



ZHRC PRACTITIONERS' TRAINING MANUAL ON CONSTITUTIONAL RIGHTS

VOLUME 1



ABOUT THE MANUAL

The Zimbabwe Human Rights Commission ZHRC has produced this manual as a resource and reference material for use by Practitioners when conducting training on the Declaration of Rights, Chapter Four of the Constitution of Zimbabwe in fulfilment of the Commission's human rights awareness raising function as provided for in Section 243 (1) (a). According to Section 243 (1) (a) the Commission is mandated to, 'promote awareness of and respect for human rights and freedoms at all levels of society'. This manual is therefore, foremost, meant to capacitate the Commission's Human Rights Officers as training Practitioners to enable them to conduct effective and participative training.

Beyond that, the Commission has no doubt that this resource material will be of great use in the capacitation of other Practitioners including lecturers, teachers, security sector trainers and civil society trainers when conducting training on human rights in fulfilment of Section 7 of the Constitution which requires the Constitution to be taught as part of the curricula in schools, security services training, the Civil Service and other public institutions.

Volume I of this manual focuses on individual civil and political rights as well as social, economic, and cultural rights. Volume II of the manual focuses on constitutional rights of specific groups, most of them vulnerable, including accused and detained persons, children, women, persons with disabilities, the elderly and war veterans of the liberation struggle.

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ACRONYMS

ACHPR:	African Charter on Human and Peoples Rights (Banjul Charter)
ACWRC:	African Charter on the Rights and Welfare of the Child
AIIPPA:	Access to Information and Protection of Privacy Act [Chapter 10:27]
BAZ:	Broadcasting Authority of Zimbabwe
BEAM:	Basic Education Assistance Module
CAT:	Convention Against Torture
CEDAW:	Convention on the Elimination of all forms of Discrimination Against Women
CPPCG:	Convention on the Prevention and Punishment of the Crime of Genocide
CP:	Corporal Punishment
CPEA:	Criminal Procedure and Evidence Act [Chapter 9:07]
CRPD:	Convention on the Rights of Persons with Disabilities
CRC:	Convention on the Rights of the Child
DVA:	Domestic Violence Act [Chapter 5:16]
EIA:	Environmental Impact Assessment
EMA:	Environmental Management Agency
ECHR:	European Convention on Human Rights
FGM:	Female Genital Mutilation
ICCPR:	International Covenant on Civil and Political Rights
ICERD:	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR:	International Covenant on Economic, Social and Cultural Rights
ILO:	International Labour Organization
OSA:	Official Secrets Act
POSA:	Public Order and Security Act [Chapter 11:17]
RDC:	Rural District Council
UDHR:	Universal Declaration of Human Rights
UNESCO:	United Nations Educational, Scientific and Cultural Organization
ZEC:	Zimbabwe Electoral Commission
ZHRC:	Zimbabwe Human Rights Commission

ACTS/ LEGISLATION

Access to Information and Protection of Privacy Act [Chapter 10:27]
 Administrative Justice Act [Chapter 10:28]
 Broadcasting Services Act [Chapter 12:06]
 Censorship and Entertainment Control Act [Chapter 10:04]
 Code of Conduct in the Electoral Act [Chapter 2:13]
 Communal Lands Act [Chapter 20:04]
 Serious Offences (Confiscation of Profits) Act [Chapter 9:17].
 Criminal Law Codification and Reform Act [Chapter 9:23]
 Criminal Procedure and Evidence Act [Chapter 9:07]
 Customary Marriages Act, [Chapter 5:07]
 Domestic Violence Act [Chapter 5:16]
 Electoral Act [Chapter 2:13]
 Environmental Management Act (Chapter 20:27)
 Indigenisation and Economic Empowerment Act [Chapter 14:33]
 Labour Act [Chapter 28:01]
 Legal Practitioner's Act (Chapter 27:02)
 Marriage Act, [Chapter 5:11]
 Official Secrets Act [Chapter 11:09]
 Public Health Act [Chapter 15:09]
 POSA: Public Order and Security Act [Chapter 11:17]
 Regional, Town and Country Planning Act [Chapter 29:12]
 Traditional Leaders Act [Chapter 29:17]
 Trafficking in Persons Act [Chapter 9:25]
 Urban Councils Act [Chapter 29:15]

CHAPTER ONE: INTRODUCTION

1 WHAT ARE HUMAN RIGHTS?

- These are entitlements and freedoms that apply to every person in the world by virtue of being human from birth until death.
- Human rights should be enjoyed by every human being regardless of 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, pregnancy, disability or economic or social status, or whether they were born in or out of wedlock. In other words, every person has the right not to be discriminated against when it comes to the enjoyment of human rights.

2 KEY CHARACTERISTICS OF HUMAN RIGHTS

There are several characteristics of human rights, which define their nature and scope. Human rights are inherent, universal, inalienable, indivisible and interdependent.

2.1 Human rights are inherent.

- Human rights are inherent or natural in the sense that they derive from the humanity of each person. They are, in the words of the UDHR, 'the birth right of all human beings.'
- Given that they are an inherent part of the humanity of each person, they are not given and they cannot be taken away.
- This implies that governments should respect, protect, promote, and fulfil human rights to any person and they cannot abolish human rights.

