: The Case of Zimbabwe* 63.

<sup>170</sup> Freedom House 2012 *Freedom in the World* <https://freedomhouse.org/report/freedom-world/2012/zimbabwe> [date of use 24 August 2015] 2.

<sup>171</sup> Masunda CO and Zembe W 2013 *The Global Political Agreement (GPA) Constitution in Zimbabwe: A New People-Driven Constitution or A Misnomer?* [communitylawcentre.org.za/constitution.../constitution...%20GPA%20C...](http://communitylawcentre.org.za/constitution.../constitution...%20GPA%20C...) [date of use 06 July 2015] 3.

supplemented with amendments over the years.<sup>172</sup> Human rights violations are caused by political and economic challenges and these still continue.

### ***2.3 The application of international and regional human rights law under the Zimbabwe Constitution 2013***

In Zimbabwe, there are constitutional provisions which relate to the domestication of international law relevant to the protection and enforcement of civil and political rights.<sup>173</sup> Those provisions relate to the interpretation of the Declaration of Rights, the status of international agreements and customary international law.<sup>174</sup>

#### ***2.3.1 The interpretation of the Declaration of Rights***

The impact of the international law on the interpretation of the Declaration of Rights is regulated by the Zimbabwe Constitution 2013 which provides that “when interpreting the Declaration of Rights, a court, tribunal or forum must take into account international law and all treaties and conventions to which Zimbabwe is a party”.<sup>175</sup> This does not only reveal a clear determination to ensure that the Zimbabwe Constitution 2013 is interpreted to comply with international law, but also demonstrates that international law has a special place in the Zimbabwean law and the Constitution.<sup>176</sup> It is worth noting that the Zimbabwe Constitution 2013 obliges the courts to consider treaties and conventions which Zimbabwe has ratified.<sup>177</sup> In other words, the courts must take into account any international law that is relevant to a particular case that deals with the interpretation of civil and political rights.<sup>178</sup> It also means that foreign cases, relevant to the interpretation of civil and political rights, may also be referred to in Zimbabwean court proceedings.<sup>179</sup> However, the courts are not obliged to refer to foreign cases since

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<sup>172</sup> Tawana H.N 2015 *Progressive reform in the new Constitution of Zimbabwe* [www.kas.de/wf/doc/kas\\_40484-1522-2-30.pdf?150223094847](http://www.kas.de/wf/doc/kas_40484-1522-2-30.pdf?150223094847) [date of use :24 August 2015] 1.

<sup>173</sup> See section 46(1)(c), s326 and 326 of the Zimbabwe Constitution 2013.

<sup>174</sup> See section 46(1)(c), s326 and 326 of the Zimbabwe Constitution 2013.

<sup>175</sup> Section 46(1)(c) of the Zimbabwe Constitution 2013.

<sup>176</sup> Section 46(1)(c) of the Zimbabwe Constitution 2013.

<sup>177</sup> Section 46(1)(c) of the Zimbabwe Constitution 2013.

<sup>178</sup> Section 46(1)(c) of the Zimbabwe Constitution 2013.

<sup>179</sup> Section 46(1)(e) of the Zimbabwe Constitution 2013.

the Zimbabwe Constitution 2013 provides that, foreign law “may” be considered by the relevant court in Zimbabwe.<sup>180</sup>

### 2.3.2. *The role of international agreements on the enforcement and interpretation of the Declaration of Rights*

The Zimbabwe Constitution 2013 states that: any international treaty which has been concluded or executed by the President or under the President’s authority, does not bind Zimbabwe unless it has been approved by parliament and it does not form part of the Law of Zimbabwe unless it has been incorporated into the Law through an Act of Parliament.<sup>181</sup> Further, the Constitution states that Customary International Law is part of the Law of Zimbabwe, unless it is inconsistent with the Constitution or an Act of Parliament.<sup>182</sup> This shows that international treaties are only binding on Zimbabwe once they have been ratified into law by Parliament, with the President’s approval.<sup>183</sup>

### 2.3.3 *The role of customary international law on the enforcement and interpretation of the Declaration of Rights*

Customary international law plays a very important role in the interpretation and enforcement of civil and political rights.<sup>184</sup> This is confirmed by the Zimbabwe Constitution 2013 which provides that customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.<sup>185</sup> According to Mubangizi customary international law, refers to the general state practice regarded as legally binding by the majority of the nations around the world.<sup>186</sup> For example, in *Kachingwe and Others v Minister of Home Affairs NO and Another*,<sup>187</sup> the Chief Justice of Zimbabwe cited the Convention against Torture and Other Cruel, Inhuman or

<sup>180</sup> Section 46(1)(e) of the Zimbabwe Constitution 2013.

<sup>181</sup> Section 327 of the Zimbabwe Constitution 2013.

<sup>182</sup> Section 326 of the Zimbabwe Constitution 2013

<sup>183</sup> Section 327 of the Zimbabwe Constitution 2013.

<sup>184</sup> Icelandic Human rights Centre date unknown *Sources of international law* <http://www.humanrights.is/en/human-rights-education-project/human-rights-concepts-ideas-and-tora/part-i-the-concept-of-human-rights/sources-of-international-law> [date of use 11 November 2015] 1.

<sup>185</sup> Section 326.

<sup>186</sup> Mubangizi J.C *The Protection of Human Rights in South Africa: A Legal and Practical Guide* (Juta & Co Ltd South Africa 2004) 45.

<sup>187</sup> [2005] ZWSC 134.



Degrading Treatment or Punishment as authority for the proposition that torture is illegal in Zimbabwe. The Chief Justice referred to the Convention against Torture<sup>188</sup> because the practice of torture is regarded as illegal by many nations around the world.<sup>189</sup>

The two requirements for a principle to be recognised as customary international law are *usus*<sup>190</sup> and opinion *juris*.<sup>191</sup> For the requirement of *usus* to be met, the principle must be constantly used in a similar manner.<sup>192</sup> The second requirement of *opinio juris* states that there must be a belief that is followed as a matter of law.<sup>193</sup> Both of these requirements must be met for a concept or principle to be considered as part of customary International law.<sup>194</sup> In determining whether a particular rule is accepted as a rule of customary law, Dugard argues that the courts should be guided by judicial decisions of international tribunals, national courts and international law treaties.<sup>195</sup>

## 2.4 Conclusion

The historical overview of the protection of civil and political rights under the Lancaster House Constitution was discussed in this chapter. In this regard, selected problems and challenges of civil and political rights in Zimbabwe were analysed. Selected developments and challenges on selected civil and political rights from 1980 to 2013 were also discussed. Although the international community can and should play some role in addressing these problems, it is up to the Zimbabweans to play a bigger role in addressing these challenges. This chapter also examined the domestication of

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<sup>188</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment was adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984. Entry into force 26 June 1987, in accordance with article 27 (1).

<sup>189</sup> Amnesty International 2014 *Global crisis on torture exposed by new worldwide campaign* <https://www.amnesty.org/en/latest/news/2014/05/amnesty-international-global-crisis-torture-exposed-new-worldwide-campaign/> [date of use 12 November 2015] 1.

<sup>190</sup> The practice of something.

<sup>191</sup> *Opinio juris* ("an opinion of law") is the belief that an action was carried out because it was a legal obligation.

<sup>192</sup> International Committee of the Red Cross (ICRC) 2014 *Assessment of Customary International Law* [https://www.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_in\\_asofcuin#AsofCuIn\\_Wroft3re](https://www.icrc.org/customary-ihl/eng/docs/v1_rul_in_asofcuin#AsofCuIn_Wroft3re) [date of use 01 October 2015] 10.

<sup>193</sup> International Committee of the Red Cross (ICRC) 2014 [https://www.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_in\\_asofcuin#AsofCuIn\\_Wroft3re](https://www.icrc.org/customary-ihl/eng/docs/v1_rul_in_asofcuin#AsofCuIn_Wroft3re) [date of use 01 October 2015] 10.

<sup>194</sup> International Committee of the Red Cross (ICRC) 2014 [https://www.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_in\\_asofcuin#AsofCuIn\\_Wroft3re](https://www.icrc.org/customary-ihl/eng/docs/v1_rul_in_asofcuin#AsofCuIn_Wroft3re) [date of use 01 October 2015] 10.

<sup>195</sup> Dugard J *International law: A South African Perspective* 4th ed (Juta 2012 Cape Town) 56.

international law in Zimbabwe that is relevant to the protection of these rights.<sup>196</sup> The next chapter analyses the protection of selected civil and political rights under the Zimbabwe Constitution 2013.

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<sup>196</sup> Dugard J *International law: A South African Perspective* 4th ed 56.

## **CHAPTER THREE: THE PROTECTION OF SELECTED CIVIL AND POLITICAL RIGHTS UNDER THE ZIMBABWE CONSTITUTION 2013**

### **3.1 Introduction**

This chapter analyses the protection of selected civil and political rights under the Zimbabwe Constitution 2013.<sup>197</sup> The right to life,<sup>198</sup> the right to human dignity,<sup>199</sup> the right to freedom from torture,<sup>200</sup> the right to freedom of assembly and association,<sup>201</sup> the right to freedom to demonstrate and petition,<sup>202</sup> the right to freedom of expression<sup>203</sup> and the right to free and fair elections<sup>204</sup> are protected under the Zimbabwe Constitution 2013. The government has a positive obligation to protect these rights and other fundamental rights enshrined in the Zimbabwe Constitution 2013. For instance, the Zimbabwe Constitution 2013 requires the government to respect, protect, promote and fulfill all the rights enshrined in the Declaration of Rights.<sup>205</sup> Failure to respect, protect and fulfill these rights amounts to a violation of the Zimbabwe Constitution 2013.<sup>206</sup> It is against this background that this chapter seeks to analyse the protection of selected civil and political rights in Zimbabwe. To this end, this chapter analyses how selected civil and political rights are protected under the Zimbabwe Constitution 2013 in order to examine whether such protection is consistent with other relevant regional and international best practices.

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<sup>197</sup> Amendment (no 20) of 2013. Hereinafter referred to as the Zimbabwe Constitution 2013.

<sup>198</sup> Section 48 of the Zimbabwe Constitution 2013.

<sup>199</sup> Section 51 of the Zimbabwe Constitution 2013.

<sup>200</sup> Section 53 of the Zimbabwe Constitution 2013.

<sup>201</sup> Section 58 of the Zimbabwe Constitution 2013.

<sup>202</sup> Section 59 of the Zimbabwe Constitution 2013.

<sup>203</sup> Section 61 of the Zimbabwe Constitution 2013.

<sup>204</sup> Section 67 of the Zimbabwe Constitution 2013.

<sup>205</sup> Section 44.

<sup>206</sup> Section 2(1).

### 3.2 The right to life

The right to life is protected under the Zimbabwe Constitution 2013.<sup>207</sup> For instance, the Zimbabwe Constitution Zimbabwe 2013 states that everyone has the right to life.<sup>208</sup> Although the Zimbabwe Constitution 2013 states that every human being has the right to life, there are circumstances where a person can be deprived of his/her life.<sup>209</sup> The Zimbabwe Constitution 2013 provides that the state may deprive persons of their lives without breaching the Zimbabwe Constitution 2013 as stated below:<sup>210</sup>

- (a) death penalty can only be imposed on people convicted of murder committed in aggravating circumstances;<sup>211</sup>
- (b) courts have discretionary powers over whether or not to impose death penalty;<sup>212</sup>
- (c) death penalty can only be carried out in accordance to a final judgment of a competent court;<sup>213</sup>
- (d) death penalty cannot be imposed on a
  - (i) person who is less than 21 years when the offence was committed;<sup>214</sup>
  - (ii) person who is more than 70 years old;<sup>215</sup>
- (e) death penalty cannot not be imposed or carried out on a woman;<sup>216</sup> and
- (f) the person sentenced to death penalty must have a right to seek pardon from the President of Zimbabwe.<sup>217</sup>

These limitations comply with internationally accepted limitations on imposing death penalty.<sup>218</sup> For instance the ICCPR<sup>219</sup> and the UDHR<sup>220</sup> impose the above limitations.

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<sup>207</sup> Section 48.

<sup>208</sup> Section 48.

<sup>209</sup> Abammeli Human Rights Lawyers Network Mwenzule 2015 *The Right to life under spotlight in Zimbabwe* [www.abammelilawyers.com/the-right-to-life-under-spotlight-in-zimbabwe/](http://www.abammelilawyers.com/the-right-to-life-under-spotlight-in-zimbabwe/) [date of use 10 August 2015] 1.

<sup>210</sup> Section 48(2).

<sup>211</sup> Section 48(2).

<sup>212</sup> Section 48(2)(a).

<sup>213</sup> Section 48(2)(b).

<sup>214</sup> Section 48(2)(c)(i).

<sup>215</sup> Section 48(2)(c)(ii).

<sup>216</sup> Section 48(2)(d).

<sup>217</sup> Section 48(2)(e).

<sup>218</sup> Article 6 of the International Covenant on Civil and Political Rights (ICCPR) adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 23 March 1976, in accordance with Article 49. Hereinafter referred to as ICCPR.



All rights are important, but the right to life is seen as the most important and the source of all other human rights, because without life no one can enjoy other rights.<sup>221</sup> The importance of the right to life was acknowledged in *S v Makwanyane*,<sup>222</sup> in which the Constitutional Court of South Africa described the right to life as the most important of all human rights and the foundation of all rights.<sup>223</sup> The right to life is also based on a moral principle that a human being has the right to live and should not be killed by another human being.<sup>224</sup>

Death penalty violates the right to life and the right not to be subjected to torture and other cruel, inhumane or degrading treatment or punishment.<sup>225</sup> Furthermore, death penalty undermines the right to human dignity which is inherent to every human being.<sup>226</sup> Even though death penalty is legal in Zimbabwe it has been 10 years without execution in Zimbabwe. Amnesty international submits that there are still 95 prisoners on death row.<sup>227</sup> There is no evidence that the death penalty deters crime or used as a method of punishment, hence it is submitted that such penalty must be abolished in Zimbabwe.<sup>228</sup> Given this background, other instances where the right to life is violated in Zimbabwe are discussed below.




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Article 3 of the Universal Declaration of Human Rights (UDHR) was proclaimed and adopted by the General Assembly in on 10 December 1948. Hereinafter referred to as UDHR. These international instruments provides the following limitations: (1) death penalty can only be imposed on people convicted of murder 'committed in aggravating circumstances; (2) death penalty cannot be imposed on people younger than 18 or on pregnant women; (3) the sentenced may seek pardon or commutation of the death penalty from the President; and, (4) the Courts have discretionary powers over whether or not to impose the death penalty.

<sup>219</sup> Article 6.

<sup>220</sup> Article 3.

<sup>221</sup> Mubangizi *The Protection of Human Rights in South Africa: A Legal and Practical Guide* (Juta & Co Claremont South Africa 2013) 92.

<sup>222</sup> *S v Makwanyane* 1995 (3) SA 391 (CC).

<sup>223</sup> Mubangizi *The Protection of Human Rights in South Africa: A Legal and Practical Guide* 92.

<sup>224</sup> Anon date unknown *Right to life* [https://en.wikipedia.org/wiki/Right\\_to\\_life](https://en.wikipedia.org/wiki/Right_to_life) [date of use 28 September 2015] 1.

<sup>225</sup> International Commission 2013 *Why the death penalty should be abolished* <http://www.icomdp.org/arguments-against-the-death-penalty/> [date of use 01 November 2015] 1.

<sup>226</sup> International Commission 2013 <http://www.icomdp.org/arguments-against-the-death-penalty/> [date of use 01 November 2015] 1.

<sup>227</sup> Amnesty International 2015 *Zimbabwe: End the death penalty after 10-year execution hiatus* <https://www.amnesty.org/en/latest/news/2015/07/zimbabwe-end-the-death-penalty-after-10-year-execution-hiatus/> [date of use 30 September 2015] 1.

<sup>228</sup> NC Coalition for Alternatives to the Death Penalty date unknown *Failure to Deter Crime* <http://nccadp.org/issues/deterrence/> [date of use 30 September 2015] 1.



### 3.2.1 Killing while making an arrest

In Zimbabwe the use of force in effecting arrest is statutorily provided in the Criminal Procedure and Evidence Act.<sup>229</sup> The use of force can be enforced by the police officers and other private persons authorised by the Criminal Procedure and Evidence Act to use force in effecting arrest.<sup>230</sup> The use of force in effecting arrest is justified when the person whose arrest is attempted, resists the attempt and cannot be arrested without the use of force.<sup>231</sup> The use of force is also justified when the suspect flees when it is clear that an attempt to arrest him is being made or resists the attempt and flees.<sup>232</sup> Over and above, the person attempting to arrest may, in order to effect the arrest, use such force as is reasonably justifiable in the circumstances of the case to overcome resistance or to prevent the person concerned from escaping.<sup>233</sup> Where a person whose arrest is attempted is killed as a result of the use of reasonable justifiable force, the killing is deemed lawful.<sup>234</sup> That person can only be arrested on the ground that he/she was committing or had committed, or was suspected on reasonable grounds of committing or having committed an offence referred to in the First Schedule of the Criminal Procedure and Evidence Act.<sup>235</sup>

The Criminal Procedure and Evidence Act on the use of force is very wide and open to abuse. This Criminal Procedure and Evidence Act only states that in effecting arrest the arrestor must use such force as is reasonably justifiable in the circumstances. The term 'reasonable justifiable' is not expressly defined in the aforesaid Act. Furthermore Criminal Procedure and Evidence Act does not state whether such force must be proportional to the seriousness of the crime, the suspect allegedly committed, and

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<sup>229</sup> Chapter 9:07. Hereinafter referred to as the Criminal Procedure and Evidence Act. See Section 42.

<sup>230</sup> Section 42(1).

<sup>231</sup> Section 42(1)(a) of the Criminal Procedure and Evidence Act.

<sup>232</sup> Section 42(1)(b) of the Criminal Procedure and Evidence Act.

<sup>233</sup> Section 42(1)(b) of the Criminal Procedure and Evidence Act.

<sup>234</sup> Section 42(2) of the Criminal Procedure and Evidence Act.

<sup>235</sup> Section 42(2) of the Criminal Procedure and Evidence Act. First Schedule provides the following offences in relation to powers of arrest: (1) Any offence at common law, other than bigamy, blasphemy, compounding an offence, contempt of court, criminal defamation, incest or violating a grave or dead body; (2) any offence in terms of any enactment in respect of which a maximum punishment of a period of imprisonment exceeding six months without the option of a fine is provided; (3) a conspiracy, incitement or attempt to commit, or being an accessory after the fact to, any of the offences specified in paragraph 1 or 2.

whether such force must be proportional to the extent of the suspect's resistance against the arrest.<sup>236</sup> Criminal Procedure and Evidence Act is flawed in regulating the use of force and in this regard must be amended to comply with the provisions of the Zimbabwe Constitution 2013. Criminal Procedure and Evidence Act can be easily manipulated by the Zimbabwe Republic Police<sup>237</sup> as they have used excessive force during the 2008 elections and during peaceful demonstrations.<sup>238</sup> Bruce argues that the ZRP have failed to conduct thorough, and impartial investigations into allegations of excessive use of force, and other human rights abuses.<sup>239</sup>

### 3.2.2 Abortion

The Zimbabwe Constitution 2013 outlaws abortion except when a pregnancy is terminated in accordance with the Termination of Pregnancy Act of 1977.<sup>240</sup> Abortion is regulated by the Termination of Pregnancy Act. This Termination of Pregnancy Act permits abortion on the following grounds: firstly where continuation of the pregnancy endangers the life of the expecting mother. Secondly abortion is also permitted where it constitutes a serious threat or permanent damage/injury to physical health.<sup>241</sup> Thirdly, abortion is allowed where there is a serious risk that the child to be born would suffer from a physical or mental defect.<sup>242</sup> Lastly abortion is further allowed where there is a reasonable possibility that the foetus is conceived as a result of unlawful sexual intercourse.<sup>243</sup> Unlawful sexual intercourse is defined by the Termination of Pregnancy Act as rape, incest or intercourse with a mentally handicapped woman.<sup>244</sup> Legal abortion must be performed by a medical practitioner in a chosen institution with the written permission of the superintendent of the institution.<sup>245</sup>

<sup>236</sup> There is no section in the Criminal Procedure and Evidence Act that talks about proportionality.

<sup>237</sup> Hereinafter referred to as the ZRP.

<sup>238</sup> Bruce D *et al* *Policing and Human Rights Assessing Southern African Countries' compliance with the SARPCCO Code of Conduct for Police Officials* (African Minds Publishers Cape Town 2012) 185.

<sup>239</sup> Bruce *et al* *Policing and Human Rights Assessing Southern African Countries compliance with the SARPCCC Code of Conduct for Police Officials* 186.

<sup>240</sup> 1977. Hereinafter referred to as the Termination of Pregnancy Act. See Section 48.

<sup>241</sup> Section (4)(a).

<sup>242</sup> Section (4)(b).

<sup>243</sup> Section (4)(c).

<sup>244</sup> Section 1.

<sup>245</sup> Section (5) of the Termination of Pregnancy Act of 1977.

