



HUMAN RIGHTS AND ZIMBABWE'S DRAFT CONSTITUTION

Derek Matyszak, Senior Researcher

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PART 1

Introduction.

There are two basic and contrary models for the crafting of constitutions in circumstances similar to those facing Zimbabwe after 15th September 2008. One is a “transformative” approach in which the constitution makers try to change essential elements of the constitutional culture – to make life different in the future - the other is a “preservative” approach which attempts to protect longstanding practices. Article VI of the GPA explicitly indicates that the intention of the agreement is that a transformative constitution is to be drafted which “deepens” democratic values in Zimbabwe. Pronouncements by politicians from the MDC formations (and SADC facilitators) is that the new constitution is intended to be transformative in the sense that it is to change the conditions under which Zimbabweans go to the polls in order to protect the integrity of the electoral process, in accordance with international standards.

Negotiations around the draft constitution reveal that, while the MDC formations are largely in favour of a transformative model, ZANU PF favours a preservative model. Both these models are reflected in the comprise document that has emerged. Where the draft constitution deals with the issues of the structure of government, presidential and executive power, the document is largely preservative. In the case of the Declaration of Rights, the draft is clearly intended to be transformative, with one or two notable exceptions. It is the Declaration of Rights and associated clauses which are considered here.

Types of Rights

Human Rights are generally accepted as falling into one of three categories named first, second, and third generation rights, although a United Nations resolution of 1977 has affirmed that all these rights should be considered as “indivisible”.

First Generation rights pertain to civil and political rights such as the rights to life, the right to liberty, the right to freedom of expression, etc., and are set out in Chapter 4 of the draft. These rights are often regarded as negative rights in that they merely require governments to refrain from certain acts, such as arbitrarily depriving a person of his or her freedom. In themselves, they can be applied without cost to the State. Second Generation rights, by contrast, seek to impose a positive duty upon States. These rights pertain to social and economic rights and include the right to housing, food, education,

health, etc., and are set out mainly in Chapter 2 of the draft as “national objectives”. They obviously have cost implications for the State. Third Generation Rights are still a developing part of international rights law, but this category includes community rights and most frequently included under this rubric is the right to a clean environment. This right appears as part of Chapter 4.

Enforcement of the Rights

i) Implementing provisions

It seems to have been assumed by those involved in the constitution making process that Zimbabwe should be a constitutional democracy. This is in contrast to a parliamentary democracy, such as that in the United Kingdom, where parliament is supreme and may make whatever laws it wishes. Under a constitutional democracy, the kinds of laws which may be made are restricted by the constitution, and, in no small part, by the Declaration of Rights.

Chapter 1, section 2 of the draft establishes the supremacy of the constitution - “*This Constitution is the supreme law of Zimbabwe and any law, practice, custom or conduct inconsistent with it is invalid to the extent of the inconsistency*”. Several mechanisms exist by which this provision is to be implemented – such as the intended power of the proposed Constitutional Court to subject legislation to judicial review and strike down any legislation enacted by Parliament which contradicts a provision of the constitution – including any law which conflicts with the Declaration of Rights.

ii) Interpretation.

Following the clause establishing the supremacy of the constitution, section 2(2) provides that “*the obligations imposed by this Constitution*” are binding on every person including the State and all executive, legislative and judicial institutions. The use of the word “*obligations*” is infelicitous as not all constitutional provisions which ought to be applied can be construed as obligations. The point is clear if one combines this unhelpful wording with another grammatical oddity. Following the Kariba draft (and to some extent the South African Constitution), in several places the draft uses the present indicative “*is*” rather than the modal “*shall*”. For example, the current constitution provides that “there **is** a Zimbabwe Media Commission” when in fact for many months after the adoption of amendment 19 to the current constitution, which introduced this provision, there quite manifestly **was not** a Zimbabwe Media Commission, and its absence was the subject of considerable controversy. The draft constitution likewise uses the present indicative - e.g. “*there is a Commission to be known as the Zimbabwe Gender Commission*”. By failing to use the modal and more conventional “*shall*”, i.e. “there shall be a gender commission”, it is unclear whether this provision creates an obligation to establish such a commission and thus falls within the ambit of section 2.2 making obligations binding. More simply, it may also be asked, for example, if, in setting out “fundamental values and principles” in Chapter 1 or by including a list of languages which are to be regarded as official, any binding “obligation” is created.

The national objectives, set out in Chapter 2, containing most second generation rights are intended “*to guide the State and all institutions and agencies of government at every level, in formulating and implementing laws and policy decisions that will lead to the establishment and promotion*”

of a just, free and democratic society in which people can enjoy prosperous, happy and fulfilled lives”, and regard must be had to these objectives when interpreting the State’s obligations under the constitution and any other law. Once again this wording is unhelpful. It is not known whether “the State and all institutions and agencies of government” includes the courts. That “regard must be had” to the national objectives when interpreting the state’s obligations does not advance the matter as to who is to have such regard is elided by the use of the passive tense. However, it would be reasonable to assume that the courts could have regard to the national objectives when considering the constitutionality, implementation or even absence of any law. The provision could be improved by making this clear.

Guidance in interpreting and applying the law is given explicitly to the courts in regard to the rights contained in Chapter 4, the Declaration of Rights.

In section 46(1)(a) the court is enjoined, when interpreting the Declaration to “*give full effect to the rights and freedoms enshrined in this Chapter*”. The use of the word “full” has significant legal implications. Under international law, in implementing human rights instruments, state parties are afforded what is referred to as a “margin of appreciation” which allows a diminution of the right afforded to take into account local conditions. The use of the word “full” suggests that no margin of appreciation is to be permitted under Zimbabwean law.