2.2 Human rights are universal and inalienable.

- Human rights are universal in the sense that all human beings everywhere in the world are entitled to the same rights.
- The foundational human rights instrument, the UDHR, makes this point very clear. It provides that human rights are the rights of all people and must be enjoyed by everyone 'without distinction of any kind, based on race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.'
- Human rights are inalienable. This means that they cannot be taken away or given up. A person can decide not to exercise a right on a particular occasion or at all, but she or he cannot give the right away.

2.3 Human rights are indivisible and interdependent.

- The idea that human rights are indivisible means that there are no conflicts between rights and no priorities among rights.
- There may however be situations or occasions when rights must be balanced and prudent decisions taken about how all rights can best be protected and promoted.
- However, no right or category of rights is inherently more important than the other set of rights.
- The notion that human rights are interdependent means that the enjoyment and fulfilment of every right depends on the enjoyment and fulfilment of all other rights.

3 CATEGORIES OF HUMAN RIGHTS

There are three categories of human rights under the Constitution of Zimbabwe Amendment (No.

20)Act, 2013. These include civil and political rights; economic, social and cultural rights; and group or collective rights. These categories of rights are briefly discussed in turn.

3.1 Civil and Political Rights

- Civil and political rights confer on citizens the freedom to contribute towards the law or policy making process and to take part in, shape, influence and challenge government policies, practices and activities.
- Examples of civil and political rights include the rights to freedom of speech and expression; freedom of religion; freedom of movement; the right to vote; the right to privacy and many more.
- Civil and political rights are the rights that generally restrict the powers of the government in respect of actions affecting the individual and his or her autonomy (civil rights).
- They have generally been called 'negative rights' in the sense that they largely require the State and all persons to avoid taking steps that would violate these rights.

3.2 Economic, Social and Cultural Rights

- Economic, social and cultural rights relate to the provision of goods and services that are necessary for an individual to live a minimally decent life.
- They also govern the work place, social security, family life, participation in cultural life and access to housing, food, water, healthcare and education.
- They are generally called 'positive rights' because they impose on the State the duty to take positive steps to ensure the provision of basic amenities of life to every person.

3.3 Group Rights

- Group rights are rights that are held by a group rather than any one individual.
- A typical example of these is the right to self-determination and nationhood, especially for persons that are under the political control of another country.
- Group rights have also typically been a focus of indigenous peoples and other groups whose rights are threatened by the State.
- For instance, religious communities have rights to assemble, exercise and propagate their beliefs.
- By the same token, linguistic and ethnic communities have the right to use their language in their communication and to make claims for the State to recognise and protect this right.

4 SOURCES OF HUMAN RIGHTS

- At the international plane, the primary sources of human rights are; the United Nations Universal Declaration of Human Rights and other various international human rights treaties such as the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the Convention on the Rights of the Child.
- At the regional level, human rights are protected in several treaties which include the African Charter on Human and People's Rights; the African Charter on the Rights and Welfare of the Child and many others.
- Domestically, human rights are guaranteed and protected in Chapter Four of the Constitution of Zimbabwe Amendment (No. 20) Act, 2013 which is referred to as the 'Declaration of Rights'. Similar provisions in other countries are referred to as the 'Bill of Rights'.

5 LIMITATIONS OF RIGHTS

- Most of the rights protected in the Constitution are not absolute. They are limited by the rights of others and other compelling societal interests.
- Every person's rights may have to yield to the common interests of society or to the competing interests of other people. However, these interests should be more compelling than the interests

protected by the right concerned.

- In essence, the need to limit rights emerges from the notion that if human beings were allowed to enjoy rights without limitations, then only a savage few would enjoy such rights to the exclusion of the weak and the vulnerable.
- Given that individuals live with others in the community, the enjoyment of their rights should not encroach on the rights of others.
- This explains why section 86(1) provides that 'the fundamental rights and freedoms set out in this Chapter must be exercised reasonably and with due regard for the rights and freedoms of other persons.'
- To be fair and reasonable, the process by which rights are limited should be in line with the requirements mentioned in section 86 of the Constitution.

5.1 Requirements for the reasonable and justifiable limitation of rights

- In terms of section 86 of the Constitution, all Constitutional rights (except those rights stipulated in section 86(3) of the Constitution) are subject to limitations that are fair, necessary, reasonable and justifiable in an open and democratic society.
- Section 86(2) provides that 'the fundamental rights and freedoms set out in this Chapter 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.'
- The requirement that there be a law of general application means that rights cannot be limited without the adoption of a law authorising such limitation.
- A law of general application is a law that applies to everyone without discrimination based on any prohibited ground. This means that a government cannot pass a law to limit the rights of a specific person or group of persons.
- To be fair, reasonable and justifiable in an open and democratic society, the limitation of rights and freedoms should not be arbitrary or without just cause.
- Whether the limiting law or measure is valid depends on whether it is permissible in a democratic and open society.
- To be fair, reasonable and justifiable, the law of general application should limit narrowly. In other words, the limitation of a right should not take away the minimum essential content of the right.
- To be necessary, a measure or law limiting a right should be the only reasonable and justifiable alternative there is, otherwise other measures that are less invasive of the right should be pursued ahead of the proposed measure that is more invasive.
- Requiring the limitation to be necessary implies that the limitation must (a) respond to a pressing public or social need, (b) pursue a legitimate aim, and c) be proportional to the aim it is sought to achieve.