It appears that the Termination of Pregnancy Act is consistent with the Zimbabwe Constitution 2013. However the government of Zimbabwe has expressed concern about the high level of illegal abortion in Zimbabwe.<sup>246</sup> Studies indicate that there are many problems from unsafe or illegal abortion and this is a concern for public health in Zimbabwe.<sup>247</sup> In Zimbabwe abortion is encouraged by strict traditional values and the fact that contraceptives are not available to women under 18 years of age.<sup>248</sup>

### 3.2.3 Euthanasia

The Collins Concise Dictionary defines euthanasia as “the act of killing someone painlessly, especially, to relieve suffering from an incurable illness”.<sup>249</sup> In order to clearly understand euthanasia, a difference between voluntary and involuntary euthanasia has to be made. A further difference must be made between active and passive euthanasia.<sup>250</sup> Voluntary euthanasia takes place when the act of euthanasia is carried out at the request of the patient and for the sake of him or her.<sup>251</sup> On the other hand, involuntary euthanasia is when the patient’s life is terminated for his own sake against his or her wishes or views.<sup>252</sup> A patient plays no part in the decision regarding his or her death and is unaware of the steps being taken to terminate his/her life.<sup>253</sup> Active euthanasia is the termination of a patient’s life either by himself or by a doctor or other person who provides the patient with the means to do so.<sup>254</sup> Passive euthanasia is when the patient refuses to undergo medical treatment or a decision by a doctor not to provide the patient with treatment, knowing that such refusal or decision may cause the

<sup>246</sup> There are no reliable figures available. See United Nations *Abortion Policies: A Global Review* (United Nations Publication New York 2010) 190.

<sup>247</sup> United Nations *Abortion Policies: A Global Review* 190.

<sup>248</sup> Department of Economic and Social Affairs of United Nations Secretariat date unknown *Abortion Policy* [www.un.org/esa/population/publications/abortion/doc/zimbabwe.doc](http://www.un.org/esa/population/publications/abortion/doc/zimbabwe.doc) [date of use 10 August 2015] 190.

<sup>249</sup> Collins Concise Dictionary (Harper Collins Publishers 1991) 484.

<sup>250</sup> The world federation of right to die for societies 1992 *Euthanasia Fact Sheet* <http://www.worldrtd.net/euthanasia-fact-sheet> [date of use 02 September 2015] 2.

<sup>251</sup> Mawere M “The Shona Concept of Euthanasia: A Quest to Depart from Zimbabwe Tradition” 2009 *The Journal of Pan African Studies* 101-116.

<sup>252</sup> Mawere 2009 *The Journal of Pan African Studies* 4.

<sup>253</sup> United States Legal 2015 *Involuntary euthanasia law and legal definition* <http://definitions.uslegal.com/i/involuntary-euthanasia/> [date of use 28 September 2015] 1.

<sup>254</sup> News Activists 2015 *Euthanasia: to kill or not to kill, that is the question* [www.cfpeople.org/SeminarianWritings/Sem001.html](http://www.cfpeople.org/SeminarianWritings/Sem001.html) [date of use 02 September 2015] 1.



death of the patient.<sup>255</sup> In Zimbabwe, voluntary, involuntary, active and passive euthanasia are considered illegal.<sup>256</sup> Most Zimbabweans believe that any person's life is precious and must be respected and protected by all other persons.<sup>257</sup> The illegality of euthanasia is also influenced by the moral values of the people of Zimbabwe. However, there is no legislation that regulates euthanasia in Zimbabwe.

#### **3.2.4 The state's duty to protect life**

The state has obligations to respect, protect, promote and fulfill the rights in the Declaration of Rights.<sup>258</sup> Accordingly the government is prohibited by the Zimbabwe Constitution 2013 from taking a life,<sup>259</sup> or omitting to take steps to protect all persons from criminal activities.<sup>260</sup> The right to life can also be interpreted as placing a duty on the government to protect people's lives. The duty imposed by the right to life implies that the state is under a constitutional obligation to protect its citizens from everything that will threaten their lives.<sup>261</sup>

### **3.3 The Right to human dignity**

The Zimbabwe Constitution 2013 is founded on the values of human dignity, the achievement of equality and the advancement of human rights and freedoms.<sup>262</sup> The concept of human dignity can be traced from Kantian philosophical thought, where he considered human dignity as what gives a person his or her intrinsic worth.<sup>263</sup> It is clear that the constitutional protection of human dignity requires citizens of Zimbabwe to acknowledge the value and worth of all individuals as equal members of the society.<sup>264</sup> Currie and De Waal explain human dignity as the source of a person's innate rights to freedom and to physical integrity, from which a number of other rights flow, such as the

<sup>255</sup> Mubangizi *The Protection of Human Rights in South Africa: A Legal and Practical Guide* 86.

<sup>256</sup> Mawere 2009 *The Journal of Pan African Studies* 105.

<sup>257</sup> Mawere 2009 *The Journal of Pan African Studies* 106.

<sup>258</sup> Section 44 of the Zimbabwe Constitution 2013.

<sup>259</sup> Section 48 of the Zimbabwe Constitution 2013.

<sup>260</sup> Section 44 of the Zimbabwe Constitution 2013.

<sup>261</sup> Currie I and De Waal J *The Bill Of Rights Handbook* (Juta Cape Town 2013) 263.

<sup>262</sup> Section 3(1)(e) of the Zimbabwe Constitution 2013.

<sup>263</sup> Currie and De Waal *The Bill Of Rights Handbook* 6th ed 251.

<sup>264</sup> De Vos P 2015 *Nkandla: yes the decision may be irrational and can be reviewed* <http://constitutionallyspeaking.co.za/2015/05/> [date of use 06 August 2015] 5.



right not to be subjected to slavery and the right to bodily integrity.<sup>265</sup> In the case of *S v Makwanyane*<sup>266</sup> Judge O'Regan expressed a similar view that:

“Recognising a right to dignity is an acknowledgement of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern. This right therefore is the foundation of many of the other rights that are specifically entrenched in ... the Bill of Rights”.<sup>267</sup>

Human dignity is not only a right that must be respected and protected but it is also a value that must be taken into account when interpreting other rights.<sup>268</sup> It implies that all people are duty to uphold the right to human dignity.<sup>269</sup> Every human being has a responsibility to treat all persons in a dignified and humane manner. The right to human dignity is adequately protected under the Zimbabwe Constitution 2013 and in line with international instruments. The right to human dignity is not consistently respected in Zimbabwe. For example human rights activists are arrested for speaking out on human rights violations.

### **3.4 The Right to freedom from torture**

The Zimbabwe Constitution 2013 provides that no person shall be subjected to torture or to inhuman or degrading punishment or other such treatment.<sup>270</sup> This right cannot be limited by any law because it has acquired the status of a peremptory norm.<sup>271</sup> This means that it is illegal for the government or any other person to violate the right to freedom from torture. There is no legislation that regulates torture in Zimbabwe, nor has torture been defined in the Zimbabwean legislation.<sup>272</sup> In relation to this, the provision of

<sup>265</sup> Currie and De Waal *The Bill Of Rights Handbook* 6th ed 351.

<sup>266</sup> *S v Makwanyane* 1995 (6) BCLR 665 (CC).

<sup>267</sup> *S v Makwanyane* 1995 (6) BCLR 665 (CC) par 328.

<sup>268</sup> McCrudden 2008 “Human Dignity and Judicial Interpretation of Human Rights” *The European Journal of International Law* 655 – 724.

<sup>269</sup> Goolam NMI 2001 *Human Dignity - Our Supreme Constitutional Value* [www.ajol.info/index.php/pelj/article/viewFile/43490/27025](http://www.ajol.info/index.php/pelj/article/viewFile/43490/27025) [date of use 29 July 2015] 4-5.

<sup>270</sup> Section 53.

<sup>271</sup> Section 50(7)(a) of the Zimbabwe Constitution 2013.

<sup>272</sup> Human Rights Non-Government Organisation forum 2012 *A study into the torture legislative framework in Zimbabwe: Gaps and opportunities* [www.hrforumzim.org/wp.../2012/.../20-PAGED-TORTURE-REPORT.pdf](http://www.hrforumzim.org/wp.../2012/.../20-PAGED-TORTURE-REPORT.pdf) [date of use 11 August 2015] 4.

torture under Zimbabwe Constitution 2013 has been the subject of several leading Supreme Court judgments where the meaning of inhuman or degrading punishment or other such treatment has been defined in its jurisprudence.<sup>273</sup> In the aforesaid cases, close attention has been paid to norms of human rights law as expressed in international treaties and in decisions of other jurisdictions.<sup>274</sup> For instance, in *Blanchard & Ors v Minister of Justice, Legal and Parliamentary Affairs*<sup>275</sup> it was held that in the past torture was interpreted to mean actions that result in severe mental and physical suffering of the victims or affected persons.

Zimbabwe has ratified the African Charter on Human and Peoples' Rights (ACHPR)<sup>276</sup> and the International Covenant on Civil and Political Rights (ICCPR)<sup>277</sup> which prohibit torture. This prohibition of torture is also set out in Convention Against Torture (CAT).<sup>278</sup> Despite this, Zimbabwe has not yet ratified the CAT, which describes torture and prohibits torture.<sup>279</sup> The ACHPR obliges Zimbabwe to recognise the rights and duties enshrined in the Charter and to adopt legislative or other measures to give effect to rights such as freedom from torture.<sup>280</sup> This implies that the government of Zimbabwe has a responsibility to prevent torture against all its citizens.

The CAT obliges its state parties to ensure that torture, attempts to commit torture or involvement in torture are treated as criminal offences.<sup>281</sup> This Convention requires that all member states take effective measures, including legislative, administrative and

<sup>273</sup> *S v Ncube & Ors* 1987 (2) ZLR 246 (S); 1988 (2) SA 702 (ZS); *S v A Juvenile* 1989 (2) ZLR 344 (S); 1990 (4) SA 151 (ZS); *CC JP V Attorney-General* 1993 (1) ZLR 242 (S); 1993 (4) SA 239 (ZS); 1993 (2) SACR 432 (ZS).

<sup>274</sup> Redress Trust 2005 *Torture in Zimbabwe, Past and Present Prevention, Punishment, Reparation?* [www.redress.org/downloads/publications/Amani2005.pdf](http://www.redress.org/downloads/publications/Amani2005.pdf) [date of use 27 September 2015] 14.

<sup>275</sup> *Blanchard & Ors v Minister of Justice, legal and parliamentary affairs* 1999 (2) ZLR 24 (S) at 30E-F.

<sup>276</sup> Article 5 of the African Charter on Human and Peoples' Rights entry into force 3 January 1976. Hereinafter referred to as the ACHPR.

<sup>277</sup> Article 7 of the International Covenant on Civil and Political Rights. It was adopted and opened for signature by General Assembly resolution 2200A (XXI) of December 16, 1966. Hereinafter referred to as the ICCPR.

<sup>278</sup> Adopted by General Assembly resolution 39/46 on 10 December 1984 in New York. Hereinafter referred to as the CAT.

<sup>279</sup> Sibanda T 2014 *Mugabe will 'never' ratify UN convention against torture* [http://www.zimbabwesituation.com/news/zimist\\_m\\_mugabe-will-never-ratify-un-convention-against-torture-sw-radio-africa/](http://www.zimbabwesituation.com/news/zimist_m_mugabe-will-never-ratify-un-convention-against-torture-sw-radio-africa/) [date of use 11 November 2015] 1.

<sup>280</sup> See Article 1.

<sup>281</sup> Article 4(1).

judicial, to prevent acts of torture.<sup>282</sup> In Zimbabwe, parliament passed a motion to ratify CAT on 23 May 2001.<sup>283</sup> However, the government did not ratify CAT.<sup>284</sup> Ratification of CAT by Zimbabwe would be an important move towards elimination of torture in Zimbabwe.<sup>285</sup> The Human Rights Forum has in the past called upon and continues to call upon the government of Zimbabwe to ratify the CAT without further delay.<sup>286</sup> The right to freedom from torture is adequately protected under the Zimbabwe Constitution 2013. However, the right to freedom from torture is not respected in practice. For instance, Human Rights Watch submits that before the 2013 elections, law enforcement officers were intimidating, beating, and committing other abuses against the persons perceived to be supporting the Movement for Democratic Change or critical of the government.<sup>287</sup> Given this background, the government should enact a legislation that provides for the offence of torture of persons and other offences associated with torture of persons; in order to prevent and combat torture of such persons in all the provinces of Zimbabwe.

### 3.5 The Right to freedom of assembly and association



The right to freedom of assembly and association is protected under the Zimbabwe Constitution 2013.<sup>288</sup> This right empowers all persons to assemble and associate without any interference from any person. Freedom of assembly is the individual's right or ability to come together with others and together they express, to exchange ideas and information publicly or hold peaceful protests.<sup>289</sup> This right applies to all gatherings,

<sup>282</sup> Article 2.

<sup>283</sup> Zimbabwe Human Rights Forum 2004 *Human Rights monthly reports* <http://www.hrforumzim.org/publications/monthly-human-rights-bulletin/torture-in-zimbabwe/> [date of use 18 July 2015] 2.

<sup>284</sup> Zimbabwe Human Rights Forum 2004 <http://www.hrforumzim.org/publications/monthly-human-rights-bulletin/torture-in-zimbabwe/> [date of use 18 July 2015] 2.

<sup>285</sup> Zimbabwe Human Rights Non-Governmental Organisation Forum 2005 *International Day against Torture* [www.hrforumzim.org/press-releases/international-day-against-torture/](http://www.hrforumzim.org/press-releases/international-day-against-torture/) [date of use 27 September 2015] 4.

<sup>286</sup> Zimbabwe Human Rights Forum 2004 <http://www.hrforumzim.org/publications/monthly-human-rights-bulletin/torture-in-zimbabwe/> [date of use 18 July 2015] 2.

<sup>287</sup> Human Rights Watch 2014 *World Report 2014: Zimbabwe* <https://www.hrw.org/world-report/2014/country-chapters/zimbabwe> [date of use 01 September 2015] 2.

<sup>288</sup> Section 58.

<sup>289</sup> Singh A 2014 *Transcript of Freedom of assembly, sometimes used interchangeably with the right to freedom* [https://prezi.com/jhksh\\_npby6f/freedom-of-assembly-sometimes-used-interchangeably-with-the/](https://prezi.com/jhksh_npby6f/freedom-of-assembly-sometimes-used-interchangeably-with-the/) [date of use 06 August 2015] 1.



peaceful assemblies and not to those involving violence.<sup>290</sup> On the other hand, the right to freedom of association protects the right of all persons to form groups together voluntarily for a common goal and/or to form and join an association. Examples of such groups or associations are political parties, sporting clubs, non-governmental organisations and trade unions.<sup>291</sup>

The right to freedom of assembly and association is also regulated by the Public Order and Security Act (POSA).<sup>292</sup> This Act restricts individuals' freedom to assembly and association by requiring all organisers of public gatherings to notify the police four days in advance of any public meeting or demonstration.<sup>293</sup> Failure to do so results in criminal prosecution as well as civil liability.<sup>294</sup> After receiving such notification, the police then have the power to prohibit the event, on the basis of the specified grounds.<sup>295</sup> If no prohibition is made by the police, then the gathering may proceed.<sup>296</sup> Those exempted from the obligation to notify the police are all gatherings and events that are not of a political nature.<sup>297</sup> In practice the police have interpreted the notification requirement as if police permission is needed before any public event can take place.<sup>298</sup> Under international law, this right is protected by the ICCPR,<sup>299</sup> the UDHR<sup>300</sup> and the ACHPR.<sup>301</sup> The African Commission Resolution on the Right to Freedom of Association states that any limitation or any restriction on the right to freedom of association:

<sup>290</sup> Australian government attorneys general department date unknown <http://www.livingsafetogether.gov.au/getinvolved/Pages/how-can-i-have-my-say.aspx> [date of use 11 August 2015] 1.

<sup>291</sup> The right to form and join trade unions is specifically protected under article 8 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). It is also protected under International Labour Organization (ILO) Convention No 87 (referred to in article 22(3) of the ICCPR and article 8(3) of International Covenant on Economic, Social and Cultural Rights 1966.

<sup>292</sup> Chapter 11:17 of 2002. Hereinafter referred to as the POSA.

<sup>293</sup> Section 24 of the POSA.

<sup>294</sup> Section 24(6) of the POSA.

<sup>295</sup> Section 25(1) of the POSA.

<sup>296</sup> Mapuva J and Muyengwa L "A Critique of the Key Legislative Framework Guiding Civil Liberties in Zimbabwe" 2012 *PER* 125-164.

<sup>297</sup> Mapuva and Muyengwa 2012 *PER* 136.

<sup>298</sup> Mapuva and Muyengwa 2012 *PER* 136.

<sup>299</sup> Article 21.

<sup>300</sup> Article 20.

<sup>301</sup> Article 10 and 11.



- (a) the government should not override constitutional provisions or undermine fundamental rights guaranteed by the Constitution and international standards;
- (b) in regulating this right, the government should not enact provisions which limit the exercise of this freedom; and
- (c) the protection of the right to freedom of association by the national laws should be consistent with the state's obligations under the ACHPR.<sup>302</sup>

The unlawful and selective enforcement of some provisions of the POSA by the police limits the right to freedom of association and assembly.<sup>303</sup> The government must ensure that POSA is amended in compliance with the Zimbabwe Constitution 2013 and international law.<sup>304</sup> This right is important because associations make it possible for people to come together for the more effective realisation of their constitutionally guaranteed rights.<sup>305</sup> Associations also give people the comfort, security, pleasure and human companionship of interacting with other people.<sup>306</sup> The failure to allow political parties, civil society organisations, and members of the public to take part in peaceful protest is unconstitutional and limits the participatory aspect of democracy.<sup>307</sup> Nonetheless, this right is not respected, especially, by the law enforcement officers who unlawfully use some provisions of the POSA to limit the right to assembly and association.<sup>308</sup> If political organisations, civil society groups and members of the public

<sup>302</sup> African Commission on Human and Peoples' Rights date unknown *Resolution on the right to freedom of association* [www.chr.up.ac.za/chr\\_old/hr\\_docs/african/docs/achpr/achpr62.doc](http://www.chr.up.ac.za/chr_old/hr_docs/african/docs/achpr/achpr62.doc) [date of use 03 September 2015] 1.

<sup>303</sup> Zimbabwe Human Rights Non-Governmental Organisation Forum 2015 *Freedom to demonstrate and petition* [www.Hrforumzim.Org/.../Bulletin-105-Freedom-To-Demonstrate-And-Petit...](http://www.Hrforumzim.Org/.../Bulletin-105-Freedom-To-Demonstrate-And-Petit...) [date of use 28 September 2015] 4.

<sup>304</sup> Human Rights Watch 2013 *Human Rights agenda for the next administration* <http://www.zimbabwesituation.com/news/human-rights-agenda-next-administration/> [date of use 27 September 2015] 2.

<sup>305</sup> Section 1 of the Zimbabwe Constitution 2013.

<sup>306</sup> Govindjee A *Introduction to human rights law* (LexisNexis Publication South Africa 2009) 131.

<sup>307</sup> Zimbabwe Human Rights Non-Governmental Organisation Forum 2015 *Freedom to Demonstrate and Petition* [www.Hrforumzim.org/.../Bulletin-105-Freedom-to-demonstrate-and-petit](http://www.Hrforumzim.org/.../Bulletin-105-Freedom-to-demonstrate-and-petit) [date of use 11 November 2015] 4.

<sup>308</sup> Human Rights Watch 2011 *Universal periodic review of Zimbabwe Human Rights Watch's submission to the Human Rights Council - March 2011* <https://www.hrw.org/news/2011/03/29/universal-periodic-review-zimbabwe> [date of use 11 November 2015] 1.

are not free to assemble, associate and to take part in protest, the participatory aspect of democracy is fatally weakened.<sup>309</sup>

### **3.6 The right to freedom to demonstrate and petition**

The right to demonstrate and petition is enshrined in the Zimbabwe Constitution 2013.<sup>310</sup> The Zimbabwe Constitution 2013 states that “every person has the right to demonstrate and to present petitions, but these rights must be exercised peacefully.”<sup>311</sup> The right to freedom to demonstrate and petition applies only to peaceful gatherings, although protests are violent sometimes.<sup>312</sup> The term “peaceful” means the absence of violence, demonstration or petition must therefore take place without chaos or riot.<sup>313</sup> A demonstration or a protest should not disturb public order and violate the rights of innocent bystanders or third parties.<sup>314</sup> The right to demonstrate is regulated by the POSA.<sup>315</sup> Under the POSA those who want to participate in a demonstration are required to give a written notice to the police in order for them to exercise the right to demonstrate and petition.<sup>316</sup> Failure to notify the police about the gathering prior to a demonstration results in the criminal prosecution of the offences.<sup>317</sup>

There is an obligation on the government to take reasonable steps to facilitate the right to freedom to demonstrate and to protect participants in peaceful demonstrations from disruption by others.<sup>318</sup> As a result the government is obliged to provide adequate means to ensure that the demonstration is not in any way interrupted by any persons.

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<sup>309</sup> De Vos P 2011 *A Problematic Limitation on the Right to Freedom of Assembly* constitutionallyspeaking.co.za/category/democracy/page/16/ [date of use 28 September 2015] 1.

<sup>310</sup> Section 59.

<sup>311</sup> Section 59.

<sup>312</sup> Zimbabwe Human Rights Non-Governmental Organisation Forum 2015 [www.hrforumzim.org/.../Bulletin-105-Freedom-to-demonstrate-and-petit](http://www.hrforumzim.org/.../Bulletin-105-Freedom-to-demonstrate-and-petit) [date of use 03 September 2015] 2.

<sup>313</sup> Ndawana D *The role of the Judiciary in Protecting the right to Freedom of Expression in Difficult Political Environments: a case study of Zimbabwe* (LLM-Thesis University of Fort Hare 2008) 86.

<sup>314</sup> Zimbabwe Human Rights Non-Governmental Organisation Forum 2015 [www.hrforumzim.org/.../Bulletin-105-Freedom-to-demonstrate-and-petit](http://www.hrforumzim.org/.../Bulletin-105-Freedom-to-demonstrate-and-petit) [date of use 03 September 2015] 2.