In applying the Declaration of Rights, the courts must also adhere to “*the values and principles that underlie a democratic society based on openness, justice, human dignity, equality and freedom*”, and, in particular, the principles and values set out in section 3. Section 3 (part of Chapter 1) sets out “founding values and principles” which include the supremacy of the constitution, the rule of law, good governance, recognition of the equality, and inherent dignity and worth of all human beings.

Furthermore, the courts, in applying and interpreting the Declaration of Rights must take into account international law and all treaties and conventions to which Zimbabwe is a party (section 46(c)), may consider relevant foreign law (section 46(e)), and must pay due regard to all the provisions of the constitution, in particular the national objectives (section 46(d)). So, for example, if a person is evicted from property and has nowhere else to go, in interpreting the right to freedom from arbitrary eviction or property under the Declaration of Rights, the courts must take into account the right to shelter which forms part of the national objectives in Chapter 2 and international laws and treaties which likewise secure these rights.

Many of the provisions of the Declaration of Rights in the draft closely follow the wording of the South African Constitution, which itself borrowed heavily from international human rights instruments. Accordingly, the jurisprudence of international human rights fora applying these instruments must be taken into account by the proposed Constitutional Court when interpreting and applying the Declaration of Rights. This should also eventuate if all international treaties to which Zimbabwe is a party are incorporated into domestic law as is stated as a national objective in Chapter 2, section 34.

In sum, in terms of these provisions, the courts should ensure that all Zimbabweans and those present within the borders of Zimbabwe enjoy the full protection of recognised

first generation human rights in accordance with international best practice and established jurisprudence.

iii) Enforcement

Where a constitution provides for certain rights without simultaneously providing the means by which they may be enforced, they become a mere declaration of intent or aspirational only. While the substance of the rights provided in the draft are transformative and “deepen democratic values in Zimbabwe”, the draft is weak when it comes to the enforcement of these rights.

It has always been a matter of some dispute whether second generation rights are, or should be, justiciable. Where, for example, judicial enforcement of a first generation right such as the right to liberty is facile and may be accomplished by the execution of a court order, the enforcement of second generation rights and the ambit and meaning to be accorded to these rights is problematic. What, for example, is intended when a constitution asserts that every person has the right to shelter? It cannot be intended to give individuals the right to sue the government and compel the provision of a home as it is unlikely that the government has the resources to provide free housing to all needy Zimbabweans. This then highlights a second issue, that of the separation of powers – one of the fundamental values of the constitution.

Politics at its root is about the allocation of resources. Second generation rights seem to invite the courts to make decisions about the allocation of state resources, which should be the preserve of the executive and effectively to determine laws establishing policy which should be the preserve of the legislature. For these reasons, during the crafting of the South African Constitution it was a highly contentious issue whether second generation rights should be justiciable. The determination that they were required a delicate jurisprudential balancing act by South Africa’s first Constitutional Court. The balancing act is accomplished in South African by providing that the state is only required to “*take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation*” of second generation rights. The draft constitution follows this formulation and jurisprudence. As a result, in many instances, this means that the right becomes not a positive right, as suggested at the outset, but rather a negative right – it is used as shield rather than a sword. Thus, rather than the right to claim entitlement of a home from the state, the right is rather used, for example, to prevent the demolition of an unauthorised dwelling unless adequate arrangements are made for alternative shelter. Enforcement of a provision of this nature should thus prevent the kind of state action witnessed during operation Murambatsvina.

However, unlike the South African Constitution, the second generation rights provided for in Zimbabwe’s draft constitution have mostly been removed from the Declaration of Rights and appear merely as national objectives. The importance of this separation is that, while the Declaration of Rights contains a specific part providing for the enforcement of the rights (Section 85 contained in Chapter 4), there is no equivalent provision in Chapter 2, which sets out most second generation rights. As noted earlier, Chapter 2 merely provides that the second generation rights shall “guide” the State and all institutions and agencies of government at every level, in formulating and implementing laws and policy decisions, and that “regard must be had” to second generation rights when interpreting the State’s obligations under the Constitution and any other law. It is thus unclear whether any remedy is available and whether an

approach may be made to the Constitutional Court if the State fails to be duly guided by or to give the necessary regard to the national objectives.

However, three second generation rights do appear in Chapter 4 (tacked onto the end of the list of first generation rights) and are thus covered by the enforcement provisions of that Chapter. These are the right to education, the right to health care and the right to food and water. As with the second generation rights provided for in Chapter 2, the requirement is only that the State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of these rights. Separating the list of first generation rights and appended second generation rights in Chapter 4, is the single third generation right – one pertaining to the environment.

Although enforcement provisions exist for the first generation rights set out in Section 85, these provisions are unsatisfactory. Two primary mechanisms are proposed for the enforcement of first generation rights – the Zimbabwe Human Rights Commission and the Constitutional Court. The former has adequate investigative powers provided for by both the Constitution itself and the enabling Act passed under the current constitution. However, it is only empowered to give opinions and to make recommendations relating to breaches of human rights. It has no power to issue executable orders in the manner of a court. The Gender Commission duplicates the jurisdiction of the Zimbabwe Human Rights Commission when considering rights related to equality and the dignity of women. It likewise has no power to issue executable orders, and it is not specifically stated that it may obtain such an order in the manner of the Zimbabwe Human Rights Commission.