5.2 Factors to be considered in determining the fairness and reasonableness of the limitation of rights

- Section 86(2) of the Constitution provides for factors to be considered in measuring the fairness, reasonableness and justifiability of the limitation of rights or freedoms. These factors include:
 - The nature of the right or freedom concerned;
 - 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. A limitation serving any of the stipulated purposes is likely to be declared Constitutional than that which does not;
 - The nature and extent of the limitation. If the limitation of a right is overbroad and leaves no room for any meaningful enjoyment of the right in question, that limitation would be declared unconstitutional;
 - The need to ensure that the enjoyment of rights and freedoms by any person does not prejudice the rights and freedoms of others. This factor relates to the need to balance competing interests; 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

- o Whether there are any less restrictive means of achieving the purpose of the limitation. If there are other less invasive means to achieve the purpose of the limitation, that means should be pursued ahead of the more invasive way of achieving the purpose.

5.3 Rights that cannot be limited by any law

- Some fundamental rights and freedoms cannot be limited. These rights are absolute and illimitable.
- This means that once it is demonstrated that a particular law violates any of the absolute rights, that law must be declared invalid and unconstitutional.
- Section 86(3) of the Constitution provides for the rights that cannot be limited. These rights include the following:
 - o the right to life, except to the extent specified in section 48;
 - o the right to human dignity;
 - o the right not to be tortured or subjected to cruel, inhuman or degrading treatment or punishment;
 - o the right not to be placed in slavery or servitude;
 - o the right to a fair trial; and
 - o The right to obtain an order of habeas corpus as provided in section 50(7) (a) of the Constitution.
- More importantly, these absolute rights are also non-derogable. This means that they cannot be derogated from even during a state of public emergency.

6 NATURE AND SCOPE OF THE STATE'S OBLIGATIONS

- The Constitution imposes on State and non-state actors specific obligations to ensure the enjoyment of fundamental human rights and freedoms.
- Section 44 of the Constitution provides that the 'State and every person, including juristic persons and every institution and agency of the government at every level must respect, protect, promote and fulfil the rights and freedoms set out in this Chapter.'
- The duty to respect requires the State to refrain from interfering with the existing enjoyment of the right. This means that when, for instance, citizens are already enjoying the right of access to water, the State may not effect disconnections. Similarly, when people have their own houses and are enjoying the right of access to adequate housing, the State should not demolish their houses.
- The duty to protect fundamental rights requires the State to prevent others from interfering with the enjoyment of the rights, especially by adopting legislation that protects the rights in question.
- The twin obligations to 'promote and fulfil' require the State to adopt appropriate measures towards the full realisation of fundamental rights and freedoms.

CHAPTER TWO: SECTION 48: THE RIGHT TO LIFE

1 OBJECTIVES

At the end of this section, learners should be able to:

- explain the content, scope and duties imposed by the right to life;
- discuss the circumstances when the right to life can be limited;
- outline national, regional and international law protecting the right to life;
- discuss whether the death penalty is discriminatory or not; and
- discuss whether the death penalty should be abolished or not.

2 DEFINITION OF KEY TERMS

Aggravating circumstances	These are factors that increase the severity of a criminal act, including the magnitude of the crime, lack of remorse and prior conviction for another crime.
Corporal punishment	any punishment in which physical force is used and intended to cause some degree of pain or discomfort, however light.
Death penalty	is a government sanctioned practice whereby a convicted person is put to death by the State as a punishment for a crime. It is also known as capital punishment.
Positive obligation	denotes a State's obligation to engage in an activity to secure the effective enjoyment of a fundamental right.
Negative obligation	denotes a State's obligation to abstain from human rights violations.
Absolute right	A right that has no restriction, limitation, exception, or qualification.

3 INTRODUCTION

- The right to life is the most basic human right afforded to every human being simply because one is human. It is the supreme right of all human beings because one has to be alive to enjoy all the other human rights.

4 SCOPE AND CONTENT OF THE RIGHT



Figure 1: Security forces must respect the right to life. In the picture above, Zimbabwean soldiers allegedly violently disperse demonstrators, available at [https://www.voazimbabwe.com/a/zimbabwe-\(accessed 13 November 2018\)](https://www.voazimbabwe.com/a/zimbabwe-(accessed 13 November 2018)).