<sup>315</sup> Sections 23 and 24.

<sup>316</sup> Section of 24(1).

<sup>317</sup> Section 24(6) of the POSA.

<sup>318</sup> Zimbabwe Human Rights Non-Governmental Organisation Forum 2015 <http://www.hrforumzim.org/publications/monthly-human-rights-bulletin/bulletin-105-freedom-to-demonstrate-and-petition/> [date of use 01 August 2015] 4.



This can be done by among other things providing police protection to ensure that clashes or riots do not occur.<sup>319</sup> The mere fact that citizens have a right to protest, or demonstrate does not mean that they should not respect other people's rights and disturb the public peace order.<sup>320</sup>

The right to freedom to demonstrate and petition is adequately protected under the Zimbabwe Constitution 2013. However this right is not respected in practice. For instance, the ZRP violates the right to demonstrate and petition through arbitrary arrests and detention of participants, denial of permission to demonstrate, persecution of organisers and other means intended to limit the exercise of the right to demonstrate and petition.<sup>321</sup> These restrictions have been used by the ZRP to harass people with dissenting views to that of the government.<sup>322</sup> This violates the right to demonstrate and petition which is guaranteed under the Zimbabwe Constitution 2013.

### **3.7 The right to freedom of expression**

The right to freedom of expression is fundamental to the existence of constitutional democracy.<sup>323</sup> The Zimbabwe Constitution 2013 guarantees the right to freedom of expression and it also includes freedom of the media.<sup>324</sup> Apart from specific reference to freedom of the press and other media, the Zimbabwe Constitution 2013 also contains specific inclusions.<sup>325</sup> Such specific inclusions include freedom to seek, receive or communicate information or ideas.<sup>326</sup> This means that the right to freedom of expression protects those who communicate information and ideas and those who receive such

<sup>319</sup> Ndawana *The role of the Judiciary in Protecting the Right to Freedom of Expression in Difficult Political Environments: a case study of Zimbabwe* 87.

<sup>320</sup> Mwanawina I "When Human Rights Congregate with Public Order Policing: An African Perspective" 2012 *International Journal of Humanities and Social Science* 144.

<sup>321</sup> Zimbabwe Human Rights Non-Governmental Organisation Forum 2015 <http://www.hrforumzim.org/publications/monthly-human-rights-bulletin/bulletin-105-freedom-to-demonstrate-and-petition/> [date of use 01 August 2015] 4.

<sup>322</sup> Zimbabwe Human Rights Non-Governmental Organisation Forum 2015 <http://www.hrforumzim.org/publications/monthly-human-rights-bulletin/bulletin-105-freedom-to-demonstrate-and-petition/> [date of use 01 August 2015] 4.

<sup>323</sup> Derechos Human Rights date unknown *Freedom of speech* <http://www.derechos.org/human-rights/speech/> [date of use 30 July 2015] 1.

<sup>324</sup> Section 61.

<sup>325</sup> Section 61(1) of the Zimbabwe Constitution 2013.

<sup>326</sup> Section 61(1)(a) of the Zimbabwe Constitution 2013.

information or ideas.<sup>327</sup> The right to seek and receive information and ideas includes the right of the media to have access to information on public affairs and the right of the general public to receive media output.<sup>328</sup> The right to freedom of expression protects the expression of every form of subjective idea and opinion capable of being communicated to others, subject to the limitation clause.<sup>329</sup> The right to freedom of expression includes political speech, commentary on one's own and on public affairs, canvassing, discussion of human rights, journalism, teaching, and commercial advertising.<sup>330</sup> Another specific inclusion contained in the right to freedom of expression is freedom of artistic creativity.<sup>331</sup> Artists are sometimes responsible for criticizing the government and the way society lives.<sup>332</sup> As the artist's work may upset other sensitive people, the government of Zimbabwe has tried to control the production and exhibition of art.<sup>333</sup> All the activities associated with and necessary for the artist to be creative must be constitutionally protected.<sup>334</sup> The term "art" include the making of films and music.<sup>335</sup> The right to freedom of expression may only be limited in accordance with the limitation clause.<sup>336</sup>

The other important inclusion is academic freedom.<sup>337</sup> At the core of the right to academic freedom is the right of the individual to research, publish and distribute learning through teaching, without government interference.<sup>338</sup> This means that the government should not prohibit institutions to conduct research that is critical of the government.<sup>339</sup> Academic freedom is no longer applicable only to institutions of higher

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<sup>327</sup> Mubangizi *The Protection of Human Rights in South Africa: A Legal and Practical Guide* 89.

<sup>328</sup> Article 19(17) of Human Rights Committee, Draft General Comment No.34 United Nations Doc. CCPR/C/GC/34/CRP2 (2010). Hereinafter referred to as Human Rights Committee, Draft General Comment.

<sup>329</sup> Article 19(11) of Human Rights Committee, Draft General Comment. See also Section 86 of Zimbabwe Constitution 2013.

<sup>330</sup> Article 19(11) of Human Rights Committee, Draft General Comment.

<sup>331</sup> Section 61(1)(b) of the Zimbabwe Constitution 2013.

<sup>332</sup> Currie and De Waal *The Bill of Rights Handbook* 351.

<sup>333</sup> Currie and De Waal *The Bill of Rights Handbook* 351.

<sup>334</sup> Currie and De Waal *The Bill of Rights Handbook* 351.

<sup>335</sup> Currie and De Waal *The Bill of Rights Handbook* 351.

<sup>336</sup> Section 86 of the Zimbabwe Constitution 2013.

<sup>337</sup> Section 61(1) of the Zimbabwe Constitution 2013.

<sup>338</sup> Taiwo EA "The Regulatory Bodies, Academic Freedom and Institutional Autonomy in Africa: Issues and Challenges- Nigerian Example" 2011 *Journal of Higher Education in Africa* 63-89.

<sup>339</sup> Taiwo 2011 *Journal of Higher Education in Africa* 16.



learning but extends to all academic activities, which include research, publishing and research institutions.<sup>340</sup> The right to freedom of expression protects citizens by enabling them to carry out academic activities without negative influence from the government.<sup>341</sup>

In addition to the limitation clause that limits all the rights in the Declaration of Rights,<sup>342</sup> the right to freedom of expression is also internally limited.<sup>343</sup> For instance, the right to freedom of expression does not extend to (a) incitement to violence, (b) advocacy of hatred or hate speech, (c) malicious injury to a person's reputation or dignity or (d) malicious or unwarranted breach of a person's right to privacy.<sup>344</sup> These forms of expression are excluded because they could adversely affect on the security of the country or the dignity of others. In light of this, these internal limitations are briefly discussed below:

### 3.7.1 *Incitement of violence*

It is submitted that incitement of violence prohibition has its origins in the United States First Amendment jurisprudence.<sup>345</sup> In *Brandenburg v Ohio*<sup>346</sup> the court held that the state laws may not criminalise the advocacy of the use of force on civil disobedience, except where such advocacy is directed to inciting or producing imminent lawlessness and is likely to incite or produce such action. Nevertheless, it is sometimes practically impossible to determine whether a particular expression constitutes incitement of violence without having regard to the possible effects it may have on its audience.<sup>347</sup> The context within which the statement was made is important.<sup>348</sup>

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<sup>340</sup> Taiwo 2011 *Journal of Higher Education in Africa* 16.

<sup>341</sup> Taiwo 2011 *Journal of Higher Education in Africa* 16.

<sup>342</sup> Section 86 of the Zimbabwe Constitution 2013.

<sup>343</sup> Section 61(5) of the Zimbabwe Constitution 2013.

<sup>344</sup> Section 61(5).

<sup>345</sup> Currie and De Waal *The Bill of Rights Handbook* 355.

<sup>346</sup> *Brandenburg v Ohio* 395 US 444 (1969).

<sup>347</sup> Msaule PR *The Constitutional Protection of Speech and Prohibition of Hate Speech in South Africa: Promises and Pitfalls* (LLM-thesis University of North West 2004) 66.

<sup>348</sup> Msaule *The Constitutional Protection of Speech and Prohibition of Hate Speech in South Africa: Promises and Pitfalls* 66.

### 3.7.2 The prohibition of hate speech

Msaule defines hate speech as expressive conduct which insults a racial or ethnic group, whether by suggesting inferiority or by effecting exclusion.<sup>349</sup> Hate speech is also viewed as an expression which incites racial hatred.<sup>350</sup> According to Floyd Abrams, hate speech is speech that causes considerable pain and offers little in the way of social benefit.<sup>351</sup> Zimbabwe has signed and ratified the ICCPR which prohibits hate speech.<sup>352</sup> Consequently the prohibition of hate speech in the Zimbabwe Constitution 2013 is consistent with the ICCPR.

Notably, although people have a right to freedom of expression, they also have duties and responsibilities which they have to complete.<sup>353</sup> Accordingly, the right to freedom of expression imposes duties and responsibilities on other individuals as well as the government.<sup>354</sup> In this regard the society has the right to receive information, while the media and the government have a duty to publish information.<sup>355</sup> Such information is to be distributed in a truthful, correct and fair manner.<sup>356</sup> Moreover, the government has a duty to ensure diversity in the media so that different people from different background can come together and engage with many ideas.<sup>357</sup> Be that as it may, the right to freedom of expression is subject to certain limitations which are listed in the Zimbabwe Constitution 2013.<sup>358</sup>



<sup>349</sup> Msaule *The Constitutional Protection of Speech and Prohibition of Hate Speech in South Africa: Promises and Pitfalls* 66.

<sup>350</sup> Msaule *The Constitutional Protection of Speech and Prohibition of Hate Speech in South Africa: Promises and Pitfalls* 66.

<sup>351</sup> Abrams F "Hate Speech: The Present Implications of a Historical Dilemma" 1992 *Villanova Law Review* 1-15.

<sup>352</sup> Article 20(2).

<sup>353</sup> Ndawana *The role of the judiciary in protecting the right to freedom of expression in difficult political environments: a case study of Zimbabwe* 91.

<sup>354</sup> Section 44 and 45 of the Zimbabwe Constitution 2013.

<sup>355</sup> Ndawana *The Role of the Judiciary in Protecting the Right to Freedom of Expression in Difficult Political Environments: a case study of Zimbabwe* 92.

<sup>356</sup> Machaka TF *The ethical conduct of newspaper reporters in reporting educational matters in the Department of Education in Limpopo province* (Masters Dissertation University of Limpopo 2006) 11.

<sup>357</sup> Vosloo M *When Political Expression turns into Hate Speech: is Limitation through Legislative Criminalisation the answer?* (LLM University of South Africa 2011) 24.

<sup>358</sup> Section 86(2)(b).



For instance, the right to freedom of expression is limited for security reasons when the political independence or the territorial integrity of the state is at risk.<sup>359</sup> Restrictions based on national security arise when there is a situation that threatens the continued existence of the state and the fundamental rights of all the people of a particular country.<sup>360</sup> For instance, a publication for a call to overthrow the government could result in political unrest.<sup>361</sup> When the government invokes national security as a justification for a limitation of freedom of expression, it must adequately explain the precise nature of the threat and the necessity of the specific action taken.<sup>362</sup> Furthermore the publication of statements that are made with the intention to cause harm to the national security may be prohibited. There must also be a relationship between the harm and the statement.<sup>363</sup>

In exercising one's right to freedom of expression, the political situation prevailing in the country must be taken into account.<sup>364</sup> The media must not unnecessarily incite violence when publishing news.<sup>365</sup> Although it is important to protect national security, the right to freedom of expression of individuals must not be sidelined. Democratic principles must always be valued by the government in accordance with international law.<sup>366</sup> In this regard, the government must provide reasons when relying on national security as a limitation to the right to freedom of expression.<sup>367</sup>

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<sup>359</sup> Ndawana *The Role of the Judiciary in Protecting the Right to Freedom of Expression in Difficult Political Environments: a case study of Zimbabwe* 91.

<sup>360</sup> Article 19 date unknown *National security* <https://www.article19.org/pages/en/national-security-more.html> [date of use 05 August 2015] 4.

<sup>361</sup> Ndawana *The Role of the Judiciary in Protecting the Right to Freedom of Expression in Difficult Political Environments: a case study of Zimbabwe* 96.

<sup>362</sup> Article 39 of General Comment No.34: Article 19: Freedoms of opinion and expression.

<sup>363</sup> Article 19 2011 <https://www.article19.org/pages/en/national-security-more.html> [date of use 05 August 2015] 5.

<sup>364</sup> Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights - Fifty-first session – 1991.

<sup>365</sup> Ndawana *The Role of the Judiciary in Protecting the Right to Freedom of Expression in Difficult Political Environments: a case study of Zimbabwe* 97.

<sup>366</sup> Ndawana *The Role of the Judiciary in Protecting the Right to Freedom of Expression in Difficult Political Environments: a case study of Zimbabwe* 97.

<sup>367</sup> Ndawana *The Role of the Judiciary in Protecting the Right to Freedom of Expression in Difficult Political Environments: a case study of Zimbabwe* 97.

The right to freedom of expression is also limited for the purpose of public order. Public order may be described as rules which ensure peaceful and effective functioning of society.<sup>368</sup> Examples of actions which are limited under public order are speech that may incite crime, violence and/or mass panic.<sup>369</sup> The limitation of public order must be reasonable, effective to protect public order. Such limitation must not restrict freedom of expression more than is necessary to protect public order.<sup>370</sup>

Freedom of expression can also be limited for public health and moral reasons.<sup>371</sup> For example, public health can be raised as a limitation to the right to freedom of expression to prohibit publications with misleading information on health threatening substance like drugs as well as other harmful but not life threatening substances like tobacco and alcohol.<sup>372</sup> Limitation based on public health and morals is of minor practical relevance to the right to freedom of expression.<sup>373</sup> According to the Siracusa principles, public health can only be relied on as a limitation to the right to freedom of expression where there is a serious threat to the health of the society.<sup>374</sup> Moreover, due regard must be taken to the international health regulations of the World Health Organization.

With regard to morality limitations, the Human Rights Committee has stated that there is no universally applicable standard for what constitutes public morality.<sup>375</sup> The Special Rapporteur on the right to freedom of expression and freedom of press emphasises the fact that morals differ widely from culture to culture and from place to place, therefore a margin of appreciation should be left for states.<sup>376</sup> A certain margin of discretion is given

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<sup>368</sup> Article 32 Human Rights Committee, Draft General Comment.

<sup>369</sup> Ndawana *The Role of the Judiciary in Protecting the Right to Freedom of Expression in Difficult Political Environments: a case study of Zimbabwe* 97.

<sup>370</sup> Human Rights Committee, Draft General Comment No. 34.

<sup>371</sup> Section 86(2)(b) of the Zimbabwe Constitution 2013.

<sup>372</sup> Ndawana *The Role of the Judiciary in Protecting the Right to Freedom of Expression in Difficult Political Environments: a case study of Zimbabwe* 99.

<sup>373</sup> Ndawana *The Role of the Judiciary in Protecting the Right to Freedom of Expression in Difficult Political Environments: a case study of Zimbabwe* 99.

<sup>374</sup> Principle 25 of Siracusa Principles.

<sup>375</sup> Human Rights Committee of United Nations. See also Bochenek and Brown 2001 *Hatred in the hallways violence and discrimination against lesbian, gay, bisexual, and transgender students in U.S. schools* [www.hrw.org/reports/pdfs/c/crd/usalbg01.pdf](http://www.hrw.org/reports/pdfs/c/crd/usalbg01.pdf) [date of use 30 September 2015]152.

<sup>376</sup> ANHRI NET 2010 *Chapter One: Limitations and restrictions on the right to freedom of expression – including press freedom – from an international perspective* <http://www.anhri.net/en/reports/pressfreedom/05.shtml> [date of use 04 August 2015] 3.



to the responsible national authorities to determine what constitutes morally acceptable behavior. However, restrictions applied on the freedom of expression should not be applied in such a manner as to promote prejudice and intolerance.<sup>377</sup>

Despite the fact that freedom of expression is provided in the Zimbabwe Constitution 2013, the majority of people in Zimbabwe do not feel free to express their views.<sup>378</sup> Memeza argues the AIPPA aims to control the flow of information in Zimbabwe as the government has been empowered to determine what type of information should be made to the public.<sup>379</sup> It therefore limits the right of freedom of expression.<sup>380</sup>

### **3.8 The right to free and fair elections**

The right to free and fair elections is guaranteed under the Zimbabwe Constitution 2013.<sup>381</sup> Free and fair elections are human rights entitlements.<sup>382</sup> In a democratic country elections must be free and fair so that the rights and interests of the governed are protected.<sup>383</sup> The government of Zimbabwe is bound by the Zimbabwe Constitution 2013 to hold open and periodic elections that guarantee the free expression of the will of the electorate.<sup>384</sup> The Zimbabwe Constitution 2013 ensures that citizens are free to make political choices which include the right to participate in the activities of a political party.<sup>385</sup> Freedom to make political choices includes the right to form political party, the right to participate in the activities of a political party and the right to campaign for a political party.<sup>386</sup> The government is also bound to ensure that representatives of political parties are freely chosen.<sup>387</sup> Apart from protecting the individuals, these

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<sup>377</sup> ANHRI NET 2010 <http://www.anhri.net/en/reports/pressfreedom/05.shtml> [date of use 04 August 2015] 3.

<sup>378</sup> Chiumbu S, Minnie J and Busseik H *Public broadcasting in Africa series* (Open society initiative for Southern Africa Rosebank South Africa 2009) 20.

<sup>379</sup> Mapuva and Muyengwa 2012 *PER* 138.

<sup>380</sup> Section 86 of the Zimbabwe Constitution 2013.

<sup>381</sup> Section 67(1)(a).

<sup>382</sup> Shumba G "A Critical Reflection on the 2002 Presidential Election in Zimbabwe" 2002 *African Human Rights Law Journal* 329.

<sup>383</sup> Shumba A *A Critical Reflection on the 2002 Presidential Election in Zimbabwe* (LLM-thesis University of Pretoria 2002) 327-346.

<sup>384</sup> Section 67(1)(a). See Shumba 2002 *African Human Rights Journal* 329.

<sup>385</sup> Section 67(1)(b).

<sup>386</sup> Section 67(2)(a) of the Zimbabwe Constitution 2013.

<sup>387</sup> Section 67(1)(b) of the Zimbabwe Constitution 2013.

requirements are also designed to enhance democracy.<sup>388</sup> The right to free and fair elections may only be limited in accordance with the limitation clause.<sup>389</sup>

Political rights are adequately protected under the Zimbabwe Constitution 2013.<sup>390</sup> This protection is in line with international laws dealing with political rights.<sup>391</sup> For instance, the UDHR<sup>392</sup> and the ICCPR make provision for open elections, just as the Convention on the Elimination of All Forms of Racial Discrimination (CERD).<sup>393</sup> Furthermore, the right to vote is protected under the ACHPR.<sup>394</sup> In order to protect this right voters participate in elections without fearing adverse effects.<sup>395</sup> Fairness means that the rules of elections are clearly indicated to all contesting parties so that they may know what is at stake.<sup>396</sup>

Feltoe sets out some of the instances and examples that could negate the freeness and fairness of an election, for instance:

- (a) when a political party's campaign is prevented;
- (b) when voters are intimidated or bribed;
- (c) when electoral laws give an unfair advantage to one of the political parties contesting the election; and
- (d) when there is rigging of the election.<sup>397</sup>

Political rights are adequately protected under the Zimbabwe Constitution 2013. However, there are times when these rights are not respected in Zimbabwe. For instance, the 2013 elections were tainted by irregularities raised by monitors of elections including reports of intimidation of voters by Zimbabwe's security forces. Moreover, it is

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<sup>388</sup> Shumba 2002 *African Human Rights Journal* 329.

<sup>389</sup> Section 86 of the Zimbabwe Constitution 2013.

<sup>390</sup> Section 67.

<sup>391</sup> The UDHR, the ICCPR and the CERD.

<sup>392</sup> See article 21 (3) of Universal declaration of human rights was adopted by General Assembly Resolution 217 A(III) of 10 December 1948. Hereinafter referred to as UDHR.

<sup>393</sup> Article 5(c). Convention on the Elimination of All Forms of Racial Discrimination was adopted and opened for signature and ratification by General Assembly resolution 2106 (XX) of 21 December 1965 entry into force 4 January 1969. Hereinafter referred to as CERD.

<sup>394</sup> Article 13.

<sup>395</sup> Shumba 2002 *African Human Rights Journal* 330.

<sup>396</sup> Shumba 2002 *African Human Rights Journal* 330.

<sup>397</sup> Feltoe 2008 *An Unfair Contest: The Presidential Elections in Zimbabwe (2002) Zimbabwe Human Rights Bulletin* 81.

submitted that traditional leaders were forcing community members to vote for ZANU-PF and large numbers of people were unfairly turned away from polling stations.<sup>398</sup>

### 3.9 Conclusion

This chapter analysed constitutional provisions on the right to life, the right to personal liberty, the right to human dignity, the right to freedom from torture, the right to freedom of assembly and association, the right to freedom to demonstrate and petition, the right to freedom of expression and the right to free and fair elections in the Zimbabwe Constitution 2013. It was noted that the Zimbabwe Constitution 2013 provides a platform for fulfilling and protecting these rights.<sup>399</sup> This chapter also highlighted gaps in the Zimbabwe Constitution 2013 with regard to torture. It was noted that there is no legislation that regulates torture and that Zimbabwe has not ratified the CAT.<sup>400</sup> The chapter also indicated that the POSA, and the AIPPA limit the right to freedom of expression, the right to freedom to demonstrate and petition and the right to freedom to assembly and association.<sup>401</sup> Now that the general protection of civil and political rights has been discussed, the next chapter focuses on instances and causes of civil and political rights in Zimbabwe.