To obtain an executable order, the Zimbabwe Human Rights Commission must itself approach the Constitutional Court as a litigant. However, in its present form the Constitutional Court is arguably inchoate only. Once again this lack of clarity is caused by the failure to use the normal modal “shall”. So rather than providing that the Constitutional Court “shall” decide constitutional matters, the draft provision is that the Constitutional Court “decides only constitutional matters”, suggesting a limitation on a jurisdiction still to be fully determined rather than delineating its powers once the draft is in force. The section (167) further provides that only the Constitutional Court may exercise jurisdiction over certain other issues, but does not anywhere establish the actual jurisdiction of the Constitutional Court. However, for the first seven years after the draft becomes effective, the current Rules of the Supreme Court will apply, with the necessary changes made, to the Constitutional Court until new Rules are drawn for that court (paragraph 18(4) of the Sixth Schedule).

For these first seven years the Constitutional Court will comprise the Chief and Deputy Chief Justice and seven other Justices of the current Supreme Court (paragraph 18(2) of the Sixth Schedule). The implementation of the human rights provided for by the draft will be contingent upon the willingness of the judges of the Constitutional Court thus constituted to enforce their “full” realisation as provided for in the “fundamental values and principles” set out in the draft. The present Supreme Court has given a restrictive interpretation to the ambit of human rights contained in the current constitution and adopted an equally restrictive approach as to who may seek to enforce those rights. Those judges who have set precedents in constitutional issues to date will thus continue do so when sitting as the Constitutional Court. This was one of the few belated amendments proposed by ZANU PF and incorporated into the final draft.

Since the enforcement of human rights is dependent upon a willing judiciary, the manner in which judicial appointments are made is of crucial importance. The current constitution provides that judges are appointed by the President (and, during the course of the Inclusive Government, this must be with the agreement of the Prime Minister – Schedule 8 20.1.3(p) of the current constitution) following recommendation by the Judicial Services Commission. The manner in which the potential nominees come to be considered by the Judicial Service Commission is opaque and not legislated. The draft seeks to change this latter aspect with a transparent system of appointments which includes public advertisement of vacancies, a call for nominations, and a public interview process. However, if the President is unhappy with nominees selected in this manner, he may revert to the present system. The majority of Commissioners on the JSC remains comprised of Presidential appointees or persons appointed *ex officio*, and who attain office through appointment by the President.

Under the current constitution, many persons seeking to enforce rights granted by the constitution and the laws of Zimbabwe have not been afforded a hearing on the issue as the Supreme Court has determined that the litigant lacks the necessary *locus standi*. This is a legal requirement that every litigant show that he or she has a peculiar or singular interest in the issue which is different from the public at large. Section 85 of the draft concerning the enforcement of the Declaration of Rights seeks to address this problem. It thus expands the category of persons enabled to approach the courts in this regard. Any person acting in his or her own interests; any person acting on behalf of another person who cannot act for themselves; any person acting as a member, or in the interests, of a group or class of persons; and, most significantly, any person acting in the public interest ought, if the draft becomes law, to be able to approach the Constitutional Court to enforce the Declaration of Rights.

Rules governing the procedures of the Constitutional Court (to supercede those of the Supreme Court which will be used in the interim, as noted above) may be made by the Court once a permissive Act to this effect is enacted by Parliament. These Rules of Court must allow any person “when it is in the interests of justice” to bring a constitutional matter directly to the Constitutional Court (section 167(5)). The ability of individuals to approach the court will thus depend upon how broadly or narrowly the Constitutional Court interprets the criterion of “the interest of justice”. The Court may decide that since only the Declaration of Rights contains a specific enforcement clause, that the intention of the drafters is that the court may only be approached for redress of the rights contained in the Declaration of Rights, and not, for example, for the enforcement of the second generation rights listed as national objectives in Chapter 2.

Two other aspects of enforcement are worthy of note. Firstly, the rights contained in the Declaration may be enforced by *any* person, whether a Zimbabwean citizen or not. Secondly, unlike the current Constitution, the rights are to apply both horizontally and vertically. This means that, whereas under the current constitution rights are only applied vertically, meaning that they are enforced by a person against the State as the party in breach, the draft allows for the application of the rights horizontally; that is, against other persons who may have transgressed the rights.

iv) Limitation of Rights.

Fundamental rights and freedoms may be subject to certain limitations or derogations in a democracy. The frequently cited example is that, notwithstanding the right to freedom

of expression, it is reasonable to restrict this right by a law preventing a person from shouting “Fire” in a crowded cinema. The provision for the limitation of rights in Chapter 4 (section 86) brings into the Constitution established democratic jurisprudence with regard to derogations. Thus fundamental rights and freedoms “*may be limited only in terms of a law of general application and to the extent that the limitation is “fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom.”*”

In considering a derogation from any right, the courts must take into account the nature of the right; the purpose of the limitation, in particular whether it is necessary in the interests of defence, public safety, public order, public morality, public health, regional or town planning or the general public interest; the nature and extent of the limitation; the need to ensure that the enjoyment of rights and freedoms by any person does not prejudice the rights and freedoms of others; the relationship between the limitation and its purpose, in particular whether it imposes greater restrictions on the right or freedom concerned than are necessary to achieve its purpose; and whether there are any less restrictive means of achieving the purpose of the limitation. That this should be the test for derogation was upheld by the Gubbay-led Supreme Court.

Rights may also be limited if the derogation is deemed strictly necessary by virtue of a public emergency. The constitution thus contemplates the possibility of derogations from the Declaration of Rights occasioned by detention without trial – though various rights for detainees are provided for in the Second Schedule to the draft. States of Public Emergency (Section 87) must be validated by two-thirds of the House of Assembly after the proclamation of the emergency by the President.