- The right to life is provided for in Section 48 of the Constitution of Zimbabwe. Section 48 (1) stipulates that 'every person has the right to life.' This section emphasises how important it is to protect the right to life and to ensure that it is not arbitrarily taken or threatened.
- The State has a positive obligation to protect a person's life. However, the right is not absolute because it can be taken away when the State imposes the death penalty. Subsection (2) provides that a law may permit the death penalty to be imposed only on a male person convicted of murder committed in aggravating circumstances who was not less than twenty-one (21) years old at the time he committed the offence. It also states that men who are more than seventy (70) years old should not be sentenced to death.
- However, the Constitution does not explain what 'aggravating circumstances' are and so it is left to judges to decide what they think 'aggravating circumstances' will be in a given case.
- It should be noted that there is currently no legislation in Zimbabwe which defines the aggravated circumstances or the conditions under which capital punishment can be imposed. As such, in the absence of such legislation, injustices can occur in the application of the judges' discretion.
- Internationally, there is advocacy for the death penalty to be outlawed.
- The Constitution provides for the protection of the unborn child under section 48(3) which provides that 'an Act of parliament must protect the lives of unborn children, and that Act must provide that pregnancy may be terminated only in accordance with that law.'
- This section therefore, accords the fetus with the right to life. From the onset fetuses are regarded as entities with rights worthy of Constitutional protection. The Constitution confers a legal duty on the State to protect the fetus against intentional killing.

5 LIMITATIONS

In terms of the Constitution the right to life can be limited in two fronts namely legal abortion and death penalty.

5.1 Legal Abortion

- There are a few exceptional and limited circumstances where abortion is legally permitted in Zimbabwe. Under the Termination of Pregnancy Act of 1977 (Termination of Pregnancy Act) abortion is permitted only in the following circumstances:
 - a. To save the life of the pregnant woman, if the continuation of the pregnancy endangers her life;
 - b. If the pregnancy is a serious threat to the pregnant woman's physical health and could cause permanent damage;
 - c. If there is a serious risk that, if the child is born, it will suffer from a physical or mental defect that will cause the child to be severely handicapped; and
 - d. Where the pregnancy is as a result of unlawful intercourse.

5.2 Death penalty

- It must be noted that it is not only the Constitution that provides the legal framework for the imposition of the death penalty. The death penalty is also provided for in Zimbabwe's subsidiary legislation.
- The Criminal Procedure and Evidence Act (CPEA) [Chapter 9:07] further provides for circumstances under which the death penalty may be passed by the High Court in accordance with the Constitution.
- Section 337(1) of the CPEA empowers the High Court to pass the sentence of death upon an offender convicted of murder committed in aggravating circumstances.
- The Defence Act provides for the death penalty for crimes other than aggravating murder and under circumstances that are not in line with the Constitution. This suggests that the Act has to be aligned to the Constitution.
- To protect the right to life where the police have to use force at a public gathering the Public Order and Security Act (POSA) provides in section 29 (4) that "the degree of force which may be so used shall not be greater than is necessary for dispersing the persons gathered and shall be proportionate to the circumstances of the case and the object to be attained."
- The police or any person authorized to effect an arrest under section 42 (1) (b) of the CPEA must not use force when effecting an arrest. However, where a person resists an arrest, the CPEA provides that the person attempting the arrest may in order to effect the arrest use such force as is reasonably justifiable in the circumstances.

6 EXCEPTIONS TO THE RIGHT TO LIFE

- The limitation clause, section 86 provides that the right to life may not be limited by law except to the extent allowed for in section 48, that is, for murder in aggravating circumstances by a male person within the age limits. It does, however, also provide that the fundamental rights in the Bill of Rights (which includes the right to life) must be exercised reasonably and with due regard for the rights and freedoms of other persons.
- The Criminal Law Code provides that where stringent requirements are met a person has a defense to criminal liability where they cause the death of another whilst acting in self-defense or acting under necessity, for example, where he or she has been threatened that he or she will be killed unless he or she kills another person.

- In order to successfully use self-defense as a justification to violate the right to life, the court could seek to rely upon section 86(1) of the Constitution which provides that the fundamental rights in Chapter 4, which includes the right to life, must be exercised reasonably and with due regard to the rights of other persons.

7 THE RIGHT TO LIFE IN INTERNATIONAL LAW

- Article 3 of the UDHR States that “everyone has the right to life, liberty and security of the person. Article 6 of the International Covenant on Civil and Political Rights (ICCPR) provides that “every human being has the right to life and that the right shall be protected by law.”
- The ICCPR provides for circumstances in which the right to life can be taken away. However, ‘specific safeguards’ exist for ensuring that in countries that have not yet abolished the death penalty, it shall be applied only in the most exceptional cases, for the most serious crimes and under the strictest limits.¹ The right to life is also provided for in other human rights instruments, for example, the Convention on the Rights of Persons with Disabilities (CPRD) Article 10 and the Convention on the Rights of the Child (CRC) Article 6.

8 CASE LAW

- The case of Nachova and Others v Bulgaria (06.07.2005) concerned the killing of the applicants’ relatives by a military policeman who was trying to arrest them.
- The court recalled that law enforcement agents must be trained to assess whether or not there is an absolute necessity to use fire arms, not only on the basis of the letter of the relevant regulations, but also with due regard to the pre-eminence of respect for human life as a fundamental value.