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<sup>398</sup> Human Rights Watch 2014 *World Report 2014: Zimbabwe* <https://www.hrw.org/world-report/2014/country-chapters/zimbabwe> [date of use 26 September 2015] 2.

<sup>399</sup> Chinomona R *Analysing the Rights of Women in the New Constitution of Zimbabwe with reference to International Law* (LLM-Thesis UP 2013) 37.

<sup>400</sup> Sibanda 2014 [http://www.zimbabwesituation.com/news/zimist\\_m\\_mugabe-will-never-ratify-un-convention-against-torture-sw-radio-africa/](http://www.zimbabwesituation.com/news/zimist_m_mugabe-will-never-ratify-un-convention-against-torture-sw-radio-africa/) [date of use 11 November 2015] 1.

<sup>401</sup> Human Rights Watch 2015 *World Report 2015: Zimbabwe Events of 2014* <https://www.hrw.org/world-report/2015/country-chapters/zimbabwe> [date of use 11 November 2015] 1.



## CHAPTER FOUR: INSTANCES AND CAUSES OF CIVIL AND POLITICAL RIGHTS ABUSES IN ZIMBABWE

### 4.1 Introduction

While the Zimbabwe Constitution 2013<sup>402</sup> protects civil and political rights, there are still ongoing human rights abuses in Zimbabwe.<sup>403</sup> The mere fact that these rights are protected under the Zimbabwe Constitution 2013 does not itself guarantee the enjoyment of, or respect for, civil and political rights.<sup>404</sup> For instance, the Zimbabwe Constitution 2013 only provide the government, individuals and all institutions with the rights and responsibilities to enforce human rights in Zimbabwe.<sup>405</sup> This Constitution provides institutions and people who have the responsibility to protect human rights in the society with the positive obligation to promote, respect and fulfill human rights of all the persons in Zimbabwe.<sup>406</sup> The purpose of this chapter is to identify a number of international, regional and domestic instruments that have been adopted by the government to improve the protection and promotion of selected civil and political rights in Zimbabwe. Moreover, this chapter examine whether these instruments have improved the protection of civil and political rights in Zimbabwe. This is, *inter alia*, done to expose the ongoing human rights violations in Zimbabwe.

### 4.2 The scope of obligations arising from civil and political rights

The responsibility for fulfilling the obligations arising from human rights lies with the government.<sup>407</sup> Human rights treaties and the Zimbabwe Constitution 2013 impose obligations to the fulfill human rights on state officials.<sup>408</sup> Obligations arising from human rights include the obligation to respect, protect and fulfill fundamental human rights.<sup>409</sup> In

<sup>402</sup> Hereinafter referred to as the Zimbabwe Constitution 2013.

<sup>403</sup> International Bar Association 2007 *Partisan policing: An obstacle to human rights and democracy in Zimbabwe* [www.ibanet.org/Document/Default.aspx?DocumentUid=e4d35d9f](http://www.ibanet.org/Document/Default.aspx?DocumentUid=e4d35d9f) [date of use 30 October 2015] 7.

<sup>404</sup> Gubbay AR "The Protection and Enforcement of Fundamental Human Rights: The Zimbabwean Experience" 1997 *Human Rights Quarterly* 227-254.

<sup>405</sup> Gubbay 1997 *Human Rights Quarterly* 229.

<sup>406</sup> Chiduzo L *The Significance of Judicial Independence in Human Rights Protection: A Critical Analysis of the Constitutional Reforms in Zimbabwe* (LLD-Thesis UWC 2013) 279.

<sup>407</sup> Fomerand J *Historical Dictionary of Human Rights* (Rowman and Littlefield United Kingdom 2014) 625.

<sup>408</sup> Section 44.

<sup>409</sup> Section 44 of the Zimbabwe Constitution 2013.



fulfilling these obligations a number of international human rights instruments require States to take domestic measures to ensure the protection and enforcement of human rights.<sup>410</sup> This occurs because States are held liable for not complying with legal obligations imposed by international legal instruments which Zimbabwe has is a member to.<sup>411</sup> These legal instruments ensure that human rights are respected and ensure that all people enjoy their rights.<sup>412</sup> In Zimbabwe there are some measures that have been put in place to ensure that civil and political rights are enforced. Examples of such measures include the establishment of the judiciary,<sup>413</sup> the Zimbabwe Republic Police (ZRP),<sup>414</sup> the independent human rights institutions<sup>415</sup> and civil society. Although some of these measures have been in existence for several years, they have not led to the effective enforcement of human rights in Zimbabwe.<sup>416</sup> This implies that there is need to examine the international and domestic measures put into place to protect and promote civil and political rights in Zimbabwe and analyse how best these mechanisms can be utilised to improve the protection of civil and political rights in Zimbabwe. This chapter will only focus on international instruments and mechanisms that Zimbabwe is a party to. It is submitted that these mechanisms could enhance the protection and promotion of civil and political rights in Zimbabwe. These and other related aspects will be discussed below.

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<sup>410</sup> International Covenant on Civil and Political Rights (1966), Freedom of Association and Protection of the Right to Organise Convention (1950), the African Charter on Human and Peoples' Rights (1966) and the African Charter on the Rights and Welfare of the Child (1999). Shelton D "Protecting human rights in a globalized world" 2002 *Boston College International & Comparative Law Review* 273-322.

<sup>411</sup> States are held liable by organisations such as the African Union, the United Union and many others.

<sup>412</sup> Chiduzo *The Significance of Judicial Independence in Human Rights Protection: A Critical Analysis of the Constitutional Reforms in Zimbabwe* 279.

<sup>413</sup> Section 162 of the Zimbabwe Constitution 2013.

<sup>414</sup> Section 219 of the Zimbabwe Constitution 2013.

<sup>415</sup> Section 232 of the Zimbabwe Constitution 2013.

<sup>416</sup> Chiduzo *The Significance of Judicial Independence in Human Rights Protection: A Critical Analysis of the Constitutional Reforms in Zimbabwe* 280.

### **4.3 The nature and challenges involving civil and political rights violations in Zimbabwe**

#### **4.3.1 Legislative-related challenges**

Selected legislation dealing with the protection of civil and political rights in Zimbabwe is discussed below.

##### **4.3.1.1 The Public Order and Security Act (POSA)<sup>417</sup>**

The POSA was enacted on 10 January 2002 and amended in December 2007.<sup>418</sup> The POSA replaced the Law and Order Maintenance Act (LOMA),<sup>419</sup> which was one of the few pieces of legislation that was retained from the colonial era.<sup>420</sup> The LOMA outlined the powers of the police, security measures for the state, and limitation of personal freedom.<sup>421</sup> The LOMA was regarded as a piece of legislation that served the interests of the white minority.<sup>422</sup> This Act infringed on the right to freedom of association and assembly, right to freedom of movement, right to freedom of expression and it provided the police wide discretionary powers.<sup>423</sup> Notably, the Rhodesian government often used LOMA to limit the revolutionary forces and their supporters.<sup>424</sup> After independence the new government kept using the LOMA even though Lancaster House Constitution stated that any law inconsistent with it is void.<sup>425</sup> Nevertheless, as years went by the LOMA was replaced by the POSA as a result of criticism by civil society organisations.<sup>426</sup> The criticism was based on the fact that the LOMA was used by the government to restrict the opposition political parties to participate in governance.<sup>427</sup>

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<sup>417</sup> Chapter 11:17. Hereinafter referred to as the POSA.

<sup>418</sup> Chiumbu S, Minnie J and Hendrik Bussiek H *Public broadcasting in Africa series* (Open Society Initiative for Southern Africa Johannesburg South Africa 2009) 29.

<sup>419</sup> 1960. Hereinafter referred to as the LOMA.

<sup>420</sup> Mapuva J and Muyengwa L "A Critique of the Key Legislative Framework Guiding Civil Liberties in Zimbabwe" 2012 *PER* 127-164.

<sup>421</sup> Mapuva and Muyengwa 2012 *PER* 135.

<sup>422</sup> Jafari J "Attacks from within: Zimbabwe's assault on basic freedoms through legislation" 2003 *Human Rights Brief* 1-5. See Mapuva and Muyengwa 2012 *PER* 135.

<sup>423</sup> Jafari 2003 *Human Rights Brief* 2.

<sup>424</sup> Mapuva and Muyengwa 2012 *PER* 135.

<sup>425</sup> Section 3 of the Lancaster House Constitution.

<sup>426</sup> Jafari 2003 *Human Rights Brief* 2. See Mapuva and Muyengwa 2012 *PER* 135

<sup>427</sup> Mapuva and Muyengwa 2012 *PER* 135.

The POSA provides that it is an offence to publish or communicate false statements prejudicial to the State and to undermine the authority of, or insult the President.<sup>428</sup> This provision can easily be used by the government to silence voices of people who criticise the president or the government. Such conduct on the part of the government violates the right to freedom of expression which is guaranteed in the Zimbabwe Constitution 2013.<sup>429</sup> Part 4 of the POSA, entitled "Public Gathering" is usually used to block opposition political parties' campaign meetings and the activities of civil society organisations.<sup>430</sup> Under the POSA anyone who wishes to organise a public gathering must notify the ZRP four days before the gathering takes place.<sup>431</sup> However, the ZRP is only authorised to restrict the gathering or prohibit it unless it has reasonable grounds for believing that the gathering will result in public disorder, a breach of the peace, or an obstruction of any thoroughfare.<sup>432</sup> The ZRP often misunderstood or deliberately violate these provisions to the detriment of *bona fide* people's gatherings.<sup>433</sup> The provision that requires the organiser of the gathering to "notify" the police, does not state that the police must give permission.<sup>434</sup> After the organisers have notified the police, then the police have the power to prohibit the event, but only on the grounds specified under the POSA.<sup>435</sup> If no prohibition is made by the police, then the gathering could proceed.<sup>436</sup> The reasons or excuses given by the police for prohibiting gatherings sometimes were that Zimbabwe African National Union Patriotic Front (ZANU-PF) has booked the same venue, or that the gathering is likely to provoke disorder.<sup>437</sup>

The provisions of the POSA have been used to decline or disturb several public meetings, including those held by members of Movement for Democratic Change

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<sup>428</sup> Section 12 of the POSA.

<sup>429</sup> Mapuva and Muyengwa 2012 *PER* 136.

<sup>430</sup> Mapuva and Muyengwa 2012 *PER* 136.

<sup>431</sup> Section 24 of the POSA.

<sup>432</sup> Section 26(1) of the POSA.

<sup>433</sup> Mapuva and Muyengwa 2012 *PER* 136.

<sup>434</sup> Sokwanele 2004 *Public Order and Security Act – Zimbabwe*  
[http://archive.kubatana.net/html/archive/legisl/040823sokwanele.asp?sector=LEGISL&year=2004&range\\_start=91](http://archive.kubatana.net/html/archive/legisl/040823sokwanele.asp?sector=LEGISL&year=2004&range_start=91) [date of use 26 October 2015] 3.

<sup>435</sup> Section 26(1) of the POSA.

<sup>436</sup> Mapuva and Muyengwa 2012 *PER* 136.

<sup>437</sup> Sokwanele 2004  
[http://archive.kubatana.net/html/archive/legisl/040823sokwanele.asp?sector=LEGISL&year=2004&range\\_start=91](http://archive.kubatana.net/html/archive/legisl/040823sokwanele.asp?sector=LEGISL&year=2004&range_start=91) [date of use 26 October 2015] 3.



(MDC).<sup>438</sup> For instance, the campaign rally of the MDC was denied by the ZRP, reason being that the same venue had been booked by ZANU-PF.<sup>439</sup> Upon further inquiry it was discovered that ZANU PF neither held nor had booked the venue.<sup>440</sup> Accordingly, it is submitted that the ZRP can be seen as taking sides and this is an infringement of the right to assembly and association.<sup>441</sup>

The POSA gives the ZRP the power to change the venue of a meeting or disallow the meeting.<sup>442</sup> Owing to this legislation, many civil society organisations and opposition political parties have found it very difficult to have meetings with their members without committing a breach of one of the provisions of the POSA.<sup>443</sup> Therefore right to freedom of speech, right to assemble and association have been limited by the POSA. This has made the work of civil society difficult as human rights activists come under scrutiny through the POSA.<sup>444</sup> From the above discussion the POSA should be amended to prevent human rights abuses.

#### 4.3.1.2 Access to Information and Protection of Privacy Act (AIPPA)<sup>445</sup>

The media in many countries are used as a tool for exposing violations human rights.<sup>446</sup> As a result the government often restricts the media in countries where governments seek to commit abuses with impunity.<sup>447</sup> The AIPPA was passed by parliament on 31 January 2002 and signed into law by President Mugabe on 15 March 2002.<sup>448</sup> It has

<sup>438</sup> Sections 17-24 of the POSA. See also Mapuva and Muyengwa 2012 *PER* 137.

<sup>439</sup> Mapuva and Muyengwa 2012 *PER* 137.

<sup>440</sup> Mapuva and Muyengwa 2012 *PER* 137.

<sup>441</sup> Section 58 of the Zimbabwe Constitution 2013.

<sup>442</sup> Mapuva and Muyengwa 2012 *PER* 137.

<sup>443</sup> Mapuva J *An Examination of the Role Played by Selected Civil Society Organizations in Promoting Democracy in Zimbabwe, 1980-2007* (Masters in Public Administration UWC 2007) 48.

<sup>444</sup> Mapuva and Muyengwa 2012 *PER* 138.

<sup>445</sup> 2002. Hereinafter referred to as the AIPPA.

<sup>446</sup> Mmegionline 2015 *Media Bill is a threat to media freedom*

<http://www.mmegi.bw/index.php?sid=2&aid=70&dir=2008/July/Friday11> [date of use 27 October 2015] 1.

<sup>447</sup> Mmegionline 2015 <http://www.mmegi.bw/index.php?sid=2&aid=70&dir=2008/July/Friday11> [date of use 27 October 2015] 1.

<sup>448</sup> Article 19 2005 *The Access to Information and Protection of Privacy Act: Two years on* <https://www.article19.org/pdfs/publications/zimbabwe-aippa-report.pdf> [date of use 01 November 2015] 5.



been amended twice, on 13 October 2003 and 18 December 2007.<sup>449</sup> The AIPPA allows the government to observe and control journalist and information in Zimbabwe.<sup>450</sup> In enacting this legislation, the government argued that it wanted to prevent the publication of information that can be manipulated and be used against the government and also to protect national security.<sup>451</sup> The AIPPA was amended in 2007 to remove the provisions of compulsory accreditation of journalists with the state-controlled Media and Information Commission (MIC).<sup>452</sup> Nonetheless, the POSA still contains a number of provisions regarding accreditation.<sup>453</sup> The POSA requires journalists to register and prohibits mass media outlets from employing anyone as a journalist who is not registered.<sup>454</sup> Accreditation lasts for 12 months, but may be renewed.<sup>455</sup> The MIC is responsible for overseeing the process of accreditation.<sup>456</sup> The AIPPA also requires that only journalists who have “prescribed qualifications” can be registered and foreign journalists may be accredited for a limited period.<sup>457</sup> The MIC also has powers to discipline journalists for breach of the code of conduct, including to terminate or suspend their accreditation,<sup>458</sup> to impose fines of up to Zim\$50,000, to impose such conditions as it deems fit on their right to practice,<sup>459</sup> and to refer them for prosecution.<sup>460</sup>

The requirement for journalists to register is not *per se*, a breach of the right of freedom to expression.<sup>461</sup> Nonetheless, the government must not interfere in the registration process because the government interference can lead to the government registering journalists who will report things that the government wants therefore infringing the right to freedom of expression. The empowerment of the MIC to register or deregister

<sup>449</sup> Article 19 2005 <https://www.article19.org/pdfs/publications/zimbabwe-aippa-report.pdf> [date of use 01 November 2015] 3.

<sup>450</sup> Mapuva and Muyengwa 2012 *PER* 139.

<sup>451</sup> Mapuva and Muyengwa 2012 *PER* 139.

<sup>452</sup> Chiumbu, Minnie and Bussiek *Public broadcasting in Africa series* 26.

<sup>453</sup> Sections 79(1) and 83 of the AIPPA.

<sup>454</sup> Sections 79(1) and 83 of the AIPPA.

<sup>455</sup> Section 84 of the AIPPA.

<sup>456</sup> Section 79 of the AIPPA.

<sup>457</sup> Section 79 of the AIPPA.

<sup>458</sup> Section 42 (iii) and (v) of the AIPPA.

<sup>459</sup> Section 42 (iv) of the AIPPA.

<sup>460</sup> Section 85 of the AIPPA.

<sup>461</sup> Article 19 2003 *Memorandum on the proposed amendments to the Ukrainian press law* [www.refworld.org/pdfid/4756d0020.pdf](http://www.refworld.org/pdfid/4756d0020.pdf) [date of use 06 November 2015] 2.

journalists or deny them a licence to practice without giving them reasons,<sup>462</sup> implies that journalists can be taken advantage of in order to retain their licences, in contravention of the ethics of their profession.<sup>463</sup> It also implies that the government can determine what journalists should report on and what they should not report on.<sup>464</sup> Furthermore, no powers in the area of the media should be exercised by institutions that are not independent from the government.<sup>465</sup> This condition is clearly not met in relation to accreditation of journalists in Zimbabwe, given the extensive roles of both the MIC and the Minister Publicity and Information.<sup>466</sup>

Excessive punishment for the breach of the AIPPA has seen many journalists being arrested and newspapers being shut down.<sup>467</sup> Media freedom and independent newspapers have been under threat as many of their employees have been charged before the courts for publishing what the state views as prejudicial to state security.<sup>468</sup> The Daily News was one of the newspapers that was critical of the government's human rights record, because it regularly published information on human rights abuses by state officials.<sup>469</sup> The Daily News also provided a platform for other political parties other than the ZANU-PF to advertise and market their views on human rights abuses in Zimbabwe.<sup>470</sup> Its closure has left little space for freedom of expression, leaving only government-controlled dailies in place.<sup>471</sup> Other newspapers such as Associated Newspapers of Zimbabwe (ANZ), the Daily News on Sunday and the Tribute were banned but they are now operating except the Tribune.<sup>472</sup> Under the AIPPA, the MIC

<sup>462</sup> Sections 42 of the AIPPA

<sup>463</sup> Mapuva and Muyengwa 2012 *PER* 139. Voluntary media council of Zimbabwe 2013 *The state of journalism ethics in Zimbabwe* archive.kubatana.net/docs/.../vmcz\_state\_of\_media\_ethics\_zim\_130829 [date of use 27 October 2015] 19.

<sup>464</sup> Mapuva and Muyengwa 2012 *PER* 139. Section 80(1) of the AIPPA.

<sup>465</sup> Article 19 2004 <https://www.article19.org/resources.php/resource/808/en/the-access-to-information-and-protection-of-privacy-act-two-years-on> [27 October 2015] 9.

<sup>466</sup> Article 19 2004 <https://www.article19.org/resources.php/resource/808/en/the-access-to-information-and-protection-of-privacy-act-two-years-on> [27 October 2015] 9.

<sup>467</sup> Mapuva and Muyengwa 2012 *PER* 139.

<sup>468</sup> Sections 23-30 of the AIPPA.

<sup>469</sup> Mapuva and Muyengwa 2012 *PER* 138.

<sup>470</sup> Article 19 2004 <https://www.article19.org/resources.php/resource/808/en/the-access-to-information-and-protection-of-privacy-act-two-years-on> [27 October 2015] 18.

<sup>471</sup> It was closed on 12 September 2003

<sup>472</sup> Zinyama T "The Complexity of Democratic Transition: The Zimbabwe Case, 1999 to 2011 2012" *International Journal of Humanities and Social Science* 136-153.

gives or denies licences to both journalists and radio stations<sup>473</sup> this has led to many radio stations being denied a chance to operate by the MIC.<sup>474</sup> The government takes advantage of AIPPA and denies journalists licences because they argue that local media should not be owned by foreigners.<sup>475</sup> This is in breach of citizens' right to freedom of expression and right to information under the Zimbabwe constitution 2013.<sup>476</sup>

From the above discussion, it can be concluded that the ZANU-PF has taken advantage of its mandate to enact legislation that restrict and limit the participation of people in strengthening public policy.<sup>477</sup> Amendments to existing laws had been limiting citizens from taking part in matters of public interest, this has also seen the government breaching its obligations of protecting the society.<sup>478</sup> This could be seen as giving the right with one hand and taking it away with the other.<sup>479</sup> Some of the provisions of the POSA and the AIPPA are outside the limitations allowed under the Zimbabwe Constitution 2013.<sup>480</sup>

#### 4.3.2 Politically-related challenges

Over the years ZANU-PF has used its position as the ruling party to violate civil and political because they do not want any political party to win the elections in Zimbabwe.<sup>481</sup> The ZANU-PFs control over law enforcement officers has seen thousands of people being killed in the Matabeleland and Midlands regions between 1982 and 1986 by government forces and armed groups during the disturbances known as

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<sup>473</sup> Section 79 of the AIPPA

<sup>474</sup> Zimbabwe Independent 2015 *Failure to license radio stations retrogressive* <http://www.theindependent.co.zw/2015/05/22/failure-to-license-radio-stations-retrogressive/> [date of use 27 October 2015] 2.

<sup>475</sup> Mapuva *An Examination of the Role Played by Selected Civil Society Organizations in Promoting Democracy in Zimbabwe, 1980-2007* 83.