Some rights as provided for in the Declaration may not, however, be subject to any limitation or derogation. These are the right to life; the right to human dignity; the right not to be tortured or subjected to cruel, inhuman or degrading punishment or treatment; the right not to be placed in slavery or servitude; and the right to obtain an order of *habeas corpus* and the right to a fair trial. The possibility of detention without trial under a state of public emergency appears to conflict with this last right.

The draft constitution does not deal with an important element pertaining to the limitation of the rights granted under the constitution, that is, the question of *onus*, or who has the burden of proving that the derogation falls within the permissible limits. The usual rule of law is that the person advancing a position has the burden of proof thereof. Our Supreme Court has, on the contrary, placed the burden upon any person alleging a breach of rights to show that the breach does not fall within a permissible derogation. The draft could have strengthened the enforcement of rights under the constitution by clearly indicating that where the State seeks to derogate from given rights, that it has the duty to show that the derogation or limitation is “fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom”

In the next part, the substance of the rights granted by the draft constitution will be considered.

PART 2

An overview of the architecture of the human rights set out in the draft constitution appears in Part 1. There it was noted that human rights are generally held to fall into one

of three categories, first generation rights, second generation rights and third generation rights. Significant aspects of specific rights in each category will be considered in what follows.

Before so doing, however, it is worth considering a “right” omitted from the draft altogether. While provisions exist for the enforcement of some of the rights contained in the draft, there is no effective provision which may be used to compel compliance with those parts of the constitution which do not constitute rights, but which the public may wish to see implemented. The current constitution contains the following provision (section 18(1a)) in the Declaration of Rights: “*Every public officer has a duty towards every person in Zimbabwe to exercise his or her functions as a public officer in accordance with the law and to observe and uphold the rule of law*”. This provision could be interpreted as requiring general compliance with the constitution and implementation of its provisions. There is no equivalent provision in the draft constitution.

The question thus arises as to whether there is any remedy if provisions of the draft constitution which do not constitute rights can be breached with impunity, rendering the provisions aspirational declarations of intent rather than binding obligations. For example, section 9(1)(a) requires that “*appointments to public offices must be made primarily on the basis of merit*”. Leaving aside the fact that the appointments need only be made primarily on merit, and not solely on merit, and thus leaving open the possibility that criteria other than merit may be taken into account, what is to happen if this provision is breached? Suppose the President were to appoint the Commissioner-General of Police solely on the basis of political considerations. Section 85 providing for the enforcement of rights only allows for an approach to be made to the Constitutional Court where the rights appearing in Chapter 4 have been transgressed. The requirement that the Commissioner-General be appointed “primarily” on merit does not appear in Chapter 4.

The draft constitution contemplates that Rules for the Constitutional Court will be developed which will allow an approach to be made to the Constitutional Court on a constitutional issue when this is “in the interests of justice” (see Part 1). Since the judges of the Constitutional Court are to develop these Rules, it is unknown whether they will consider it to be “in the interests of justice” that individuals may apply to the Court to compel the President to comply with the constitution in an instance such as the one postulated. The Rules for the Constitutional Court will be drawn by current judges of the Supreme Court, who have given a restrictive interpretation to the principle of *locus standi* and the ability of individuals to approach the court on constitutional issues. In setting out the jurisdiction of the Constitutional Court, the draft provides that only the Constitutional Court may determine whether Parliament or the President has failed to fulfil a constitutional obligation. Thus, the draft seems to contemplate the possibility of legal proceedings to compel compliance with the constitution by parliament and the president, but does not specify how this is to come about. It is possibly assumed that the Constitutional Court will take cognisance of this provision and draw the rules of court accordingly.

If, however, the Rules do not allow individuals to seek to enforce provisions of the constitution which do not constitute rights, reliance will need to be placed upon section 97 of the draft to compel the President to implement and adhere to the Constitution.

If the President fails to uphold the constitution, he can be removed from office on account of such failure by the affirmative vote of two-thirds of the combined Houses of

Parliament. However, it is unlikely that those members of Parliament who belong to the same party as the President would support this censure. It is even more improbable that the electorate will ever vote in such a manner that two-thirds of the combined members of both Houses of Parliament will belong to a different party to the President they have just elected. This means of censure for failure to uphold the constitution can thus never be implemented unless there is a rebellion against the President from within his or her own party. Until such time, there is no means by which general implementation of the provisions of the constitution can be compelled. Since the possibility of being removed from office on account of failing to uphold the constitution is extremely remote, the impeachment provisions do not furnish any motivation for the head of the executive to implement and abide by the terms of the constitution. The ability to compel compliance may thus be limited to breaches of the rights contained in Chapter 4, and through the ability of a person affected by unconstitutional legislation to challenge its validity.

The result is that the implementation of, and compliance with, many of the provisions of the draft constitution by the President, and thus the State, will be dependent upon the respect of the President for constitutionalism, a quality which has not been marked in the present incumbent.

First Generation Rights.

These rights appear in the Declaration of Rights (Chapter 4 of the COPAC draft constitution) as “Fundamental Rights and Freedoms”. They are:

- the right to life;
- the right to personal liberty;
- the rights of arrested and detained persons;
- the right to human dignity;
- the right to personal security;
- the right to freedom from torture or cruel, inhuman or degrading treatment or punishment;
- the right to freedom from slavery or servitude;
- the right to freedom from forced or compulsory labour;
- the right to equality and non-discrimination;
- the right to privacy;
- the right to freedom of assembly and association;
- the right of the freedom to demonstrate and petition;
- the right to freedom of conscience;
- the right to freedom of expression and freedom of the media;
- the right of access to information;
- the right to language and culture;
- the right to freedom of a profession, trade or occupation; labour rights;
- the right to freedom of movement and residence;
- political rights; the right to administrative justice;
- the right to a fair hearing;
- the rights of accused persons;
- property rights and marriage rights.