9 ACTIVITIES

- Conduct a debate on whether the death penalty should be abolished.
- Are provisions that exempt certain categories of people from the death penalty discriminatory? (refer to Section 56 of the Constitution).
- Under what circumstances can the right to life be taken away?
- Identify the duties and responsibilities of these duty bearers and rights holders concerning the right to life:
 - The State
 - All persons
 - The Police
 - The Army
 - Health Personnel
 - Prison Officials

10 KEY POINTS

- The right to life is entrenched in section 48 of the Constitution of Zimbabwe.
- This right can be limited through the death penalty and abortions that are permitted by the law (under the Termination of Pregnancy Act).
- Besides the Constitution, there are pieces of legislation that permit the death penalty in Zimbabwe.

1. General Comment No. 36 on Article 6 of the ICCPR on the right to life by the UN Human Rights Committee adopted at the 6th session of the Human Rights Committee on 30 April 1982.

- The death penalty in Zimbabwe is discriminatory because only men can be executed but women cannot, hence this violates Section 56 of the Constitution.
- There are also criminal law exceptions where the right to life can be lawfully taken away for just cause.
- Internationally, there is advocacy for the death penalty to be outlawed.
-

11 CONCLUSION

- It is clear that the right to life is an important right in the Constitution and Zimbabwe's legal response to protecting this right is positive as Zimbabwe has ratified and domesticated certain provisions in international and domestic legislation that Zimbabwe is a party to.
- It is recommended that Zimbabwe must amend section 48 of its Constitution which has the provision for death penalty which violates rights such as the right to equality and freedom from torture or cruel, inhuman or degrading treatment or punishment.

CHAPTER THREE: SECTION 49: RIGHT TO PERSONAL LIBERTY

1 OBJECTIVES

At the end of this section, learners should be able to

- Explain the scope and content of the right to personal liberty.
- Determine what constitutes an arbitrary deprivation of personal liberty.
- Explain the State's obligation to bring an accused person to trial within a reasonable period of time or release them, either conditionally or unconditionally.
- Discuss the right to personal liberty under national law, regional and international instruments.

2 DEFINITION OF KEY TERMS

Personal liberty	encompasses freedom from unauthorised physical restraint.
Arbitrary	Means something based on random choice or personal whim, rather than any reason or system. It also means being capricious or proceeding merely from the will and not based on reason or principle.
Contract	It is a legally enforceable agreement entered into by two or more persons with contractual capacity.
Arrest	Means seizing someone by legal authority and taking him/her into custody.
Detention	refers to confinement or maintenance of a person in custody whilst awaiting a Court decision.

3 INTRODUCTION

- The right to personal liberty is protected in Section 49 of the Constitution.
- Broadly speaking, the right to liberty encompasses not only freedom from unauthorised physical restraint, but it also embraces all the freedoms available to the individual to conduct themselves in virtually all lawful ways.

4 SCOPE OF THE RIGHT

- The right to personal liberty means that persons must not be subject to arrest and detention, except as provided for by law. Their arrest and the detention must also not be arbitrary or without just cause.
- Detention involves deprivation of liberty, so it is essential that correct procedures are adopted when an arrest or restriction of any person's liberty is made.
- Every deprivation of liberty must be in accordance with reasons and procedures prescribed by law.
- An arrest or detention without a basis in law is arbitrary. The same applies where the law authorising the arrest or detention is vague, overbroad or incompatible with other human rights such as freedom of expression, assembly and demonstration.

4.1 The right not to be detained without trial

- Section 49(1) (a) of the Constitution provides that the right to personal liberty includes 'the right not to be detained without trial.'
- The duty not to detain an individual without trial mainly applies to the police and correctional officers who detain offenders for purposes of trial.

- It also applies to army officers responsible for detaining accused members of the military for purposes of trial before military courts.
- The length of police custody and the fact that deprivation of liberty limits the exercise of many rights are of particular importance when the Court is reviewing the State's compliance with the right to personal liberty.
- The right not to be detained without trial should be read together with the rights of arrested and detained persons that are stipulated in section 50 of the Constitution.
- Section 50(2)(b) of the Constitution provides that any person who is arrested or detained and who is not released must be brought before a court not later than 48 hours after the arrest took place or the detention began.
- This provision clearly sets out the procedural requirements to be complied with by authorities that detain persons. They ensure that persons under arrest or detention are not subjected to arbitrary treatment which violates their rights.
- This provision implies that long and extreme delays in finalising trials, especially in the case of pre-trial detainees, amounts to subjecting accused persons to a prison sentence despite their being innocent until proven guilty.

4.2 Freedom from arbitrary detention

- Section 49(1) (b) of the Constitution clearly States that 'every person has the right to personal liberty which includes the right not to be deprived of their liberty arbitrarily or without just cause.'
- The right to personal liberty applies to all forms of detention where people are deprived of their personal liberty and not just detention for purposes of trial.
- Accordingly, section 49(1) (b) regulates all situations under which a person is not free to leave a place as and when they wish to do so.
- Freedom from arbitrary or unlawful detention means that every deprivation of liberty must be in accordance with and authorised by law.
- Furthermore, the lack of limits on the period of detention or lack of a right to contest the detention makes such detention arbitrary and unconstitutional.
- Unlike section 49(1) (a) which primarily regulates detention on remand pending trial, section 49(1) (b) of the Constitution refers to all forms of detention, including unlawful detention by private persons.
- With pre-trial detention, the duty bearers are law enforcement agents, particularly correctional officers. However, freedom from arbitrary detention must be respected by law enforcement officers and private persons who may wish to restrict another person's freedom of movement for any cause.
- Therefore, section 49(1) (b) of the Constitution governs situations where the police or any person detains someone either for just cause (for example if the detained person is caught committing an offence) or for wrong reasons.
- In other words, section 49(1) (b) applies both to persons arrested for purposes of trial and to other persons deprived of their liberty for other reasons. Accordingly, the prohibition of detention arbitrarily or without just cause under section 49(1)(b) applies to, among others, such issues as kidnapping; detention by teachers and detention by the army, other security personnel or any private person.
- For detention to be considered lawful, the grounds and procedure for deprivation of liberty must be stipulated in the law.
- The deprivation of liberty must be neither arbitrary nor violate the safeguards contained in the Constitution and legislation.
- In addition, the courts must protect an accused person's right to personal liberty in all cases where the accused is being held in custody.