<sup>476</sup> Section 61 of the Zimbabwe Constitution 2013.

<sup>477</sup> Mapuva and Muyengwa 2012 *PER* 152.

<sup>478</sup> Mapuva and Muyengwa 2012 *PER* 152.

<sup>479</sup> Ndawana D *The Role of the Judiciary in Protecting the right to Freedom of Expression in Difficult Political Environments: a case study of Zimbabwe* (LLM-Thesis University of Fort Hare 2008) 3.

<sup>480</sup> Ndawana *The role of the judiciary in protecting the right to freedom of expression in difficult political environments: a case study of Zimbabwe* 57.

<sup>481</sup> Amnesty International 2013 *Walk the Talk: Zimbabwe must respect and protect fundamental freedoms during the 2013 harmonized elections* [www.refworld.org/docid/51e500634.html](http://www.refworld.org/docid/51e500634.html) [date of use 11 November 2015] 8.



Gukurahundi.<sup>482</sup> Further acts of violence that were politically motivated happened during the 2008 elections.<sup>483</sup> These elections were not free and fair as those who wanted to vote were harassed, intimidated and some were beaten by the police and members of the ZANU-PF.<sup>484</sup> Especially members of the Movement for Democratic Change (MDC) and civil society members were beaten and were harassed by members of the ZANU-PF.<sup>485</sup> In 2007, Morgan Tsvangirai, the leader of the MDC was beaten and taken to hospital for convening and addressing a political meeting in Zimbabwe.<sup>486</sup> People who were responsible for such violations were not held accountable.<sup>487</sup> Since the attainment of independence human rights activists such as Beatrice Mtetwa, Jestina Mukoko<sup>488</sup> and many others have been arrested, tortured and harassed for playing their role of promoting and protecting human rights. Lawyers in Zimbabwe who were helping victims of human rights violations have also been subjected to arrest, harassment and torture for fighting for the protection of their rights.<sup>489</sup> Such lawyers include Gabriel Shumba,<sup>490</sup> Andrew Makoni, Alec Muchadehama and Beatrice Mtetwa,<sup>491</sup> have all been subjected to arrests and threats for taking up human rights cases. In 2015 Itai Dzamara a journalist who was against some of the government's actions which are against the principles of democracy, was allegedly abducted by the military intelligence agents.<sup>492</sup> It is reported that the ZANU-PF saw him as a threat to the government. This implies that those who advocate for human rights are not protected by the government. From the above

<sup>482</sup> Amnesty International 2013 [www.refworld.org/docid/51e500634.html](http://www.refworld.org/docid/51e500634.html) [date of use 11 November 2015] 14.

<sup>483</sup> Amnesty International 2013 [www.refworld.org/docid/51e500634.html](http://www.refworld.org/docid/51e500634.html) [date of use 11 November 2015] 7.

<sup>484</sup> Amnesty International 2013 [www.refworld.org/docid/51e500634.html](http://www.refworld.org/docid/51e500634.html) [date of use 11 November 2015] 7.

<sup>485</sup> Zimbabwe Human Rights Non-Governmental Organisation Forum 2007 *Political Violence Report: December 2007* [www.hrforumzim.com](http://www.hrforumzim.com) [date of use 10 November 2015] 12.

<sup>486</sup> Zimbabwe Human Rights Non-Governmental Organisation Forum 2007 [www.hrforumzim.com](http://www.hrforumzim.com) [date of use 10 November 2015] 12.

<sup>487</sup> Amnesty International 2013 [www.refworld.org/docid/51e500634.html](http://www.refworld.org/docid/51e500634.html) [date of use 11 November 2015] 8.

<sup>488</sup> *Mukoko v Attorney-General and Others* [2012] ZWSC 11.

<sup>489</sup> Chidzuza *Significance of Judicial Independence in Human Rights Protection: A Critical Analysis of the Constitutional Reforms in Zimbabwe* 307.

<sup>490</sup> *Gabriel Shumba v Republic of Zimbabwe Communication 288/2004*.

<sup>491</sup> Chidzuza *The Significance of Judicial Independence in Human Rights Protection: A Critical Analysis of the Constitutional Reforms in Zimbabwe* 307.

<sup>492</sup> Cross E 2015 *160 Days: The disappearance of Itai Dzamara*

<http://nehandaradio.com/2015/08/16/160-days-the-disappearance-of-itai-dzamara/> [date of use 17 November 2015] 2.

discussion it can be seen that there is a political challenge which needs the commitment of the government to abide by the principles of democracy and stop human rights violations. The government has a responsibility to respect, protect and fulfill the rights in the Zimbabwe Constitution 2013.<sup>493</sup>

#### 4.3.3 Economic-related challenges

Zimbabwe has been facing an economic challenge since 2000.<sup>494</sup> This challenge was a result of the introduction of Economic Structural Adjustment Programme (ESAP) by the government together with the greediness of most of the members of the government who accumulated riches through corrupt means.<sup>495</sup> This has affected how the government funds institutions that promote and protect human rights. The Commissioner of the Zimbabwe Human Rights Institution has on several occasions mentioned that it does not have enough money to operate.<sup>496</sup> As a result, the ZANU-PF government attacks NGOs and opposition parties who want to give food aid and other help to the need in Zimbabwe.<sup>497</sup> Moreover the government has used the Private Voluntary Organisations Act (PVOA)<sup>498</sup> to burn foreign funding to civil society organisations, funding which was given to these organisations during an economic crisis in Zimbabwe.<sup>499</sup>

#### 4.4 Independent national and international human rights role players

Reif describes independent human rights institution as a body which is established by the Constitution, laws and regulations, the functions of which are specifically to promote

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<sup>493</sup> Section 44 of the Zimbabwe Constitution 2013.

<sup>494</sup> Africa Economic Development Institute 2009 *The Failing Economy of Zimbabwe* [http://priv.asiaeconomicinstitute.org/resources/uploads/africa/articles/1\\_1/1237478297Africa\\_Exclusives\\_Vol1\\_No1\\_2009-03-02\\_RO.pdf](http://priv.asiaeconomicinstitute.org/resources/uploads/africa/articles/1_1/1237478297Africa_Exclusives_Vol1_No1_2009-03-02_RO.pdf) [date of use 15 November 2015] 1.

<sup>495</sup> Moyo S *Corruption in Zimbabwe: An Examination of the Roles of the State and Civil Society in Combating Corruption* (PHD-thesis University of Central Lancashire 2014) 3.

<sup>496</sup> United Nations Development Programme 2014 [http://www.zw.undp.org/content/zimbabwe/en/home/operations/projects/democratic\\_governance/capacity-building-support-to-the-zimbabwe-human-rights-commissio.html](http://www.zw.undp.org/content/zimbabwe/en/home/operations/projects/democratic_governance/capacity-building-support-to-the-zimbabwe-human-rights-commissio.html) [date of use 10 September 2015] 1.

<sup>497</sup> Raftopoulos B *NGOs, the State and Politics in Zimbabwe* (Baobab Harare 2000) 36.

<sup>498</sup> Private Voluntary Organisations Act 1996 [Chapter 17:05] General Notice 99 of 2007. Hereinafter referred to as the PVOA.

<sup>499</sup> Raftopoulos B *NGOs, the State and Politics in Zimbabwe* 36.



and protect human rights.<sup>500</sup> She further argues that these institutions assist in building good governance in a state in two ways. The importance of these institutions has been widely recognised by the United Nations human rights bodies since 1946.<sup>501</sup> In 1992 the United Nations Commission on Human Rights adopted the Guiding Principles Relating to the Status of National Institutions (Paris Principles).<sup>502</sup> The Paris Principles provide guidelines on the formation of human rights institutions and also provide standards and principles that human rights institutions should follow in order to function effectively.<sup>503</sup> In this regard, it is submitted that the success of human rights institutions is dependent on achieving existence and strength of particular legal, financial, political, and social factors.<sup>504</sup> Although human rights institutions in Zimbabwe do not have the power to make binding decisions in response to complaints of human rights violations or maladministration by government, they can play a valuable role in human rights protection and oversight of administrative behavior.<sup>505</sup> For the purposes of this sub-heading, the judiciary, the Zimbabwe Human Rights Commission (ZHRC), the Southern African Development Community Tribunal (SADC Tribunal), law enforcement officers and civil society organisations will be discussed below.

#### 4.4.1 *The role of the judiciary*

There is no doubt that the judiciary plays an important role in any democratic state.<sup>506</sup> The independence of the judiciary is a guarantee of the protection of human rights and upholds the rule of law in the society.<sup>507</sup> However, before the enactment of the Zimbabwe Constitution 2013, the judiciary in many circumstances failed to protect

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<sup>500</sup> Reif L.C "Building Democratic Institutions: The Role of National Human Rights Institutions in Good Governance and Human Rights Protection" 2000 *Harvard Human Rights Journal* 1-69.

<sup>501</sup> Reif 2000 *Harvard Human Rights Journal* 3.

<sup>502</sup> Reif 2000 *Harvard Human Rights Journal* 3.

<sup>503</sup> Chidzuza L *The Significance of Judicial Independence in Human Rights Protection: A Critical Analysis of the Constitutional Reforms in Zimbabwe* (LLD-Thesis UWC 2013) 291.

<sup>504</sup> Reif 2000 *Harvard Human Rights Journal* 2.

<sup>505</sup> Section 233 of the Zimbabwe Constitution 2013.

<sup>506</sup> Asmal K and Wilmot J *Spirit of the Nation: Reflections on South Africa's Educational Ethos* (New Africa Education and the Human sciences council in association with the department of education South Africa Claremont 2002) 21.

<sup>507</sup> Chidzuza *The Significance of Judicial Independence in Human Rights Protection: A Critical Analysis of the Constitutional Reforms in Zimbabwe* 57.



human rights.<sup>508</sup> For instance, the executive has in the past refused to enforce binding court orders and decisions that were seen to be unfavorable and detrimental to the ambitions and aspirations of the ruling party ZANU-PF.<sup>509</sup> This has resulted in unwarranted attacks on the judiciary and the legal profession as a whole, with the decisions of the judiciary being influenced by the executive.<sup>510</sup> A lot of Zimbabweans had lost confidence and faith in the justice and court system and they went to other neighboring countries to seek justice as indicated in *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre*.<sup>511</sup> The increased human rights violations in Zimbabwe have over the years seen a rise in the number of cases that have been brought before the African Commission.<sup>512</sup> On a number of occasions the African Commission has found that there were no effective domestic remedies for the alleged human rights violations in Zimbabwe.<sup>513</sup> This therefore implies that the Judiciary in Zimbabwe has failed to protect human rights for the people of Zimbabwe.<sup>514</sup> For example in the case of *Andrew Barclay Meldrum v Zimbabwe*<sup>515</sup> and *Zimbabwe Human Rights NGO Forum v Zimbabwe*<sup>516</sup> the African Commission stated that member states to the African Charter should abide by the provisions of this Charter which provides that States should protect and promote the

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<sup>508</sup> Zimbabwe Human Rights Non-Governmental Organisation Forum 2005 *Zimbabwe Facts and Fictions* hrforumzim.org/.../SR23-Zimbabwe-Facts-and-Fictions-An-Audit-of-the [date of use 04 November 2015] 23.

<sup>509</sup> Zimbabwe Human Rights Non-Governmental Organisation Forum 2005 hrforumzim.org/.../SR23-Zimbabwe-Facts-and-Fictions-An-Audit-of-the [date of use 04 November 2015] 24.

<sup>510</sup> Zimbabwe Human Rights Non-Governmental Organisation Forum 2005 hrforumzim.org/.../SR23-Zimbabwe-Facts-and-Fictions-An-Audit-of-the [date of use 04 November 2015] 25.

<sup>511</sup> (485/2012) [2013] ZASCA 168 (27 November 2013). See also *Mike Campbell v the Republic of Zimbabwe and Fick v Government of the Republic of Zimbabwe* (North Gauteng High Court, South Africa, 2010)

<sup>512</sup> Chiduzo *The Significance of Judicial Independence in Human Rights Protection: A Critical Analysis of the Constitutional Reforms in Zimbabwe* 57.

<sup>513</sup> Chiduzo *The Significance of Judicial Independence in Human Rights Protection: A Critical Analysis of the Constitutional Reforms in Zimbabwe* 57.

<sup>514</sup> Chiduzo *The Significance of Judicial Independence in Human Rights Protection: A Critical Analysis of the Constitutional Reforms in Zimbabwe* 57.

<sup>515</sup> 294/04 *Zimbabwe Lawyers for Human Rights and Institute for Human Rights and Development in Africa (on behalf of Andrew Barclay Meldrum) v Zimbabwe*.

<sup>516</sup> 245/02.

independence of the judiciary.<sup>517</sup> Moreover, persons in authority must lead by example, by following what the law states and not using it for their own interest.

Nonetheless, the Zimbabwe Constitution 2013 has brought some changes that seek to promote and protect the independence of the judiciary of which will be discussed below. The provisions of the Zimbabwe Constitution 2013 must be properly implemented so that there should be a significant improvement of the judiciary.<sup>518</sup> The protection of the independence of the judiciary in the Constitution is in accordance with international law.<sup>519</sup> With regard to the appointment of judges, the Zimbabwe Constitution 2013 provides that there must be fair and clear appointment procedures to ensure that fit and well qualified individuals are appointed.<sup>520</sup> The appointment procedures seek to enhance transparency and impartiality and this is an improvement from the appointment procedure under the Lancaster House Constitution.<sup>521</sup> Although the Zimbabwe Constitution 2013 has brought changes there are provisions that do not bode well with the independence of the judiciary. These provisions relate to the role of the President in appointments of judges,<sup>522</sup> removal of judges<sup>523</sup> and the setting of remuneration of judges.<sup>524</sup> The President still has the power to appoint tribunal that investigates the removal of a judge.<sup>525</sup> The powers of the president to appoint tribunals and the power to fix the salaries of judges without being bound by the advice of the JSC does not bode well for the independence of the judiciary.<sup>526</sup> Thus in a situation where the decisions of the judiciary are not in favour of the government the president can reduce the salary of

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<sup>517</sup> Chiduzo *The Significance of Judicial Independence in Human Rights Protection: A Critical Analysis of the Constitutional Reforms in Zimbabwe* 57.

<sup>518</sup> Chiduzo *The Significance of Judicial Independence in Human Rights Protection: A Critical Analysis of the Constitutional Reforms in Zimbabwe* 274.

<sup>519</sup> See Principle 1 of the United Nations Basic Principles on Judicial Independence, General Assembly Resolution 40/32 of 1985.

<sup>520</sup> Section 180(2) of the Zimbabwe Constitution 2013.

<sup>521</sup> Chiduzo *The Significance of Judicial Independence in Human Rights Protection: A Critical Analysis of the Constitutional Reforms in Zimbabwe* 274.

<sup>522</sup> Section 180 of the Zimbabwe Constitution 2013.

<sup>523</sup> Section 187 (2), (3) and (4) of the Zimbabwe Constitution 2013.

<sup>524</sup> Section 188(1) of the Zimbabwe Constitution 2013.

<sup>525</sup> Section 187 (2), (3) and (4) of the Zimbabwe Constitution 2013.

<sup>526</sup> Chiduzo *The Significance of Judicial Independence in Human Rights Protection: A Critical Analysis of the Constitutional Reforms in Zimbabwe* 272.



judges or he can increase it so that the judges make decisions in favour of the government.<sup>527</sup>

It is prohibited that judicial members be influenced by, for example, politics or political affiliation, as their close relationship with political parties can influence their judgements.<sup>528</sup> Therefore appointing persons who are affiliated to a political party or background to the bench becomes quite questionable. The appointment of Chief Justice, Chidyausiku to the Supreme Court was controversial.<sup>529</sup> Questions were raised because the Chief Justice Chidyausiku is affiliated to the ruling party and is a former Minister of Justice.<sup>530</sup> This has led to the credibility of the independence of the judges of the Supreme Court being questioned.<sup>531</sup> Therefore, the government must address these gaps as identified in this research.

#### 4.4.2. *The role of Zimbabwe Human Rights Commission*

The Zimbabwe Human Rights Commission (ZHRC) was established as one of the constitutional bodies envisaged under the Global Political Agreement.<sup>532</sup> The Zimbabwe Human Rights Commission was established in 2009 after 29 years of independence.<sup>533</sup> It was established by the Zimbabwe Constitution Amendment 19 and Commissioners were sworn in by the President on 31 March 2010.<sup>534</sup> At the time when the Zimbabwe Human Rights Commission was set up, there was no enabling legislation for it to be



<sup>527</sup> Chiduzza *The Significance of Judicial Independence in Human Rights Protection: A Critical Analysis of the Constitutional Reforms in Zimbabwe* 272.

<sup>528</sup> Section 164(4) of the Zimbabwe Constitution 2013.

<sup>529</sup> Zimbabwe Independent 2001 *Zimbabwe: Chidyausiku to take over as chief justice* <http://allafrica.com/stories/200108100274.html> [date of use 06 November 2015] 1.

<sup>530</sup> Machipisa L 2001 *Politics-Zimbabwe: A top judge appointed new chief justice* <http://www.ipsnews.net/2001/03/politics-zimbabwe-a-top-judge-appointed-new-chief-justice/> [date of use 26 November 2015] 2.

<sup>531</sup> Zimbabwe Independent 2001 <http://allafrica.com/stories/200108100274.html> [date of use 06 November 2015] 1.

<sup>532</sup> Maveneka L 2015 *Terminal evaluation of the support for the strengthening of the promotion and protection of human rights and the rule of law through enhanced capacity of institutions* [erc.undp.org/evaluationadmin/downloaddocument.html?docid=8775](http://erc.undp.org/evaluationadmin/downloaddocument.html?docid=8775) [date of use 17 October 2015] 5.

<sup>533</sup> Chiduzza *The significance of judicial independence in human rights protection: A critical analysis of the constitutional reforms in Zimbabwe* 293.

<sup>534</sup> Section 100R.



operational.<sup>535</sup> It only began to function in March 2010 when the President appointed the Chairman and other members of the Zimbabwe Human Rights Commission and became fully operational in 2012 after the passing of enabling legislation.<sup>536</sup> The Zimbabwe Human Rights Commission is now given effect by Zimbabwe Constitution 2013 and the Zimbabwe Human Rights Commission Act. The provisions of the Zimbabwe Constitution 2013 extended the mandate of the Commission by including the functions of the dissolved office of the Public Protector.<sup>537</sup> The government of Zimbabwe took an important decision to set up the Zimbabwe Human Rights commission in its effort to address human rights violations and its positive indication of the will by government to fulfill its duty to promote and protect human rights.<sup>538</sup>

Interms of the Zimbabwe Constitution 2013 the functions of this Commission are to promote awareness of and respect for human rights and freedoms at all levels of society,<sup>539</sup> receive complaints from the public<sup>540</sup> and to investigate conduct of the authority or person alleged to have violated human rights,<sup>541</sup> to secure appropriate redress, including recommending the prosecution of offenders, where human rights or freedoms have been violated.<sup>542</sup> However, it should be noted that even though the Zimbabwe Constitution 2013 has established a fully operational Human Rights Commission with enabling legislation, this does not automatically guarantee the effective protection and promotion of human rights.<sup>543</sup> It is submitted that the success of the Zimbabwe Human Rights Commission in effectively protecting and promoting human rights goes deeper than its mere establishment.<sup>544</sup> Reif notes that for any human rights institution to effectively discharge its functions there are a number of factors,

<sup>535</sup> Maveneka 2015 [erc.undp.org/evaluationadmin/downloaddocument.html?docid=8775](http://erc.undp.org/evaluationadmin/downloaddocument.html?docid=8775) [date of use 17 October 2015] 5.

<sup>536</sup> Zimbabwe Human Rights Commission Act Chapter 10:30 (No 2/2012). Hereinafter referred to as Zimbabwe Human Rights Commission Act.

<sup>537</sup> Section 243 (1) (e) of Zimbabwe Constitution 2013.

<sup>538</sup> Zimbabwe Human Rights Non-Governmental Organisation Forum 2011 *The role of human rights commission* [www.Hrforumzim.com](http://www.Hrforumzim.com) [date of use 04 November 2015]1.

<sup>539</sup> Section 242 (1)(a) of the Zimbabwe Constitution 2013.

<sup>540</sup> Section 243(d) of the Zimbabwe Constitution 2013.

<sup>541</sup> Section 243(f) of the Zimbabwe Constitution 2013.

<sup>542</sup> Section 243 (1)(g) of the Zimbabwe Constitution 2013.

<sup>543</sup> Chiduzo *The Significance of Judicial Independence in Human Rights Protection: A Critical Analysis of the Constitutional Reforms in Zimbabwe* 293.