Rights of citizenship are contained in a separate chapter, Chapter 3.

This is a comprehensive list of rights which one would expect in a liberal democracy. The manner in which the rights have been provided departs from the current constitution in a significant manner. The current constitution, after detailing each right, then sets out all the permissible derogations from the right granted. This is most apparent in the case of the right to protection from the compulsory deprivation of property (sections 16 and 16A) where the derogations from the right run to six pages of the constitution.

The approach adopted by the draft constitution is generally to provide a blanket provision allowing limitations to the rights only in terms of laws of general application, and to the extent that the limitations are fair, reasonable, necessary, and justifiable in a democratic society based on openness, justice, human dignity, equality, and freedom.

The intention and effect is thus that any derogations from the rights will come through legislation “of general application”, and it will be for the Constitutional Court to determine whether any particular limitation of the right is fair, reasonable, necessary, and justifiable in a democratic society based on openness, justice, human dignity, equality, and freedom.

In making this determination they must apply the interpretive principles referred to in Part 1, and, in particular, must have regard to the jurisprudence of international human rights instruments. Where the content of the right is not unequivocally or uniformly acknowledged in international human rights practice, the drafters have chosen to specify the content for some rights.

However, this approach has not been adopted uniformly throughout the Declaration of Rights, and, in some sections, the drafters have reverted to the format under the current constitution by specifying particular derogations which are to be deemed permissible. It is in these sections that the draft is self-contradictory, for, if the derogations fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality, and freedom, there would be no need to make specific mention of these derogations as permissible. In so doing, the drafters appear to concede that these derogations require specific mention precisely because they would not be upheld as fair, reasonable, necessary, and justifiable in a democratic society based on openness, justice, human dignity, equality, and freedom.

Hence, having stated in Chapter 2 that Zimbabwe is founded on fundamental values and principles which include “fundamental human rights and freedoms”, and that there may “only” be a derogation from these fundamental human rights and freedoms where such derogations are fair, reasonable, necessary, and justifiable in a democratic society based on openness, justice, human dignity, equality, and freedom, the drafters then include derogations which do not adhere to this principle.

i) The Right to Life.

In regard to this right, the drafters have departed from the formula of allowing the courts to determine the permissible derogations, and have specifically provided that the death penalty will not contravene this right (as is contended by Amnesty International, for example), if it is imposed on a man over 21 when he committed an offence or a man under 71 years old who committed the offence in aggravating circumstances. Since there

is no such offence as “aggravated murder” and “aggravated circumstances” are not defined for murder in the Criminal Law (Codification and Reform) Act, it is thus left either for the courts to determine how broadly or narrowly aggravation will be defined, or for the Criminal Law (Codification and Reform) Act to be amended to specify the nature of aggravation in regard to murder - which has been done in relation to other offences, such as robbery. An extremely narrow definition would all but abolish the death penalty or at least be a further step in this direction. It is contended by some that the death penalty contradicts the right to freedom from cruel and inhuman punishment. The fact that it is proposed that the death penalty cannot be imposed on a woman seems to contradict the clauses proscribing discrimination on the basis of a person’s sex, emphasised elsewhere in the draft.

The section also specifically contemplates the possibility of what will be deemed by some as a derogation, in allowing Parliament to pass legislation permitting abortion in certain circumstances, thus leaving the current state of the law unaltered in this regard.

ii) The Right to Liberty

Although the core of this right is the right not to be deprived of liberty arbitrarily or without just cause, the drafters deemed it necessary to make specific mention of this aspect of the right. Also specified is that no person may be imprisoned on account of a failure to pay a civil debt, in accordance with most contemporary jurisprudence on this issue. While the right includes a prohibition on detention without trial, extensive derogations from this are allowed during a state of emergency elsewhere in the draft.

iii) The Rights of Arrested and Detained Persons

The content of these rights has wisely been specified in the section and improve upon the provisions in the current constitution. The draft provides that those arrested, in addition to access to a legal practitioner, must be allowed to communicate with and be visited by their spouse or next of kin, a medical practitioner of their choice, and a religious counsellor. The right could be improved if it were stipulated that the arrestee is to be allowed “confidential communication” with his or her legal or medical practitioner. In terms of the draft, all arrestees must be brought before a court within 48 hours. This would render unconstitutional provisions in the Criminal Procedure and Evidence Act which allow detention for up to 96 hours where the 48 hour period expires on a “non-court” day, or even longer where a warrant for further detention is signed by a senior police officer. In terms of the draft, detainees have a right to bail unless there are compelling reasons justifying his or her continued detention. Under the Criminal Procedure and Evidence Act, the admission to bail is more restrictive and the Criminal Procedure and Evidence Act would thus need to be amended to reflect these changes. The last two provisions greatly improve the right to liberty in Zimbabwe.

The draft constitution retains the current and controversial approach to the “right to silence”, which, although allowing a person to remain silent after arrest, permits the court to draw an adverse inference from any failure to mention a fact which an arrestee or accused could reasonably be expected to mention at various points in the criminal process.

iv) The Right to Dignity

This right is heavily emphasised in the draft constitution. Not only does it appear as a right on its own in section 51, it is also a part of the “founding values and principles” of section 3 and the courts are enjoined to take into account “*values that underlie a democratic society based on openness, justice, human dignity, equality, and freedom*” when interpreting the Constitution.