4.3 The right not to be detained for failure to fulfil a contractual obligation

- The Constitution makes it clear that failure to fulfil a contract cannot be a ground for an arrest or

any form of detention.

- Failure of one party to perform their obligations under the contract in such a way that the value of the contract is destroyed exposes that party to liability for breach of contract damages under the law. It does not justify an arrest or detention for non-performance.
- The Constitutional rule that failure to perform contractual obligations is not a reason for the detention of a debtor is meant to avoid the mixing of criminal and civil law remedies by making sure that creditors rely on civil courts for the resolution of private disputes.

5 RIGHT TO PERSONAL LIBERTY IN REGIONAL AND INTERNATIONAL HUMAN RIGHTS INSTRUMENTS.

- At the international level, the right to personal liberty is protected under Article 3 UDHR, Article 9 ICCPR, Article 6 of ACHPR, Article 14 CRPD and Article 37 (b) CRC.
- Article 9 of the ICCPR provides that 'everyone has the right to liberty and security of person. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law.'
- Article 6 of the ACHPR provides for the right to personal liberty and states that 'every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.'
- Article 37 (b) of CRC States that 'no child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.'

6 CASE LAW

- In the case of *S v Mukwakwa* 1997 (2) ZLR 298 (H), where a suspect escaped from police cells after more than 60 hours of detention, the court stated that: *'It cannot be said that the custody from which the accused escaped was lawful. He escaped after almost 60 hours, of detention had elapsed. During those 60 hours two court days had passed. There was no reason why the man could not be taken to court. There was no reason given why he should be held a full 48 hours. There was no reason given why the 48 hours should be extended. The prolonged detention was in addition accompanied by inhuman and degrading treatment. This was unlawful. The escape was not unlawful.'*
- In *Nyemba and Another v The Zimbabwe Republic Police and Others* ZHRC/CI/0041/15, two senior officers from the army and the police had detained the second complainant (a brother to the first complainant) for three days without any just cause. The Zimbabwe Human Rights Commission summarised that the right not to be detained without just cause as follows: *'It therefore, follows that he who arrests or detains, that is, the one who interferes with this right has the duty to justify the infringement. Put differently, the deprivation of personal liberty by an arrest or detention is prima facie unlawful. Consequently, the person arresting and detaining another must establish that his actions are authorized by law.'* In this complaint, Inspector Dhowa did not offer any justification for the detention of the complainant in a place that is not legally recognized as a detention place. It is not in dispute that complainant was detained for 3 days. The ZHRC found that the detention was unlawful and on that basis, complainant's right to personal liberty was violated.

7 ACTIVITIES

- Scenario:** Mrs. Moyo has contracted a builder and one of the contractual conditions is that she pays the builder half the charged amount as advance payment. However, a year down the line,

the builder has not provided the service and is giving excuses. She reports the matter to the police who arrest and detain the builder. He is brought before the Court and is imprisoned for 3 months.

Discuss the right to personal liberty in light of the above scenario.

- b) On 09 May 2018, the picture below (adapted) appeared on the New Zimbabwe website home page. Assuming that it is true that prisoners cannot attend trials or bail hearings due to the unavailability of transport or the shortage of fuel:
- Discuss the essential elements of the right to liberty and limitations and whether the conduct of the authorities in the picture amounts to arbitrary detention.
 - Discuss the remedies to be granted to the detainees should they take their case to Court and the Court finds in their favour.