<sup>544</sup> Chiduzo *The Significance of Judicial Independence in Human Rights Protection: A Critical Analysis of the Constitutional Reforms in Zimbabwe* 293.

which include legal, political, financial and social factors that need to be addressed, therefore the researcher will discuss those factors.<sup>545</sup>

At the time of writing this research the Zimbabwe Human Rights Commission was not fully operational due to lack of adequate financial and human resources.<sup>546</sup> Reif argues that the effectiveness of the Commission requires that the institution's structures be given adequate financial and human resources.<sup>547</sup> In order to ensure that the Zimbabwe Human Rights Commission is able to discharge its duties effectively, the government needs to ensure that the Zimbabwe Human Rights Commission has adequate resources and that the institution itself is financially independent.<sup>548</sup> Zimbabwe is facing an economic challenge and such challenge has had a negative impact on the Zimbabwe Human Rights Commission.<sup>549</sup> Some of those challenges are lack of facilities, including offices for the Zimbabwe Human Rights Commission.<sup>550</sup> Therefore the provision of adequate resources to the Zimbabwe Human Rights Commission has proven to be a big challenge that the government of Zimbabwe needs to address taking into consideration the financial challenges that the country has been facing over the years. Adequate remuneration to the employees of the Commission needs to be provided in order to ensure professionalism within the institution.<sup>551</sup> The Zimbabwe Human Rights Commission is expected to play an important role in protecting and promoting human rights, therefore the government of Zimbabwe should make available adequate resources.<sup>552</sup>

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<sup>545</sup> Reif 2000 *Harvard Human Rights Journal* 2

<sup>546</sup> United Nations Development Programme 2014  
[http://www.zw.undp.org/content/zimbabwe/en/home/operations/projects/democratic\\_governance/capacity-building-support-to-the-zimbabwe-human-rights-commissionio.html](http://www.zw.undp.org/content/zimbabwe/en/home/operations/projects/democratic_governance/capacity-building-support-to-the-zimbabwe-human-rights-commissionio.html) [date of use 10 September 2015] 1.

<sup>547</sup> Reif 2000 *Harvard Human Rights Journal* 26.

<sup>548</sup> Chidzuza *The significance of judicial independence in human rights protection: A critical analysis of the constitutional reforms in Zimbabwe* 299.

<sup>549</sup> Moyo S *Corruption in Zimbabwe: An examination of the roles of the state and civil society in combating corruption* (LLD-thesis University of Central Lancashire 2014) 114.

<sup>550</sup> United Nations Development Programme 2014  
[http://www.zw.undp.org/content/zimbabwe/en/home/operations/projects/democratic\\_governance/capacity-building-support-to-the-zimbabwe-human-rights-commissionio.html](http://www.zw.undp.org/content/zimbabwe/en/home/operations/projects/democratic_governance/capacity-building-support-to-the-zimbabwe-human-rights-commissionio.html) [date of use 10 September 2015] 1.

<sup>551</sup> Chidzuza *The Significance of Judicial Independence in Human Rights Protection: A Critical Analysis of the Constitutional Reforms in Zimbabwe* 299.

<sup>552</sup> Chidzuza *The Significance of Judicial Independence in Human Rights Protection: A Critical Analysis of the Constitutional Reforms in Zimbabwe* 299.



In order for the Zimbabwe Human Rights Commission to fulfill its mandate the government must ensure that the Zimbabwe Human Rights Commission is independent and its independence must be respected by both the government and all organs of state.<sup>553</sup> Chiduzza argues that independence is the attribute that underpins a national institution's legitimacy and credibility and contributes to the effective discharge of the institution's functions.<sup>554</sup> Reif argues that the independence factor requires that heads of national institutions are appointed in a manner that gives them independence from influence or control by the government.<sup>555</sup> However the appointment of the former Chairperson of the Zimbabwe Human Rights Commission, Jacob Mudenda, caused controversy as there were reports that constitutional procedures were not followed in his appointment.<sup>556</sup> The credibility of the appointment of Jacob Mudenda was also called into question as the Chairperson was a former Governor of Matabeleland North during the Gukurahundi massacres.<sup>557</sup> His political commitment to the ZANU-PF has seen him being elected as a ZANU-PF Member of Parliament in the recently held elections and subsequently as the speaker of Parliament whilst holding the office of the Chairperson of the Zimbabwe Human Rights Commission.<sup>558</sup> Allegations of corruption and close links with the ZANU-PF have also been leveled against the Chairperson of the Zimbabwe Human Rights Commission, thus questioning the credibility of his appointment. Reif argues that the personal character of the persons appointed to be a head of a Human Rights Commission is an important contributory factor in ensuring that the institution is able to discharge its duties effectively.<sup>559</sup> Taking into consideration the relationship that Mr. Mudenda had with the government, there was a risk that the

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<sup>553</sup> Section 235(1) (a) of Zimbabwe Constitution 2013. See also section 7 of the Zimbabwe Human Rights Commission Act which deals with the independence and impartiality of the Commission and Commissioners.

<sup>554</sup> Chiduzza *The Significance of Judicial Independence in Human Rights Protection: A Critical Analysis of the Constitutional Reforms in Zimbabwe* 294.

<sup>555</sup> Reif 2000 *Harvard Human Rights Journal* 25.

<sup>556</sup> Newsday 2013 *Mugabe, Tsvangirai Misfire* <http://www.newsday.co.zw/2013/02/20/mugabe-tsvangirai-misfire/> [date of use 05 November 2015] 1.

<sup>557</sup> Newsday 2013 <http://www.newsday.co.zw/2013/02/20/mugabe-tsvangirai-misfire/> [date of use 05 November 2015] 1.

<sup>558</sup> Newsday 2013 <http://www.newsday.co.zw/2013/02/20/mugabe-tsvangirai-misfire/> [date of use 05 November 2015] 1. See also New Zimbabwe 2013 *MDC-T MPs to boycott Parliament opening* <http://www.newzimbabwe.com/news-12173-MDC-T+to+boycott+parliament+opening/news.aspx> [date of use 05 November 2015] 2.

<sup>559</sup> Reif 2000 *Harvard Human Rights Journal* 24.



Zimbabwe Human Rights Commission might have been influenced by the government. Reif notes that it is important that individuals who have not been involved in politics in the past should be appointed to head human rights institutions.<sup>560</sup> As such, any future appointments to the Zimbabwe Human Rights Commission must be individuals who do not have a close relationship with any political party especially the ruling party,<sup>561</sup> with credible qualifications, who are fit and proper and without any government links should be appointed to be head of the Commission. This will ensure that the Zimbabwe Human Rights Commission is independent and that individuals are able to carry out their duties without the political influence.

#### 4.4.3 *The role of the Southern African Development Community Tribunal (SADC)*<sup>562</sup>

The SADC is an organisation that strives for regional integration to promote economic growth, peace and security in the Southern African region.<sup>563</sup> Zimbabwe ratified the SADC treaty.<sup>564</sup> The SADC tribunal was established under the SADC treaty in 1992, but became operational in November 2005.<sup>565</sup> Its mandate was to ensure that there is proper implementation of the SADC treaty and whether state parties comply with the treaty and other subsidiary instruments as well as adjudicating on disputes.<sup>566</sup> In order to improve the human rights situation in the SADC region, SADC should ensure that its member States act in accordance with the SADC Treaty which requires members to act in accordance with the principles of human rights, democracy and the rule of law.<sup>567</sup> Therefore, Zimbabwe was bound by the SADC treaty and the SADC had a role to

<sup>560</sup> Reif 2000 *Harvard Human Rights Journal* 27.

<sup>561</sup> Reif 2000 *Harvard Human Rights Journal* 27.

<sup>562</sup> Hereinafter referred to as the SADC.

<sup>563</sup> Southafrica.infor date unknown *The Southern African Development Community* <http://www.southafrica.info/africa/sadc.htm#.ViLaCLH8Jjo> [date of use 18 October 2015] 1.

<sup>564</sup> Chidzuza *The Significance of Judicial Independence in Human Rights Protection: A Critical Analysis of the Constitutional Reforms in Zimbabwe* 314.

<sup>565</sup> Article 9 of the SADC Treaty. Moyo A "Defending Human Rights and the Rule of Law by the SADC Tribunal: Campbell and Beyond" 2009 *AHRLJ* 590 - 614

<sup>566</sup> Article 9 of the SADC Treaty.

<sup>567</sup> Article 4 (c) of the SADC Treaty.

ensure that Zimbabwe fulfills its obligations.<sup>568</sup> The SADC has over the years played an important role in trying to resolve the political challenges in Zimbabwe.<sup>569</sup>

The SADC Treaty states a number of principles that must be fulfilled by member states, amongst these principles is the importance of human rights, democracy and the rule of law.<sup>570</sup> Nonetheless, it should be noted that the SADC Treaty does not directly refer to specific human rights instruments.<sup>571</sup> The SADC Protocol of the Tribunal and Rules of Procedure<sup>572</sup> does not include the issue of handling human rights cases in the jurisdiction of the Tribunal.<sup>573</sup> However, the SADC Treaty elaborate on a series of complaints that the Tribunal may handle, which include disputes between states and natural or legal persons.<sup>574</sup> The Protocol of the Tribunal and Rules of Procedure also allows an applicant to bring an action against a state if they have exhausted all available remedies or unable to proceed within their domestic jurisdiction.<sup>575</sup> The preamble to the SADC Treaty also emphasises the importance of guaranteeing and complying with and the rule of law.<sup>576</sup> It can therefore be concluded that although the SADC Treaty does not expressly grant the SADC Tribunal jurisdiction with regards to human rights complaints, it had the capacity to hear human rights cases where individuals were not being protected by the legal system of their country.<sup>577</sup> The SADC Tribunal used a number of

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<sup>568</sup> Chiduzo *The Significance of Judicial Independence in Human Rights Protection: A Critical Analysis of the Constitutional Reforms in Zimbabwe* 131.

<sup>569</sup> Chiduzo *The Significance of Judicial Independence in Human Rights Protection: A Critical Analysis of the Constitutional Reforms in Zimbabwe* 314.

<sup>570</sup> Article 4 of the SADC Treaty. Chiduzo *The Significance of Judicial Independence in Human Rights Protection: A Critical Analysis of the Constitutional Reforms in Zimbabwe* 315.

<sup>571</sup> Chiduzo *The Significance of Judicial Independence in Human Rights Protection: A Critical Analysis of the Constitutional Reforms in Zimbabwe* 315.

<sup>572</sup> 2000. Hereinafter referred to as Protocol of the Tribunal and Rules of Procedure.

<sup>573</sup> Protocol of the Tribunal and Rules of Procedure. Chiduzo *The Significance of Judicial Independence in Human Rights Protection: A Critical Analysis of the Constitutional Reforms in Zimbabwe* 315.

<sup>574</sup> Articles 17-20. See also Cowell F 2013 "The death of the Southern African Development Community Tribunal's human rights jurisdiction" *Human Rights Law Review* 153-165.

<sup>575</sup> Article 15(2) Protocol on Tribunal and the Rules of Procedure Thereof 2000.

<sup>576</sup> See also Article 4(c) of the SADC Treaty which emphasises the importance of human rights, democracy and the rule of law. Chiduzo *The Significance of Judicial Independence in Human Rights Protection: A Critical Analysis of the Constitutional Reforms in Zimbabwe* 315.

<sup>577</sup> Chiduzo *The Significance of Judicial Independence in Human Rights Protection: A Critical Analysis of the Constitutional Reforms in Zimbabwe* 315.

provisions in the SADC Treaty and SADC Protocol of the Tribunal and Rules of Procedure in order to have the capacity to hear human rights cases.<sup>578</sup>

The ineffectiveness of the SADC Tribunal was challenged in the case of *Mike Campell (PTY) Limited v The Republic of Zimbabwe*.<sup>579</sup> Mike Campell and other farm owners brought cases to the SADC Tribunal challenging the land invasions in Zimbabwe in 2000. They had their farms taken by force by the government in its implementation of the Land Reform Program in Zimbabwe. They brought a number of cases before the SADC Tribunal alleging that their rights under the Lancaster House Constitution had been violated.<sup>580</sup> The tribunal granted judgment in their favor. Despite these judgments being granted in favour of Mike Campell and others, the government of Zimbabwe refused to comply with the judgments which declared that Zimbabwe was in breach.<sup>581</sup> The Zimbabwean government was, unwilling to hold liable those who were involved in farm seizures because they were ZANU-PF supporters and President Mugabe, claimed the Tribunal was making decisions that were “nonsense” and “of no consequence”.<sup>582</sup> In November 2009, the Zimbabwean government announced their intention to withdraw from the SADC Tribunal Protocol.<sup>583</sup>

The Zimbabwean Minister of Justice and Legal Affairs, also argued that the SADC Tribunal Protocol did not bind Zimbabwe even though they had agreed to both the Protocol and the Amended SADC Treaty.<sup>584</sup> Justice Gauntlett SC and Professor Jowell QC argued that “the government of Zimbabwe was bound by the decisions of the Tribunal and had to enforce its decisions because the decisions of the SADC Tribunal are final and binding on the parties to a dispute. Therefore the Tribunal’s human rights



<sup>578</sup> Chiduzo *The Significance of Judicial Independence in Human Rights Protection: A Critical Analysis of the Constitutional Reforms in Zimbabwe* 315.

<sup>579</sup> (2/2007) [2008] SADCT (28 November 2008).

<sup>580</sup> Chiduzo *The Significance of Judicial Independence in Human Rights Protection: A Critical Analysis of the Constitutional Reforms in Zimbabwe* 317.

<sup>581</sup> Chiduzo *The Significance of Judicial Independence in Human Rights Protection: A Critical Analysis of the Constitutional Reforms in Zimbabwe* 317.

<sup>582</sup> Cowell 2013 *Human Rights Law Review* 159.

<sup>583</sup> Cowell 2013 *Human Rights Law Review* 159.

<sup>584</sup> Cowell 2013 *Human Rights Law Review* 159.



jurisdiction was incorporated into the Treaty".<sup>585</sup> Therefore Zimbabwe had an obligation under the treaty to implement the decisions of the Tribunal.<sup>586</sup>

However in 2010, the Zimbabwean government lobbied that the SADC Tribunal's capacity to hear individual human rights cases must be suspended. Thus the Tribunal was suspended at the SADC heads of government meeting.<sup>587</sup> This ended the role of the Tribunal to hear individual human rights cases and it restricted the Tribunal to resolve inter-state disputes under SADC treaties.<sup>588</sup> Cowell notes that the agreement to remove the jurisdiction of the SADC Tribunal with regards to hearing human rights cases has led to the weakening of the rule of law amongst the SADC governments and will clearly jeopardise the protection of human rights in the region.<sup>589</sup> Nathan also states that the decision to suspend the Tribunal was influenced by politics and this therefore creates an impression that the protection of state sovereignty is more valuable than the protection of human rights.<sup>590</sup>

The importance of the SADC Tribunal and its role in protecting human rights was expressed in the South African Constitutional Court case of *Government of the Republic of Zimbabwe v Fick and Others*.<sup>591</sup> The Constitutional Court highlighted that there is a problem of the violation of human rights in Africa and therefore the SADC Tribunal had been established to promote and protect fundamental rights and freedoms.<sup>592</sup> Mogoeng J further emphasised that the SADC Tribunal was set up to ensure that no SADC member State was able to undermine the regional development agenda by betraying the objectives of SADC with impunity.<sup>593</sup> The SADC Tribunal has played an important role in protecting human rights within the SADC region.

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<sup>585</sup> Cowell 2013 *Human Rights Law Review* 165. See article 16 of SADC Treaty.

<sup>586</sup> Articles 6 and 16 of the SADC Treaty.

<sup>587</sup> Cowell 2013 *Human Rights Law Review* 154.

<sup>588</sup> Cowell 2013 *Human Rights Law Review* 154.

<sup>589</sup> Cowell 2013 *Human Rights Law Review* 153.

<sup>590</sup> Nathan L "Solidarity triumphs over democracy- the dissolution of the SADC Tribunal" 2011 *Development Dialogue* 123-136.

<sup>591</sup> 2013 (5) SA 325 (CC); 2013 (10) BCLR 1103 (CC).

<sup>592</sup> Chiduzo *The Significance of Judicial Independence in Human Rights Protection: A Critical Analysis of the Constitutional Reforms in Zimbabwe* 319.

<sup>593</sup> Chiduzo *The Significance of Judicial Independence in Human Rights Protection: A Critical Analysis of the Constitutional Reforms in Zimbabwe* 319.

From the above discussion, it is evident that the decision of the SADC Summit to suspend the jurisdiction of the Tribunal to handle human rights cases, has left the SADC citizens with no recourse to justice when their rights are violated by their governments.<sup>594</sup> The African Commission on Human and Peoples' Rights is slow in handling human rights cases, thus the SADC Tribunal offered help for SADC citizens in protecting their human rights.<sup>595</sup> Therefore, it is important that a new SADC Protocol on the SADC Tribunal should give the Tribunal the jurisdiction to hear human rights issues.<sup>596</sup>

#### 4.4.4 *The role of law enforcement officers*

Law enforcement officials play an important role in society, by protecting people and upholding the law.<sup>597</sup> This makes it important that the police and other relevant authorities should not abuse human rights but instead act in a manner that protects the most vulnerable individuals in the society.<sup>598</sup> The Zimbabwe Republic Police (ZRP) is created by the Zimbabwe Constitution 2013.<sup>599</sup> The Zimbabwe Constitution 2013 also makes it mandatory for the ZRP to work within the confines of its constitutional mandate<sup>600</sup> and of international standards.<sup>601</sup> The Zimbabwe Constitution 2013 provides that the ZRP is responsible for investigating, protecting and securing the lives and property of people,<sup>602</sup> preserving the internal security,<sup>603</sup> and maintaining law and order.

<sup>594</sup> Chiduzo *The significance of judicial independence in human rights protection: A critical analysis of the constitutional reforms in Zimbabwe* 320.

<sup>595</sup> Chiduzo *The significance of judicial independence in human rights protection: A critical analysis of the constitutional reforms in Zimbabwe* 320.

<sup>596</sup> Chiduzo *The Significance of Judicial Independence in Human Rights Protection: A Critical Analysis of the Constitutional Reforms in Zimbabwe* 321.

<sup>597</sup> Article 1 of the United Nations Code of Conduct for Law Enforcement Officials was adopted by General Assembly Resolution 34/169 of 17 December 1979. This Code provides that Law enforcement officials shall at all times fulfill the duty imposed upon them by law, by serving the community and by protecting all persons against illegal acts, consistent with the high degree of responsibility required by their profession.

<sup>598</sup> Chiduzo *The significance of judicial independence in human rights protection: A critical analysis of the constitutional reforms in Zimbabwe* 2810.

<sup>599</sup> Section 219 of the Zimbabwe Constitution 2013.

<sup>600</sup> Section 219 (3).

<sup>601</sup> Section 219(2)(c). See Chiduzo *The Significance of Judicial Independence in Human Rights Protection: A Critical Analysis of the Constitutional Reforms in Zimbabwe* 281.

<sup>602</sup> Section 219 (1) (c) of the Zimbabwe Constitution 2013

<sup>603</sup> Section 219 (1) (b) of the Zimbabwe Constitution 2013.

The ZRP and other law enforcement officer are required to uphold the Zimbabwe Constitution 2013 and enforce the law without fear or favour.<sup>604</sup>

The ZRP is regulated by the Police Act of Zimbabwe.<sup>605</sup> The Police Act elaborates on the duties of the police in maintaining public safety and public order.<sup>606</sup> The Police Act also complies with the Zimbabwe Constitution 2013 as it seeks to ensure that the police are responsible for preserving maintaining law and order and in Zimbabwe.<sup>607</sup> Further, there exist a lot of international human rights standard that provide guidelines for law enforcement.<sup>608</sup> Amongst many other international framework such as Code of Conduct for Law Enforcement Officials General Assembly Resolution<sup>609</sup> and Southern African Regional Police Chiefs Cooperation Organisation (SARPCCO) Code of Conduct.<sup>610</sup> This framework includes principles, guidelines, declarations of various authoritative bodies and codes of conduct.<sup>611</sup> Although some of the guidelines are not binding but they carry persuasive guidance with regards to human rights standards that relate to law enforcement.<sup>612</sup> International law demands that any police force in any democratic society must adopt a comprehensive human rights policy.<sup>613</sup> Further, international law

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<sup>604</sup> Section 219 (1) (e) of the Zimbabwe Constitution 2013.

<sup>605</sup> [Chapter 11:10]. Hereinafter referred to as Police Act.

<sup>606</sup> Chiduzo *The Significance of Judicial Independence in Human Rights Protection: A Critical Analysis of the Constitutional Reforms in Zimbabwe* 281.

<sup>607</sup> Section 219 of the Zimbabwe Constitution 2013. See Chiduzo *The Significance of Judicial Independence in Human Rights Protection: A Critical Analysis of the Constitutional Reforms in Zimbabwe* 281.

<sup>608</sup> The overall framework includes guidelines, principles, codes of conduct and declarations of various authoritative bodies. Although some of the guidelines are not binding they do carry persuasive guidance with regards to human rights standards that relate to law enforcement. The instruments include amongst many others the Code of Conduct for Law Enforcement Officials General Assembly Resolution 34/169 of 17 December 1979, the Conventions against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (1984), the United Nations General Assembly Code of Conduct for Law Enforcement Officials (1979), and the Convention on the Elimination of All Forms of Racial Discrimination (1966).

<sup>609</sup> Adopted by General Assembly resolution 34/169 of 17 December 1979. Hereinafter referred to as Code of Conduct for Law Enforcement Officials.

<sup>610</sup> Code of Conduct was developed and adopted at the 6th Annual General Meeting of SARPCCO on 31 August 2001. Hereinafter referred to as the SARPCCO.

<sup>611</sup> Chiduzo *The Significance of Judicial Independence in Human Rights Protection: A Critical Analysis of the Constitutional Reforms in Zimbabwe* 282.

<sup>612</sup> Chiduzo *The Significance of Judicial Independence in Human Rights Protection: A Critical Analysis of the Constitutional Reforms in Zimbabwe* 282.