Also to be considered by the courts is the jurisprudence of foreign and international courts, which Zimbabwe’s judges must take into account. This jurisprudence has held that the right to dignity forms an essential part of the right to freedom from unfair discrimination and acts which impair the dignity of any person are considered inherently unfair. Hence, the criminalisation of sex by gay men, thus reducing them to “unapprehended felons”, has been held by the South African Constitutional Court to constitute unfair discrimination as impairing their dignity as well as infringing other rights. In the draft, the right to the respect and protection of an individual’s dignity is specifically afforded to each individual in both their public *and private* life (section 51).

v) The Right to Personal Security

This right, not provided for in the current constitution, embraces the right to bodily and psychological integrity, and includes the right to be free from violence, the right to make choices concerning reproduction and the right not to be subjected to scientific or medical experimentation. For example, enforced sterilisation of HIV positive mothers would contravene this right.

vi) The Right to Equality and Non-discrimination

The right to equality and non-discrimination is greatly enhanced by the draft as the manner in which it is formulated is a vast improvement on the wording of the current constitution. Unlike the current constitution, the draft unequivocally provides the blanket provision that “*every person is equal before the law and has the right to equal protection and benefit of the law.*”

Section 56(3) provides that “*every person has the right not to be treated in an unfairly discriminatory manner on such grounds as their nationality, race, colour, tribe, place of birth, ethnic or social origin, language, class, religious belief, political affiliation, opinion, custom, culture, sex, gender, marital status, age, disability or economic or social status, or whether born in or out of wedlock.*” By using the words “on grounds such as” the drafters intend the list to be illustrative and not exhaustive. It is precisely because the Supreme Court interpreted the grounds upon which discrimination is prohibited in the current constitution as being exhaustive that the Supreme Court has refused to rule laws proscribing gay sex as unconstitutional. The court held that, had the legislature intended to render laws proscribing gay sex unconstitutional, sexual orientation would have been included amongst the grounds set out in the constitution. Since the grounds in the draft are illustrative only, it would be difficult to argue that sexual orientation is not a similar ground to those listed and must thus be deemed included. Furthermore, by signing and ratifying the International Covenant on Civil and Political Rights Zimbabwe undertook, by way of Article 2, to bring its laws in line with the rights established by the Covenant. Since international law and jurisprudence must be taken into account when interpreting the rights in the draft, it must be assumed that the

drafters of the constitution intended to comply with Article 2, and bring the rights in the draft into conformity with the minimum standards provided for by the Covenant.

Accordingly, the provision ought to conform to the jurisprudence established by numerous judgments from international fora in interpreting lesbian, gay, bi-sexual, transgender and inter-sex (LGBTI) rights under the Covenant. The provision must, in addition, be interpreted in a manner befitting a democratic society based on openness, justice, human dignity, equality, and freedom which, as noted above, must preclude unfair discrimination on the basis of sexual orientation. It is thus contradictory for the provision under “marriage rights” section 78(3) to stipulate that “Persons of the same sex are prohibited from marrying each other.” However, the provision would not prevent gay or lesbian couples from entering into civil unions which have the same legal consequences as a marriage. Under “marriage rights”, “every person”, and not only heterosexual persons, have the right to found a family. This appears phrased specifically to allow homosexual couples to found families through civil unions.

Furthermore, the draft requires the State to take reasonable legislative and other measures to promote the achievement of equality and to protect or advance people or classes of people who have been disadvantaged by unfair discrimination. This could be interpreted to require the amendment of the Criminal Law (Codification and Reform) Act to repeal the criminalisation of consensual sex between adult males - sex between two consenting adult women is not criminalised under Zimbabwe’s law - and to require civil union legislation to be brought into effect. It is significant that an amendment proposed by ZANU PF to provide that “Homosexuality, gays (sic) and lesbian practices are prohibited” is not in the draft. The exclusion must be held as deliberate when using legislative history as a hermeneutic tool.

Since legislation, under this provision, is not to be regarded as discriminatory if it is reasonable and enacted to advance equality, the draft allows the possibility of “affirmative action” programmes. The permissible breadth of such legislation will be determined by the courts. The courts, for example, will decide whether legislation violates the requirement of reasonableness in the section if it deprives a person of property solely because that person belongs to a previously advantaged group (regardless of whether the dispossessed person was actually advantaged), and gives the property to a member of a previously disadvantaged group (regardless of whether the recipient was actually disadvantaged).

Finally, it should be noted that equality and non-discrimination does not always infer equal treatment. Often discrimination arises through treating different people equally and equal people differently. Differences of sex must be taken into account on occasion to prevent discrimination. This is acknowledged by the draft. It is on occasion, however, debatable whether a particular right should only be afforded to one sex. For example, under labour rights, the right to maternity leave is only afforded to women.

vii) The Right to Privacy

The drafters have deemed it necessary to detail the nature of this right, even though it is adequately established by the jurisprudence in most democracies. The right is thus stipulated as including the right not to have one’s home, premises or property entered without permission; one’s person, home, premises or property searched; one’s

possessions seized; the privacy of one's communications infringed; or one's health condition disclosed.

The draft thus restores the right to privacy which was removed from the current constitution by way of a 1996 amendment. Perhaps not insignificantly, the amendment was passed at a time when there was heated controversy about homosexuality after an LGBTI activist organisation (GALZ) lobbied for the right to participate in an annual book fair in Harare.