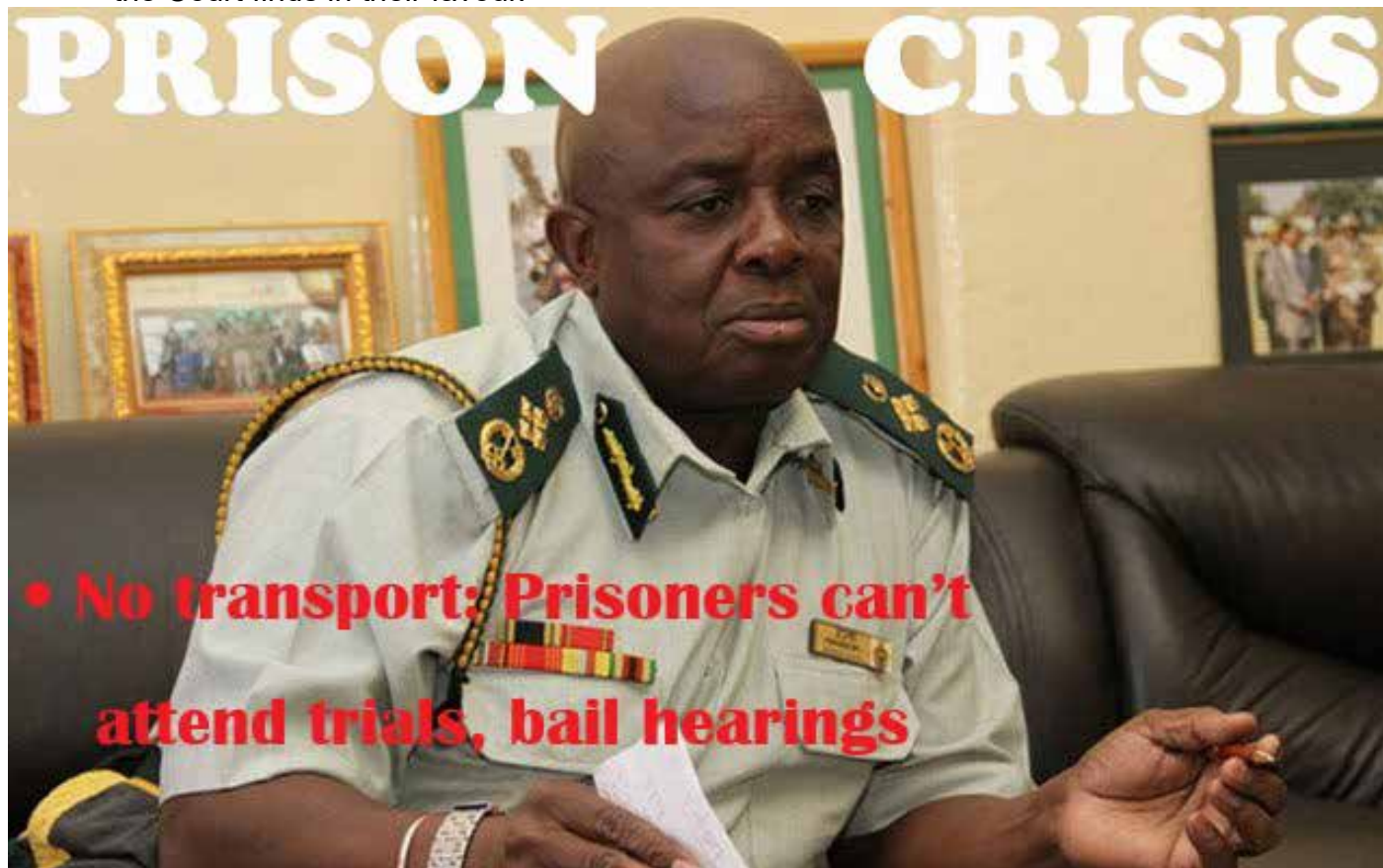


Figure 2: Commissioner General of Prisons, Retired Major General Paradzayi Willings Zimhondi. Source: New Zimbabwe.Com. See M Taruvinga 'Prison crisis: No vehicles to take prisoners to court; trials and bail hearings fail to take place' available at <https://www.newzimbabwe.com/no-vehicles-to-take-prisoners-to-court-trials-and-bail-hearings-fail-to-take-place/> (accessed 9 May 2018).

8 LIMITATION OF THE RIGHT

- The right to personal liberty is not absolute and can be restricted by law.
- Generally, deprivation of liberty is justifiable if it is necessary, reasonable and proportional to the reasons for its use. The deprivation of liberty must not be arbitrary or discriminatory.
- The general limitation provided in Section 86(2) of the Constitution also applies to the right to personal liberty. The limitation is permissible only 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.
- The principle of proportionality limits the State's power to restrict personal liberty only to those circumstances that are strictly necessary.
- The court's decision on whether the deprivation of liberty is arbitrary would then be a value judgement made after considering all these and other relevant factors.

9 KEY POINTS

- The right to personal liberty is a constitutionally guaranteed right that is limitable.
- The right to personal liberty includes the right not to be detained without trial, freedom from arbitrary detention without just cause, freedom from imprisonment for a contractual debt.
- The duty not to detain a person without trial mainly applies to the police, correctional officers and members of the military who detain offenders for purposes of trial.
- However, the duty not to deprive a person their liberty arbitrarily or without just cause applies to security sector personnel and private actors as well.

10 CONCLUSION

- In summation, the right to personal liberty is protected under domestic, regional and international law. From the above discussion, it is clear that the right to personal liberty is not absolute and can be restricted. These restrictions must, however, be justified.
- In Zimbabwe, most of the unjustifiable limitations of the right to personal liberty come in the form of lengthy periods of pre-trial detention for petty, political or bureaucratic reasons.

CHAPTER FOUR: SECTION 51: RIGHT TO DIGNITY

1 OBJECTIVES

At the end of this section, learners should be able to:

- Explain the scope and content of the right to human dignity;
- Discuss the duties and responsibilities of the State and private persons in realising this right;
- Assess whether the right can be limited and, if so, under what circumstances; and
- Understand the protection of this right under national, regional and international law.