<sup>613</sup> See Office of the United Nations High Commissioner for Human Rights Professional Training Series No. 5/Add.3 Human Rights Standards and Practice for the Police (2004) 1.



also demands that human rights standards must be incorporated into standing orders for the police and police must be given human rights training regularly.<sup>614</sup>

Regionally Zimbabwe is a member of SARPCCO. This code of conduct outlines the scope of the police duties and serves as a guide in showing how the police can execute those duties and protect human rights.<sup>615</sup> According to SARPCCO the police have a duty not to use excessive force,<sup>616</sup> torture and cruel, inhuman and degrading treatment or punishment is also prohibited.<sup>617</sup> Makwerere argues that in carrying out law enforcement duties, the police should always apply human rights standards, such as, the right to life, right to freedom of expression, privacy, liberty and the protection of the law, prohibition against torture, assembly and association.<sup>618</sup> However, despite the existence of such guidelines that seek to assist the police with issues relating to protection of human rights, the ZRP has over the years been politically influenced to the extent that it has abandoned its constitutional responsibilities and obligations.<sup>619</sup>

Since independence, reports have shown that the ZRP sometimes fail to protect and respect civil and political rights enshrined in the Zimbabwe Constitution 2013 and international covenants.<sup>620</sup> Makwerere reports that members of opposition political parties and civil society activists bear marks of physical torture by the ZRP. This is unfortunate because ZRP claims to protect the rights of all the people.<sup>621</sup> Given this background, some of the duties of police under the SARPCCO Code of Conduct are discussed below.<sup>622</sup>

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<sup>614</sup> See Office of the United Nations High Commissioner for Human Rights Professional Training Series No. 5/Add.3 Human Rights Standards and Practice for the Police (2004) 1.

<sup>615</sup> IDASA (An African Democracy Institute), and the Research and Advocacy Unit (RAU) 2011 *Women and Law enforcement in Zimbabwe* [www.peacewomen.org/.../ssr\\_womenlawenforcementzimbabwerau\\_rau](http://www.peacewomen.org/.../ssr_womenlawenforcementzimbabwerau_rau) [date of use 01 November 2015] 4.

<sup>616</sup> Article 3 of the SARPCCO.

<sup>617</sup> Article 3 of the SARPCCO.

<sup>618</sup> Makwerere "Human rights and policing: A case study of Zimbabwe" 2012 *International Journal of Humanities and Social Science* 129-139.

<sup>619</sup> Makwerere 2012 *International Journal of Humanities and Social Science* 132.

<sup>620</sup> The Redress Trust 2005 *Torture in Zimbabwe, past and present prevention, punishment, reparation?* [www.redress.org/downloads/publications/Amani2005.pdf](http://www.redress.org/downloads/publications/Amani2005.pdf) [date of use 14 October 2015] 21-24.

<sup>621</sup> Makwerere 2012 *International Journal of Humanities and Social Science* 133.

<sup>622</sup> Only the police duties that are related to this research are discussed.

#### 4.4.4.1 Duty not to use excessive force

In Zimbabwe the use of force in effecting arrest is statutorily governed by the Criminal Procedure and Evidence Act.<sup>623</sup> A police officer may use excessive force as is reasonably justifiable in the circumstances of the case for overcoming any resistance by the perpetrator.<sup>624</sup> Where a person is killed as a result of the use of reasonable justifiable force then the killing is lawful.<sup>625</sup> In terms of the Criminal Procedure and Evidence Act<sup>626</sup> police officials may only use force when strictly necessary and to the extent required for the performance of their duties and adhering to national legislation and practice.<sup>627</sup> Only such force as is reasonable in the circumstances may be used to prevent crime or to effect an arrest.<sup>628</sup>

There is evidence that the ZRP officers have overstepped their powers as there are many accusations and allegations by human rights activists and lawyers of violations of human rights through the use of excessive force.<sup>629</sup> For instance, in 2011 Amnesty International reported the widespread use of excessive force by the ZRP which was implicated in numerous cases of torture, assault and ill-treatment, especially, of members of the political opposition parties and those who criticize the government policies.<sup>630</sup>

The ZRP have often used excessive force to disperse peaceful demonstrations, by using live ammunition, which once resulted in the death of the MDC supporter, Gift Tandare, who was shot dead by police.<sup>631</sup> Human rights activists also have repeatedly been victims of police brutality.<sup>632</sup> In 2011, police disrupted another peaceful prayer meeting in Harare. They stormed the church hall during prayer and dispersed the

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<sup>623</sup> Section 42 of the Criminal Procedure and Evidence Act Chapter 9:07. Hereinafter referred to as the Criminal Procedure and Evidence Act.

<sup>624</sup> Section 42(1)(a) of the Criminal Procedure and Evidence Act.

<sup>625</sup> Section 42(2) of the Criminal Procedure and Evidence Act.

<sup>626</sup> Chapter 9:07. Hereinafter referred to as the Criminal Procedure and Evidence Act.

<sup>627</sup> Section 42 of the Criminal Procedure and Evidence Act.

<sup>628</sup> Section 42(1)(b) of the Criminal Procedure and Evidence Act.

<sup>629</sup> Makwerere 2012 *International Journal of Humanities and Social Science* 132.

<sup>630</sup> Makwerere 2012 *International Journal of Humanities and Social Science* 132.

<sup>631</sup> Bruce D et al *Policing and Human Rights Assessing Southern African Countries' Compliance with the SARPCCO Code of Conduct for Police Officials* (African Minds Publishers Cape Town 2012) 186.

<sup>632</sup> Bruce et al *Policing and Human Rights Assessing Southern African Countries' Compliance with the SARPCCO Code of Conduct for Police Officials* 186.





congregation, which included many church members, community leaders and the community at large.<sup>633</sup> Congregants were severely tortured and assaulted.<sup>634</sup> The ZRP fired teargas canisters indiscriminately and arrested twelve people including four pastors.<sup>635</sup> From the above events the key question can be asked is the use of force applied by the police reasonably justifiable in the circumstances? Did they resist arrest? It seems that there is a tendency among the police to apply the Criminal Procedure and Evidence Act unlawfully.

#### 4.4.4.2 Torture and cruel, inhuman and degrading treatment or punishment

The SARPCCO states that, no police official under any circumstances shall inflict, instigate or tolerate any act of torture or other cruel, inhuman or degrading treatment or punishment in any person.<sup>636</sup> Zimbabwe is one of the few Southern African states that have not ratified the United Nations Convention against Torture.<sup>637</sup> The Zimbabwe Constitution 2013 prohibits torture and this prohibition binds all natural persons.<sup>638</sup> It was reported that the police, state security agents, and ZANU-PF supporters have been involved in human rights violations, specifically, in torture cases.<sup>639</sup> This shows that law enforcement officers are used to push the political agenda. People in Zimbabwe have been subjected to torture and ill-treatment during public gatherings, arrests and when in custody, especially, during elections.<sup>640</sup> During the 2008 election period, Human Rights Watch reported that more than 5 000 people were tortured by the ZANU-PF-led

<sup>633</sup> Anon 2011 *13 Congregants still in police custody as police violate mukoyi's right to health* [http://www.zimbabwesituation.com/apr12\\_2011.html](http://www.zimbabwesituation.com/apr12_2011.html) [date of use 01 October 2015] 4.

<sup>634</sup> Atwood A 2011 *Police violently suppress prayer for peace* [www.kubatanablogs.net/.../police-violently-suppress-prayer-for-peace](http://www.kubatanablogs.net/.../police-violently-suppress-prayer-for-peace) [date of use 25 October 2015] 2.

<sup>635</sup> Atwood 2011 [www.kubatanablogs.net/.../police-violently-suppress-prayer-for-peace](http://www.kubatanablogs.net/.../police-violently-suppress-prayer-for-peace) [date of use 30 July 2014] 2.

<sup>636</sup> Article 4 of the SARPCCO. See Southern African Regional Police Chiefs Co-operation Organisation 2001 Harare resolution on the SARPCCO code of conduct for police officials [www.apf.ch/content/files\\_res/SARPCCO](http://www.apf.ch/content/files_res/SARPCCO) [22 October 2015] 3.

<sup>637</sup> Adopted by General Assembly resolution 39/46 on 10 December 1984 in New York. Hereinafter referred to as the CAT.

<sup>638</sup> Section 58 of the Zimbabwe Constitution 2013.

<sup>639</sup> Human rights watch 2011 *Perpetual fear impunity and cycles of violence in Zimbabwe* <http://www.hrw.org/news/2011/03/08/zimbabwe-no-justice-rampant-killings-torture> [date of use 30 October 2015] 4.

<sup>640</sup> Tsunga 2012 *Zimbabwe ongoing risks for human rights defenders in the context of political deadlock and pre-electoral period* [reliefweb.int/sites/reliefweb.int/files/resources/full%20report\\_173.pdf](http://reliefweb.int/sites/reliefweb.int/files/resources/full%20report_173.pdf) [date of use 01 October 2015] 16.



government.<sup>641</sup> Although three political parties now share responsibility over government affairs, and the Ministry of Home Affairs is now controlled by ZANU-PF and MDC-T ministers, challenges relating to the continued use of torture remain.<sup>642</sup>

In the case *Mukoko v Attorney-General and Others*<sup>643</sup> a civil society leader, Jestina Mukoko was abducted from home and subjected to torture, an inhuman and degrading treatment by the police. The Supreme Court ordered the Attorney-General to stop the criminal proceedings against her.<sup>644</sup> Despite the court ruling that acts of torture had been committed in terms of international law, none of these officials were held accountable because torture is not a crime in Zimbabwe.<sup>645</sup> Even where the ZRP is not the direct perpetrators or directly involved in violence, the ZRP is sometimes complicit by failing to take action against the actual perpetrators.<sup>646</sup>

#### 4.4.4.3 Respect for the rule of law

The ZRP is entrusted with the duty of maintaining the law and order which is necessary for the enjoyment of human rights.<sup>647</sup> Maseng defines the rule of law as written laws which embody the human rights traditions accepted virtually universally, and which protect individuals and order society in the respective nations of the world.<sup>648</sup> Hence the rule of law is important for strengthening democracy. When carrying out its duties the ZRP should always apply human rights standards.<sup>649</sup> The main examples of human rights that should be adhered to when exercising this duty are the right to life, protection against torture, liberty, privacy, protection of the law, expression, assembly and

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<sup>641</sup> Human Rights Watch 2011 <http://www.hrw.org/news/2011/03/08/zimbabwe-no-justice-rampant-killings-torture> [date of use 30 October 2015] 20.

<sup>642</sup> Bruce *et al* *Policing and Human Rights Assessing Southern African Countries' Compliance with the SARPCCO Code of Conduct for Police Officials* 189.

<sup>643</sup> [2012] ZWSC 11.

<sup>644</sup> [2012] ZWSC 11. See Magaisa 2012 <http://nehandaradio.com/2012/10/05/a-look-at-judgment-in-jestina-mukoko-torture-case/> [date of use 01 October 2015] 2.

<sup>645</sup> Magaisa 2012 *A look at judgment in Jestina Mukoko torture case* <http://nehandaradio.com/2012/10/05/a-look-at-judgment-in-jestina-mukoko-torture-case/> [date of use 01 October 2015] 2.

<sup>646</sup> Amnesty International 2002 *Policing to protect human rights* <https://www.amnesty.org/download/Documents/.../afr030042002en.pdf> [11 November 2015] 8.

<sup>647</sup> Section 219 (1) (d) of the Zimbabwe Constitution 2013. See also Article 7 of SARPCCO.

<sup>648</sup> Maseng JO *The State, Civil Society and Underdevelopment: The Case of Zimbabwe* (Masters in Political Science NWU- Vaal Triangle Campus 2010) 17.

<sup>649</sup> Makwerere 2012 *International Journal of Humanities and Social Science* 132.

association.<sup>650</sup> The powers of the ZRP entail great responsibilities and have a great impact on the relationship between the police and the public.<sup>651</sup> If the ZRP and other law enforcement authorities do not respect human rights or fail to apply human rights standards, their relationship with the public will be weakened and will make their work more difficult.<sup>652</sup> In this regard, the ZRP should note that effective policing requires co-operation with the public.<sup>653</sup>

The Zimbabwe Constitution 2013 requires the ZRP and other relevant persons to respect and uphold the rule of law.<sup>654</sup> Over the past decade, human rights defenders have argued that the ZRP does not respect the rule of law.<sup>655</sup> One of the allegations against the police and the judiciary has been their failure to uphold the rule of law when matters are of a political nature.<sup>656</sup> The African Democracy Institute and Research and Advocacy Unit reports that women activists were arrested and unnecessary violence was used on them and they were being detained beyond the prescribed 48 hours.<sup>657</sup> In some instances, the police did not take women activists into custody, but assaulted them as they were aware that there was no possibility of conviction if formal charges were laid against them.<sup>658</sup>

Due to the continued violation of human rights by law enforcement officers, it is submitted that the ZRP should abide by their constitutional duty of protecting the

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<sup>650</sup> Makwerere 2012 *International Journal of Humanities and Social Science* 132.

<sup>651</sup> Makwerere 2012 *International Journal of Humanities and Social Science* 131.

<sup>652</sup> Makwerere 2012 *International Journal of Humanities and Social Science* 133.

<sup>653</sup> Michael Rowe *Introduction to Policing* (British Library Cataloguing Publication Unknown 2014) 18.

<sup>654</sup> Section 219 (1) (e).

<sup>655</sup> International Bar Association 2007 *Partisan policing: An obstacle to human rights and democracy in Zimbabwe* [www.ibanet.org/Document/Default.aspx?DocumentUid=e4d35d9f](http://www.ibanet.org/Document/Default.aspx?DocumentUid=e4d35d9f) [date of use 02 October 2015] 42.

<sup>656</sup> IDASA (An African Democracy Institute), and the Research and Advocacy Unit (RAU) 2011 [www.peacewomen.org/.../ssr\\_womenlawenforcementzimbabwerau\\_rau](http://www.peacewomen.org/.../ssr_womenlawenforcementzimbabwerau_rau) [date of use 22 October 2015] 2.

<sup>657</sup> IDASA (An African Democracy Institute), and the Research and Advocacy Unit (RAU) 2011 [www.peacewomen.org/.../ssr\\_womenlawenforcementzimbabwerau\\_rau](http://www.peacewomen.org/.../ssr_womenlawenforcementzimbabwerau_rau) [date of use 22 October 2015] 2.

<sup>658</sup> IDASA (An African Democracy Institute), and the Research and Advocacy Unit (RAU) 2011 [www.peacewomen.org/.../ssr\\_womenlawenforcementzimbabwerau\\_rau](http://www.peacewomen.org/.../ssr_womenlawenforcementzimbabwerau_rau) [date of use 22 October 2015] 6.



society.<sup>659</sup> One of the questions that must be addressed is how the issue of the violation of human rights by the ZRP can be adequately addressed? As highlighted previously in this chapter, the ZRP has been used by the government to advance their own political interests in violation of Zimbabwe Constitution 2013. Therefore, there must be some change in order to improve the ZRP's image and its constitutional mandate with regard to protection and enforcement of human rights.<sup>660</sup> It is important that such improvements ensure that the ZRP conduct itself as a national security service charged by the Zimbabwe Constitution 2013 and statute with ensuring public order and security in Zimbabwe.<sup>661</sup> However, it is important that the government refrain from interfering with the duties of the ZRP so that the ZRP can perform their constitutional mandate effectively.<sup>662</sup> Therefore, the government of Zimbabwe must be willing to support such change as it can be seen from the above discussion how the ZRP has been politically influenced by the government.<sup>663</sup> It is also important that the government respects the Zimbabwe Constitution 2013 and ensures that it brings to an end the use of the law enforcement officers and the ZRP for political activities of the ZANU-PF.<sup>664</sup>

#### **4.5 The role of the civil society in Zimbabwe**

The civil society compliments the role of the state in promoting human rights.<sup>665</sup> The civil society is defined as those organisations formed by the society whose main purpose is to promote and protect human rights voluntarily.<sup>666</sup> Examples of civil society organisations are academics, human rights defenders, non-governmental organisations (NGOs), non-profit organisations (NPOs), trade unions, private voluntary organisations

<sup>659</sup> Chiduzo *The Significance of Judicial Independence in Human Rights Protection: A Critical Analysis of the Constitutional Reforms in Zimbabwe* 285.

<sup>660</sup> Chiduzo *The Significance of Judicial Independence in Human Rights Protection: A Critical Analysis of the Constitutional Reforms in Zimbabwe* 285.

<sup>661</sup> Chiduzo *The Significance of Judicial Independence in Human Rights Protection: A Critical Analysis of the Constitutional Reforms in Zimbabwe* 285.

<sup>662</sup> Chiduzo *The Significance of Judicial Independence in Human Rights Protection: A Critical Analysis of the Constitutional Reforms in Zimbabwe* 285.

<sup>663</sup> Chiduzo *The Significance of Judicial Independence in Human Rights Protection: A Critical Analysis of the Constitutional Reforms in Zimbabwe* 285.

<sup>664</sup> Chiduzo *The Significance of Judicial Independence in Human Rights Protection: A Critical Analysis of the Constitutional Reforms in Zimbabwe* 285.

<sup>665</sup> Zimbabwe Human Rights NGO Forum 2013 *Who will defend the human rights defenders? A report on the harassment of human rights activists in Zimbabwe 2012 – February 2013* [www.hrforumzim.org](http://www.hrforumzim.org) [date of use 25 October 2015] 3.

<sup>666</sup> Maseng *The State, Civil Society and Underdevelopment: The Case of Zimbabwe* 1.



(PVOs) and religious organisations.<sup>667</sup> Maseng argues that the role of civil society comes in two ways:

“One is democratic consolidation and the other is democratic transitions. In democratic consolidation civil society plays a role through the support and maintenance of democratic principles and institutions. Equally, in democratic transitions civil society plays a major role in mobilising pressure for political change.”<sup>668</sup>

Therefore civil society organisation plays an important role in a democratic transition. In recognising the work and importance of civil society a number of international and domestic instruments have been put into place to protect the work of civil society globally. The main instrument that protects the rights of civil society internationally is the United Nations Declaration on the Right and Responsibility of Individuals, and Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms (commonly known as the Declaration on Human Rights Defenders).<sup>669</sup> The Declaration on Human Rights Defenders sets out international standards that seek to protect the activities of civil society organisations globally.<sup>670</sup> It also protects the rights of civil society organisations globally and these rights include, amongst many others, the right to discuss and develop human rights ideas and advocate for their acceptance,<sup>671</sup> the right to criticise government bodies and agencies and to make proposals to improve their functioning,<sup>672</sup> and the right to provide legal assistance or other advice and assistance in defence of human rights.<sup>673</sup> The Zimbabwean government has a responsibility to implement and



<sup>667</sup> Maseng *The State, Civil Society and Underdevelopment: The Case of Zimbabwe* 1.

<sup>668</sup> Maseng *The State, Civil Society and Underdevelopment: The Case of Zimbabwe* 21.

<sup>669</sup> A/RES/53/144 8 March 1999.

<sup>670</sup> Chiduzo *The Significance of Judicial Independence in Human Rights Protection: A Critical Analysis of the Constitutional Reforms in Zimbabwe* 303.

<sup>671</sup> Article 7 of the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms.

<sup>672</sup> Article 9(3)(c) of the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms.

<sup>673</sup> Article 8(2) of the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms. See Chiduzo *The Significance of Judicial Independence in Human Rights Protection: A Critical Analysis of the Constitutional Reforms in Zimbabwe* 303.

respect all the provisions of the Declaration and to protect civil society organisations against any violence and intimidation.<sup>674</sup>

However, despite the importance of the work of the civil society in promoting and protecting human rights, their work in Zimbabwe has over the years been undermined and limited.<sup>675</sup> Both the state and civil society have contributed towards the attainment of independence and the development of Zimbabwe.<sup>676</sup> However, from the 1990s civil society in Zimbabwe has not enjoyed working together with the state and this has caused tension between the two.<sup>677</sup> The civil society in Zimbabwe has faced obstacles in their pursuit to promote and protect human rights.<sup>678</sup> Such obstacles have ranged from harassing and intimidating them through police summon, disruption of assemblies and protests, police violence, propaganda and slandering, threats of closure, and deterrence from participating in international and regional meetings.<sup>679</sup> They also monitored and exposed human rights violations.<sup>680</sup> Thus fear of exposure and to be held accountable for human rights violations has resulted in attempts by the government to limit the operations of the civil society and force them to either follow what the government wants or stop their work all together.<sup>681</sup>

The relationship between the state and civil society in Zimbabwe is also weakened by repressive legislation and regulations that limit the operations of civil society organisations.<sup>682</sup> Legislation such as the AIPPA has been used to threaten, harass, and intimidate the civil society members.<sup>683</sup> Moreover, the POSA has also been used to ban public meetings and activities of civil society, thus limiting freedom of peaceful

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<sup>674</sup> Chiduzo *The Significance of Judicial Independence in Human Rights Protection: A Critical Analysis of the Constitutional Reforms in Zimbabwe* 303.

<sup>675</sup> Chiduzo *The Significance of Judicial Independence in Human Rights Protection: A Critical Analysis of the Constitutional Reforms in Zimbabwe* 306.

<sup>676</sup> Maseng *The State, Civil Society and Underdevelopment: The Case of Zimbabwe* 1.

<sup>677</sup> Maseng *The State, Civil Society and Underdevelopment: The Case of Zimbabwe* 1.

<sup>678</sup> Chiduzo *The Significance of Judicial Independence in Human Rights Protection: A Critical Analysis of the Constitutional Reforms in Zimbabwe* 306.

<sup>679</sup> Zimbabwe Human Rights NGO Forum 2013 [www.hrforumzim.org](http://www.hrforumzim.org) [date of use 25 October 2015] 3.

<sup>680</sup> Zimbabwe Human Rights NGO Forum 2013 [www.hrforumzim.org](http://www.hrforumzim.org) [date of use 25 October 2015] 4.