Laws proscribing same-sex sex have been held to contravene international human rights instruments which establish the right to privacy, and the initial inroads into laws adversely affecting the LGBTI community were made by enforcing this right, it being thought more politic to strike down laws affecting homosexual conduct on this basis than to apply the right to non-discrimination. The latter right implies full equality in all aspects of life, including the controversial right of marriage between same sex couples. Applying the right to privacy in the manner required by the draft, that is, in accordance with the jurisprudence of international law and precepts of value that underlie a democratic society based on openness, justice, human dignity, equality and freedom should likewise render laws against same-sex sex in the Criminal Law (Codification and Reform) Act unconstitutional.

viii) The Right to Freedom of Conscience.

This right appears in the current constitution and the draft largely repeats its substance, though leaves the issue of derogation to the courts. However, the formulation of the draft differs significantly from the current constitution by the inclusion of the following subsection:

“Parents and guardians of minor children have the right to determine, in accordance with their beliefs, the moral and religious upbringing of their children, provided they do not prejudice the rights to which their children are entitled under this Constitution, including their rights to education, health, safety and welfare.”

The subsection leaves some very difficult issues for the court to determine. For example, could a person sue his parents for a violation of the right to security of the person, if he had been circumcised as a child in accordance with their religious beliefs but contrary to his wishes when an adult?

ix) Freedom of Expression and Freedom of the Media

Given the restricted nature of freedom of expression and the media in Zimbabwe at present, the drafters have thought it prudent to elaborate the content of this right in the draft. In addition to detailing the established content of this right, the section further provides that broadcasting and other electronic media may be subject only to licensing procedures that are necessary to regulate the airwaves and other forms of signal distribution, and which are independent of control by government or by political or commercial interests.

In terms of the draft, all State-owned media of communication must be free to determine independently the editorial content of their broadcasts or other communications, be

impartial and afford fair opportunity for the presentation of divergent views and dissenting opinions. The intention is thus to turn State media into public media.

x) Access to Information

The draft constitution introduces a specific right of access to information. While most rights in Chapter 4 are afforded “to every person” this right restricted to Zimbabwean citizens and permanent residents of Zimbabwe. Thus foreign news agencies, for example, will not be able to claim this right.

Access to information is regarded as necessary for the purposes of transparent governance and to facilitate informed choice by the electorate. However, it is widely recognised in democracies that, in specified instances, it may be necessary to limit this right in the interests of defence, public security, or professional confidentiality, and this is provided for in the draft provided the restriction is fair, reasonable, necessary, and justifiable in a democratic society based on openness, justice, human dignity, equality, and freedom. The ZANU PF draft wanted “national security” to be included as an additional ground upon which access to information may be restricted. This term is often so broadly defined, and defined by the State itself so as to include the “security” of a governing party, that it is regarded as effectively removing the right altogether except in limited circumstances. Since the ZANU PF version was not adopted, the Access to Information and Protection of Privacy Act, which currently restricts access to information on the basis of national security, will require amendment.

xi) Political Rights

Political rights were introduced into the current constitution by way of constitutional amendment 19, and is one of the few parts of constitutional amendment 19 intended to survive beyond the period of Inclusive Government. These rights are transferred into the draft with minor changes in formulation. Included as a political right, is the right of every adult Zimbabwean citizen to vote in all elections and referendums. The wording closely follows that of the South African constitution which has been interpreted by the courts there as requiring that South Africans out of the country be allowed to vote without returning to South Africa to do so. If this right is interpreted in a similar manner by the Constitutional Court, then provision must be made for Zimbabweans in the diaspora to vote. The requirement is not affected by the Fourth Schedule which sets out the qualifications for registration as a voter. The Schedule provides that electoral law may prescribe additional residential requirements to ensure that voters are registered on the most appropriate voters roll. Accordingly, registration requirements based on residence must be solely for the purpose of allocating a constituency in which the citizen may vote, and not to preclude a citizen from voting altogether on the basis that he or she resides outside the country. This interpretation is emphasised in the Fourth Schedule by the provision that any registration requirements must be consistent with the right of all adult Zimbabwean citizens to vote in elections and referendums.

xii) Property Rights

In detailing these rights, the “preservative” approach of ZANU PF has been preferred to the transformative approach generally applied by the MDC formations. This is reflected in the fact that the ZANU PF draft proposed no changes to the COPAC draft to alter the right. The rights to property detailed under the draft seek to preserve and entrench

current constitutional provisions and legislation pertaining to land. Thus the distinction between property generally and agricultural property (land) is retained, and the numerous and extensive derogations contained in the current constitution, particularly in regard to agricultural land, are repeated in the draft. The constitution thus specifically provides that agricultural land acquired after 2000 remains vested in the State. Several other derogations are noteworthy due to the fact that they contradict various constitutional principles appearing elsewhere in the draft. Chapter 4, the Declaration of Rights, stipulates that the fundamental rights and freedoms set out in the Declaration may be limited only in terms of a law of general application and to the extent that the limitation is fair, reasonable, necessary, and justifiable in a democratic society based on openness, justice, human dignity, equality, and freedom. However, in regard to compulsory acquisition of agricultural land, the requirement that any law in this regard be of “general application” is excluded. Furthermore, it is expressly stated that no compulsory acquisition of land may be challenged on the basis that it is discriminatory, thus gainsaying the right to freedom from discrimination and equality before the law set out earlier in the draft (the insertion of this derogation is presumably to deal with the judgment of the SADC tribunal which found that the government’s policy on law discriminated on the basis of race in violation of the SADC Treaty).

The jurisdiction of the courts in matters of compulsory acquisition is ousted, as is the right to compensation for land compulsorily acquired, both of which provisions contradict international law on these issues. Adherence to international law and treaties (which would include the SADC Treaty) is given as a founding value and principle in Chapter 2.