<sup>681</sup> Zimbabwe Human Rights NGO Forum 2013 [www.hrforumzim.org](http://www.hrforumzim.org) [date of use 25 October 2015] 4.

<sup>682</sup> Maseng *The State, Civil Society and Underdevelopment: The Case of Zimbabwe* 2.

<sup>683</sup> See the discussion above.



assembly.<sup>684</sup> The work of NGOs in Zimbabwe has also been limited through the enactment of the PVOA.<sup>685</sup> The PVOA requires all organisations that provide welfare services or treatment or any activities that uplift the standard of living of persons or families to register with the government.<sup>686</sup> Registration of these organisations is not automatic as the government has the right to deny an organisation to register after looking at its financial books.<sup>687</sup> In order to control the activities of NGOs, the PVOA contains restrictions on foreign funding to civil society organisations and such foreign funding was later banned in a later amendment to the PVOA.<sup>688</sup> Such measures have limited the operations of many NGOs in Zimbabwe and as a result, some of the NGOs were forced to close down because of financial problems.<sup>689</sup> This has negatively impacted on the promotion and protection of human rights in Zimbabwe.<sup>690</sup>

The discussion above highlights the importance of civil society organisations in the protection of human rights in Zimbabwe. However, as discussed above, an unfriendly environment has been created by the government of Zimbabwe in seeking to limit the work of civil society organisations.<sup>691</sup> As a result this has had a negative impact on the promotion and protection of human rights in Zimbabwe.<sup>692</sup> Therefore, it is important that the government of Zimbabwe respects the institutions that have been established to give effect to the Zimbabwe Constitution 2013.<sup>693</sup> The government should put in place practical measures aimed at creating a safe environment that enable and empower civil

<sup>684</sup> See the discussion above.

<sup>685</sup> 22 of 2001/Chapter 17:05. Hereinafter referred to as the PVOA.

<sup>686</sup> Mapuva and Muyengwa 2012 *PER* 130.

<sup>687</sup> Private Voluntary Organisations Act 22 of 2001/Chapter 17:05 General Notice of 2007 –Code of Procedure for the Registration and Operations of Non-Governmental Organisations in Zimbabwe.

<sup>688</sup> Private Voluntary Organisations Act 22 of 2001/Chapter 17:05 General Notice of 2007 –Code of Procedure for the Registration and Operations of Non-Governmental Organisations in Zimbabwe. See also Chiduzo *The Significance of Judicial Independence in Human Rights Protection: A Critical Analysis of the Constitutional Reforms in Zimbabwe* 308.

<sup>689</sup> Nehanda Radio 2012 *ZANU-PF Ban of NGO's in Zimbabwe self-defeating* <http://nehandaradio.com/2012/02/19/zanu-pf-ban-of-ngos-in-zimbabwe-self-defeating/> [date of use 06 November 2015] 2.

<sup>690</sup> Chiduzo *The Significance of Judicial Independence in Human Rights Protection: A Critical Analysis of the Constitutional Reforms in Zimbabwe* 308.

<sup>691</sup> Chiduzo *The Significance of Judicial Independence in Human Rights Protection: A Critical Analysis of the Constitutional Reforms in Zimbabwe* 309.

<sup>692</sup> Chiduzo *The Significance of Judicial Independence in Human Rights Protection: A Critical Analysis of the Constitutional Reforms in Zimbabwe* 309.

<sup>693</sup> Chiduzo *The Significance of Judicial Independence in Human Rights Protection: A Critical Analysis of the Constitutional Reforms in Zimbabwe* 309.



society organisations to pursue their activities freely and without undue limitations.<sup>694</sup> This will ensure that the government acknowledges international regulations or declarations such as the Declaration on Human Rights Defenders.

#### **4.6 Conclusion**

The importance of human rights protection has over the years been given a lot of attention by the international community and national governments.<sup>695</sup> The international law mandates States to adopt and implement domestic measures to promote and protect human rights.<sup>696</sup> Zimbabwe has adopted such measures but political interference has affected their effectiveness.<sup>697</sup> Thus the protection of civil and political rights has been undermined by the government.<sup>698</sup> It is therefore, important that the measures discussed in this Chapter are enforced in order to address all the gaps that were stated. Political willingness to adopt adequate preventative measures could improve or curb human rights abuses in Zimbabwe. If the measures discussed in this chapter are properly implemented and complemented by the constitutional reforms, there is no doubt that there will be an improvement in the promotion and protection of civil and political rights in Zimbabwe.

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<sup>694</sup> See Guidelines on the Protection of Human Rights Defenders.

<sup>695</sup> Ramcharan BG *The Law, Policy and Politics of the UN Human Rights Council* (Hotei Publishing Netherland 2015) 84

<sup>696</sup> Chiduzo *The Significance of Judicial Independence in Human Rights Protection: A Critical Analysis of the Constitutional Reforms in Zimbabwe* 323.

<sup>697</sup> Chiduzo *The Significance of Judicial Independence in Human Rights Protection: A Critical Analysis of the Constitutional Reforms in Zimbabwe* 323.

<sup>698</sup> Chiduzo *The Significance of Judicial Independence in Human Rights Protection: A Critical Analysis of the Constitutional Reforms in Zimbabwe* 323.

## CHAPTER FIVE: RECOMMENDATIONS AND CONCLUSION

### 5.1 Introduction

This chapter provides overall conclusions discussions on the protection and enforcement of civil and political rights in Zimbabwe as indicated in the preceding chapters. Moreover, this chapter analyses whether the Zimbabwe Constitution 2013 has adequately provided for the protection of civil and political rights in line with regional and international standards. For instance, this research has noted and discussed the problem of violation of selected civil and political rights in Zimbabwe.<sup>699</sup> This problem has been attributed to the government's reliance on repressive legislation and other institutions to violate the rights of ordinary people and human rights defenders.<sup>700</sup> In this regard, this research has noted the importance of protecting human rights by individuals and all institutions that are responsible for the protection of human rights in Zimbabwe.<sup>701</sup> This chapter provides some recommendations that could be utilised by the government and other relevant authorities to improve the protection of civil and political rights in Zimbabwe.

### 5.2 Recommendations

As indicated in the previous chapters and given the various problems and challenges that are still associated with the abuse and violation of human rights in Zimbabwe it is recommended that:

- (a) ***All the statutes or Acts of Parliament that are inconsistent with the Zimbabwe Constitution 2013 should be repealed and/or aligned with the aforesaid Constitution***

It is submitted that the government of Zimbabwe must in accordance with the Zimbabwe Constitution 2013 amend or repeal legislation such as the Public Order and Security Act (POSA),<sup>702</sup> the Access to Information and Protection of Privacy Act (AIPPA),<sup>703</sup> and the

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<sup>699</sup> See Chapter Three and Four.

<sup>700</sup> Zimbabwe Human Rights Non-Governmental Organisation Forum 2013 *Who will defend the human rights defenders?* [reliefweb.int/sites/.../Who-will-defend-the-human-rights-defenders.pdf](http://reliefweb.int/sites/.../Who-will-defend-the-human-rights-defenders.pdf) [11 November 2015] 3.

<sup>701</sup> See Chapter four.

<sup>702</sup> Chapter 11:17. Hereinafter referred to as the POSA.

Private Voluntary Organisations Act<sup>704</sup> which are sometimes arbitrarily used by the government authorities and institutions to limit civil and political rights in Zimbabwe. As has been discussed in Chapters three and four, the AIPPA, the POSA and the PVO have been used by the government and other authorities to limit the right to freedom of assembly and association,<sup>705</sup> the right to freedom to demonstrate and petition<sup>706</sup> and the right to freedom of expression.<sup>707</sup> Some of the provisions of the AIPPA, the POSA and the PVO do not encourage the promotion and protection of human rights in Zimbabwe. Moreover, the aforesaid legislation does not allow human rights defenders and NGOs to conduct their duties freely. In this regard any amendment should be done in line with international law and the Zimbabwe Constitution 2013. For instance, with regard to the POSA, it is submitted that:

(i) The POSA should be amended to enact a section or statement that reminds the police officers to protect or serve everyone, regardless of their political affiliation, colour and gender.<sup>708</sup>

(ii) The POSA should be further amended to enact a section that makes it clear that the police have no power to refuse permission to any persons to conduct peaceful gatherings, and that failure to give notice will not render a gathering unlawful or make the organiser liable to criminal prosecution.<sup>709</sup>

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<sup>703</sup> 2002. Hereinafter referred to as the AIPPA.

<sup>704</sup> 22 of 2001/Chapter 17:05. Hereinafter referred to as the PVO.

<sup>705</sup> Section 58 of the Zimbabwe Constitution 2013.

<sup>706</sup> Section 59 of the Zimbabwe Constitution 2013.

<sup>707</sup> Section 9 of the Zimbabwe Constitution 2013.

<sup>708</sup> Sokwanele 2004 *Public Order and Security Act – Zimbabwe*

[http://archive.kubatana.net/html/archive/legisl/040823sokwanele.asp?sector=LEGISL&year=2004&range\\_start=91](http://archive.kubatana.net/html/archive/legisl/040823sokwanele.asp?sector=LEGISL&year=2004&range_start=91) [date of use 26 October 2015] 3.

<sup>709</sup> Sokwanele 2004

[http://archive.kubatana.net/html/archive/legisl/040823sokwanele.asp?sector=LEGISL&year=2004&range\\_start=91](http://archive.kubatana.net/html/archive/legisl/040823sokwanele.asp?sector=LEGISL&year=2004&range_start=91) [date of use 26 October 2015] 3.



**(b) Zimbabwe should also seriously consider ratifying the United Nations Convention Against Torture (CAT)<sup>710</sup>**

To date Zimbabwe has not ratified the CAT. The first step that Zimbabwe must take is to ratify the CAT. The next step is to align Zimbabwe's position on torture with international law by enacting a legislation which is compliant with the requirements of the CAT and which puts the necessary structures in place to prevent the occurrences of torture. Currently, there is no legislation that specifically prohibits torture,<sup>711</sup> the Zimbabwe Constitution 2013<sup>712</sup> is the only law that prohibits torture. Consequently it is submitted that all the relevant legislation in Zimbabwe should contain a definition of torture similar to that of the CAT. Moreover the act of torture should be clearly identified as a criminal offence in that legislation in Zimbabwe.

**(c) Zimbabwe should consistently respect international and regional instruments that it has ratified**

Zimbabwe as a party to various international treaties including but not limited to the International Covenant on Civil and Political Rights (ICCPR), the African Charter on Human and Peoples' Rights (ACHPR), the African Charter on the Rights and Welfare of the Child (ACRWC) should implement the obligations imposed by these treaties.<sup>713</sup> The Zimbabwean government should domesticate these treaties by legislation that is consistent with the provisions of those treaties. The mandate of institutions that promote and protect human rights should also be in line with international standards such as the Paris Principles and other international guidelines. Adherence to these international and regional instruments could help Zimbabwe to uphold its international obligations.<sup>714</sup>

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<sup>710</sup> Adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984. Entry into force 26 June 1987, in accordance with article 27 (1). Hereinafter referred to as CAT

<sup>711</sup> GOV.UK 2015 *Corporate report Zimbabwe - Country of Concern* <https://www.gov.uk/government/publications/zimbabwe-country-of-concern/zimbabwe-country-of-concern> [date of use 12 November 2015] 5.

<sup>712</sup> Section 53.

<sup>713</sup> Chiduzo *The Significance of Judicial Independence in Human Rights Protection: a Critical Analysis of the Constitutional Reforms in Zimbabwe* 330.

<sup>714</sup> Chiduzo *The significance of judicial independence in human rights protection: a critical analysis of the constitutional reforms in Zimbabwe* 330.

Consequently, this could go a long way in resolving Zimbabwean's relations with the wider international community.<sup>715</sup>

**(d) *Law enforcement and policing standards should conform with the relevant international best practices***

It is important that since Zimbabwe has ratified international law that promotes and protects human rights, the policing standards in the Zimbabwe should conform with international standards.<sup>716</sup> As a member of the African Union (AU), the Southern African Development Community (SADC) and the United Nations (UN), Zimbabwe should ensure that ZRP are guided by effective laws and standards to protect all the fundamental rights that are enshrined in a number of international instruments to which the country is a state party.<sup>717</sup> Although some of the police code of conduct or law enforcement standards are not binding they can be used to guide the conduct of the police in Zimbabwe with regards to protecting human rights.<sup>718</sup> For instance, the International Human Rights Standards for Law provides legal and ethical standards that guide the conduct of the police.<sup>719</sup> These standards include the importance for law enforcement officials to respect and obey the law at all times,<sup>720</sup> the importance of law enforcement officials to respect and protect human dignity<sup>721</sup> and maintain or uphold the rights of all persons.<sup>722</sup> Zimbabwe as a member of the Southern African Regional Police Chiefs Co-operation Organisation (SARPPCO) should also make every effort to have its

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<sup>715</sup> Chiduzo *The significance of judicial independence in human rights protection: a critical analysis of the constitutional reforms in Zimbabwe* 330.

<sup>716</sup> Chiduzo *The significance of judicial independence in human rights protection: a critical analysis of the constitutional reforms in Zimbabwe* 290.

<sup>717</sup> Chiduzo *The significance of judicial independence in human rights protection: a critical analysis of the constitutional reforms in Zimbabwe* 290.

<sup>718</sup> Chiduzo *The significance of judicial independence in human rights protection: a critical analysis of the constitutional reforms in Zimbabwe* 290.

<sup>719</sup> Chiduzo *The significance of judicial independence in human rights protection: a critical analysis of the constitutional reforms in Zimbabwe* 290.

<sup>720</sup> Article 1 and Article 8 of the International Human Rights Standards for Law Enforcement Code of Conduct.

<sup>721</sup> Article 11 of Universal Declaration of Human Rights, Article 11 International Civil and Political Rights and Rule 84(2) of Principles of Detention or Imprisonment, principle 36.

<sup>722</sup> Article 11 of Universal Declaration of Human Rights, Article 11 International Civil and Political Rights and Rule 84(2) of Principles of Detention or Imprisonment, principle 36. See Chiduzo *The significance of judicial independence in human rights protection: a critical analysis of the constitutional reforms in Zimbabwe* 290.



legislation conform to SARPCCO standards.<sup>723</sup> The International Bar Association (IBA) found in 2007 that the conduct of the police in Zimbabwe did not conform to the SARPCCO Code of Conduct.<sup>724</sup> The report of the International Bar Association found that the following articles of the Code of Conduct were breached by ZRP: article 1,<sup>725</sup> 3,<sup>726</sup> 4.<sup>727</sup> Thus Zimbabwe being a member of the SARPCCO has not stopped from violating the Code of Conduct, particularly in relation to political independence, human rights and the rule of law. It is therefore, important that Zimbabwe should be guided by the Code of Conduct of SARPCCO.

**(e) *The ZRP and other law enforcement authorities should not engage in politically related activities***

In order to improve the conduct of the police and ensure that it remains free from politically related activities in conducting its duties, the Zimbabwe Constitution 2013 provides that the law enforcement authorities such as the ZRP must be national in character, patriotic, professional and subordinate to the civilian authority.<sup>728</sup> These provisions should therefore remind the ZRP and other law enforcement authorities that it is important to uphold their constitutional obligations.<sup>729</sup> The government must also stop using the ZRP to advance their own interest that is inconsistent with the Zimbabwe Constitution 2013. It is also submitted that in order for the ZRP to be effective the, government must ensure that the ZRP is able to conduct its constitutional duties without any political interference.<sup>730</sup> Therefore, it is important that the government respects the

<sup>723</sup> Makwerere "Human Rights and Policing: A Case Study of Zimbabwe" 2012 *International Journal of Humanities and Social Science* 129-139

<sup>724</sup> Bruce D et al *Policing and Human Rights Assessing Southern African Countries' Compliance with the SARPCCO Code of Conduct for Police Officials* (African Minds Publishers Cape Town 2012) 195.

<sup>725</sup> Article 1 of the SARPCCO Code of Conduct is about respect for human rights.

<sup>726</sup> Article 3 of the SARPCCO Code of Conduct is about the use of force.

<sup>727</sup> Article 3 of the SARPCCO Code of Conduct is about prohibition against torture, cruel, inhuman or degrading treatment.

<sup>728</sup> Section 219(3) of the Zimbabwe Constitution 2013. See Chiduzo *The Significance of Judicial Independence in Human Rights Protection: a Critical Analysis of the Constitutional Reforms in Zimbabwe* 285.

<sup>729</sup> Chiduzo *The Significance of Judicial Independence in Human Rights Protection: a Critical Analysis of the Constitutional Reforms in Zimbabwe* 285.

<sup>730</sup> Chiduzo *The Significance of Judicial Independence in Human Rights Protection: a Critical Analysis of the Constitutional Reforms in Zimbabwe* 285.



Zimbabwe Constitution 2013 and the role of the law enforcement authorities in Zimbabwe.

**(f) *The government must respect all human rights institutions***

This research also recognises that in order to improve the promotion and protection of civil and political rights in Zimbabwe, there is a need for the government to refrain from interfering with the functions of the independent human rights institutions.<sup>731</sup> The government can do this by creating a politically free environment. This means that political will and commitment are also needed from the government.<sup>732</sup> This is important as independent human rights institutions will be able to do their work freely and effectively. The government should also allow the independent institutions to carry out their constitutional mandate without fear and favour.<sup>733</sup> On the other hand, the employees of these institutions should not be involved in politics or be members of any political party.<sup>734</sup> The President and the Committee on Standing Rules and Orders should also ensure that individuals that are appointed to these institutions are fit and proper persons and have no close relationship with any political party.<sup>735</sup> Moreover, the government should provide sufficient funding for the Zimbabwe Human Rights Commission and should respect its role and functions in the protection of human rights in Zimbabwe.<sup>736</sup>

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<sup>731</sup> Section 235(3) of the Zimbabwe Constitution 2013.

<sup>732</sup> Chiduzi *The Significance of Judicial Independence in Human Rights Protection: a Critical Analysis of the Constitutional Reforms in Zimbabwe* 328.

<sup>733</sup> Section 235(1)(c) of the Zimbabwe Constitution 2013.

<sup>734</sup> Section 236 (3) of the Zimbabwe Constitution 2013.

<sup>735</sup> Section 236 (1) (b) of the Zimbabwe Constitution 2013. See Chiduzi *The Significance of Judicial Independence in Human Rights Protection: a Critical Analysis of the Constitutional Reforms in Zimbabwe* 329.

<sup>736</sup> Section 235 (2) of the Zimbabwe Constitution 2013.

**(g) *The government should consistently support the work of NGOs and human rights defenders***

As has been noted in this research, ZANU-PF has over the years had suspicions that civil society organisations work with opposition political parties to change the government in Zimbabwe.<sup>737</sup> Thus, the activities of NGOs and Human Rights Defenders have been limited through the enactment of legislation which caused the human rights violations in Zimbabwe to escalate.<sup>738</sup> Civil society organisations have played and still play an important role in Zimbabwe with regard to promoting and protecting human rights.<sup>739</sup> As a result of this crucial role, the government of Zimbabwe should provide them with a politically free environment, repeal or amend legislation that limits the activities of civil society organisations in order to exercise their rights freely.<sup>740</sup> Civil society can assist the government in coming up with legislation which will foster a good environment for the promotion and protection of civil and political rights

**(h) *The government should consider abolishing the death penalty***

Although death penalty is legal in Zimbabwe, it has been 10 years without execution and Amnesty International has reported that there are still 95 prisoners on death row.<sup>741</sup> It does not help to legalise death penalty while the government does not put it into practice. Therefore the government of Zimbabwe should consider abolishing the death penalty.



<sup>737</sup> Amnesty International 2004 *Human rights defenders under siege* [reliefweb.int/.../2F0AB284831BBE9D49256FFD000D5C65-ai-zwe-10m](http://reliefweb.int/.../2F0AB284831BBE9D49256FFD000D5C65-ai-zwe-10m) [date of use 09 November 2015] 5-6. See Chidzuza *The Significance of Judicial Independence in Human Rights Protection: a Critical Analysis of the Constitutional Reforms in Zimbabwe* 329.

<sup>738</sup> Chidzuza *The Significance of Judicial Independence in Human Rights Protection: a Critical Analysis of the Constitutional Reforms in Zimbabwe* 329.

<sup>739</sup> Chidzuza *The Significance of Judicial Independence in Human Rights Protection: a Critical Analysis of the Constitutional Reforms in Zimbabwe* 329.

<sup>740</sup> Chidzuza *The Significance of Judicial Independence in Human Rights Protection: a Critical Analysis of the Constitutional Reforms in Zimbabwe* 329.

<sup>741</sup> Amnesty International 2015 *Zimbabwe: End the death penalty after 10-year execution hiatus* <https://www.amnesty.org/en/latest/news/2015/07/zimbabwe-end-the-death-penalty-after-10-year-execution-hiatus/> [date of use 30 September 2015] 1.

### **5.3 Conclusion**

The research has recognised the importance of the protection of civil and political rights in Zimbabwe.<sup>742</sup> While the Zimbabwean Constitution of 2013 provides for the protection of civil and political rights, more may still need to be done to improve the enforcement of these rights in Zimbabwe. For instance, the government, the judiciary and different independent human rights institutions still need to work harder in order to improve the protection of civil and political rights in Zimbabwe. Nonetheless it is encouraging to note that the Zimbabwe Constitution 2013 has adequately provided for the protection of selected civil and political rights in Zimbabwe. It is submitted that more may still need to be done to ensure the practical and consistent enforcement of civil and political rights in Zimbabwe.

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<sup>742</sup> See Chapters One to Four.



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