The section on agricultural land concludes with provisions whose legal import is difficult to determine as they appear to be historical-political statements or a declaration of values which would be more appropriately placed in the preamble to the draft, if they are to be inserted at all. The provisions are as follows, that:

- (a) *under colonial domination the people of Zimbabwe were unjustifiably dispossessed of their land and other resources without compensation;*
- (b) *the people consequently took up arms in order to regain their land and political sovereignty, and this ultimately resulted in the Independence of Zimbabwe in 1980;*
- (c) *the people of Zimbabwe must be enabled to re-assert their rights and regain ownership of their land;*

and accordingly—

- (i) *the former colonial power has an obligation to pay compensation for agricultural land compulsorily acquired for resettlement, through an adequate fund established for the purpose; and*
- (ii) *if the former colonial power fails to pay compensation through such a fund, the Government of Zimbabwe has no obligation to pay compensation for agricultural land compulsorily acquired for resettlement.*

These provisions are all to “be regarded as of ultimate and overriding importance”.

The intended effect of attributing supreme importance to these provisions is obscure. It is not stated whether the obligation of “the former colonial power” to pay compensation is legal or moral. A legal obligation is not established on the grounds set out, nor is it

created by way of the statement to this effect in the constitution. It has already been stated that the Zimbabwean government will not pay compensation for agricultural land, so there is no legal need for this to be repeated at the end of the section. The provisions as a whole appear unnecessary for legal and constitutional purposes.

xiii) Marriage rights

In addition to the right of every person to found a family, and the prohibition on same sex marriage, discussed above there is also a provision that no person may be compelled to enter into marriage against their will.

xiv) Other Rights

Part 3 of Chapter 4 “elaborates” certain rights provided by the Declaration “*to ensure greater certainty as to the application of those rights and freedoms*” to particular classes of people. The classes of people are women, children, the elderly, persons with disabilities and veterans of the liberation struggle.

In elaborating the rights for women, the draft appears to acknowledge a de facto inequality. Thus the draft provides that every woman has full and equal dignity of the person with men, rather than stating that men and women are equal. This recognition of a present de facto inequality is echoed in the fact that women are grouped with the elderly, disabled and children.

Second Generation Rights

These rights appear predominantly in Chapter 2 of the draft, and are intended as guides in interpreting, enforcing, and setting the laws and government policy for the country. Three appear in Chapter 4 as rights that may be directly enforced by individuals. The second generation rights appearing in the draft are as follows:

- the right to food security and food and water;
- the right to employment;
- the right to provision of care and assistance from the state for mothers, fathers and other family members who have charge of children;
- the right to education;
- the right to shelter;
- the right to health care services;
- the right to social security;
- the right to legal aid;
- the right to sporting and recreational facilities;
- and the right to education.

Although the formulation is subject to slight variation for some of the rights, in general the provisions require the State to take reasonable legislative and other measures, within the limits of the resources available to it, to achieve the progressive realisation of this right. As mentioned in Part 1, this formulation is taken from the South African constitution, and the intention is most probably that the ground breaking jurisprudence of the South African Constitutional Court is followed in interpreting these rights.

Third Generation Rights.

These rights relate to communities and the environment. With the exception of rights pertaining to the environment, third generation rights appear in Chapter 2. They include:

- cultural rights, that is, the duty of the state to preserve and protect Zimbabwe's heritage;
- the right to fair regional representation in the institutions of government and that all local communities have equitable access to resources to promote their development;
- the duty of the state to take measures for the preservation of traditional knowledge possessed by members of local communities regarding the medicinal and other properties of animal and plant life in their areas;
- and environmental rights.

Environmental rights include the right of every person to an environment that is not harmful to their health or well-being and to have the environment protected for the benefit of present and future generations, through reasonable legislative and other measures.

As with second generation rights, where the rights have cost implications for the State the duty placed upon the State is to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of the right.

Omitted from the list of third generation rights are rights pertaining to animals which have been included in many of the more recently drawn constitutions, such as those of Brazil, Ecuador and Bolivia. In 2002, the German constitution was amended to include the following: "*The state takes responsibility for protecting the natural foundations of life and animals in the interest of future generations*". Provisions of this kind have been used to prevent the cruel treatment of animals and have engendered protective legislation concerning the lot of animals in commercial food production and vivisection.

Conclusion.

With the notable exception of property rights, and particularly rights to agricultural land, the human rights afforded by the draft constitution are broadly in conformity with the provisions one would expect to find in the constitution of a contemporary liberal democracy. Remarkably, gay and lesbian rights (bar those of marriage) are also afforded protection in all but name. It would require a singularly perverse judgement from Zimbabwe's courts not to find that the present criminalisation of consensual same-sex sex between adult males has been rendered unconstitutional if the draft is adopted.

The provisions pertaining to the electronic media should also have the effect of opening up the airwaves to a plurality of voices, though current restrictive legislation will probably still be in place ahead of the elections in 2013. However, the enforcement of many of the rights set out in the Declaration of Rights may fall short of liberal democratic standards. Full realisation of the rights will be dependent upon the judiciary in Zimbabwe, and in particular the proposed Constitutional Court. To date the judiciary has adopted a restrictive and narrow approach to human and civil rights. With the President still exercising considerable power over judicial

appointments, this will remain unchanged unless there is a change in this office. Nonetheless, in democratic terms, the rights set out in the draft considerably improve upon the current constitution.



The Research and Advocacy Unit [RAU]

Address:	8, Sir Herbert Taylor Drive, Lincoln Green HARARE, Zimbabwe
Telephone:	+ 263(4) 741151
Fax:	+263(4) 741151
Cell phone:	+263 772 273 839
Email:	admin@rau.co.zw
Website:	www.researchandadvocacyunit.org