2 DEFINITIONS OF KEY TERMS

Dignity	being naturally worthy of honour or respect simply because you are a human being.
Violence	all forms of physical, sexual or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation.
Torture	the action or practice of inflicting severe pain on someone as a punishment or in order to force him or her to confess that he or she has committed a crime or to do or say something they wouldn't say under normal circumstances.
Autonomy	Independence or freedom from external control or influence.
Inherent	inborn, natural.
Self-actualisation	the realisation or fulfilment of one's talents and potential.

3 INTRODUCTION

- In general terms, the idea of human dignity entails, among others the preservation of certain minimum standards of treatment for persons.
- Human dignity implies the guarantee of individual independence or freedom from external control or influence (autonomy). This means that no person should be used as an instrument or an object by another person or by the State.
- All human beings are naturally entitled to respect (chiremera/ isizotha/ inhlonipho). That treatment of people with respect entitled to them and not using them as objects or instruments is at the core of the concept of unhu/ ubuntu (humanness).

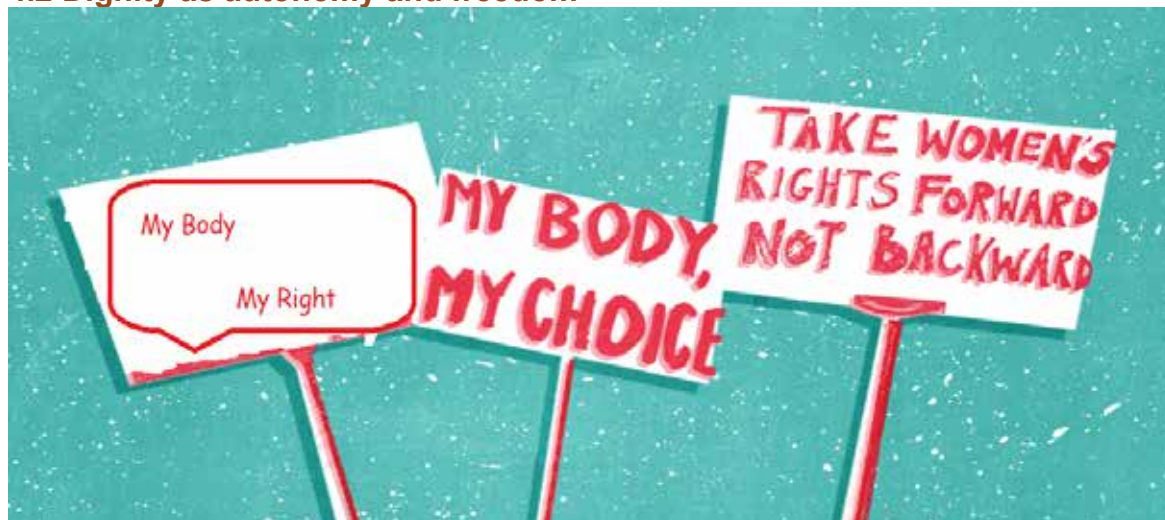
4 THE SCOPE AND CONTENT OF THE RIGHT

- Section 51 of the Constitution provides that every person has inherent dignity in their private and public life, and the right to have that dignity respected and protected.
- The right to human dignity has a wide meaning which covers a number of different values and contexts. It is considered to be what gives a person his or her intrinsic worth to be respected by other persons and by the State.
- Dignity is not only one of the founding values of the Constitution, it is also an independent, self-standing and enforceable right.
- The right to human dignity implies an expectation to be protected from conditions or treatment that is abusive, degrading, humiliating or demeaning as such treatment violates this right.

4.1 Dignity and punishment

- Human dignity is often invoked in issues relating to punishment for criminal conduct and because of that right, courts normally avoid imposing unnecessarily harsh punishments on convicts.
- The concept arises in issues relating but not limited to:
 - a. cruel and unusual punishment;
 - b. the retention of the death penalty;
 - c. prisoners' rights to decent housing, food, clean water and humane conditions of confinement;
 - d. searches on an individual's person;
 - e. forcing people to take certain bodily fluids (urine, blood, etc.);
 - f. and procedural guarantees such as a person being treated as innocent until proven guilty (presumption of innocence).
- The death penalty/capital punishment has been characterised as cruel, inhuman and degrading resulting in the denial of the condemned prisoners' dignity. It violates the convict's sense of self-worth and portrays the State as the principal violator of human dignity.
- Other forms of punishment that potentially strip criminal offenders of their dignity include life imprisonment without parole and corporal punishment.
- Cruel and unusual punishments treat members of the human race as non-humans, as objects to be toyed with and discarded.

4.2 Dignity as autonomy and freedom



Human dignity is at the core of all human rights.

- Dignity works hand in hand with rights related to privacy and the autonomy of the human person. It creates space for individuals to enforce their right to personal security and control over their own bodies.
- Accordingly, human dignity entitles a person to freely make their own decisions on matters to do with the use of contraceptives, the spacing of one's children and many other issues concerning sexuality and reproduction.
- Human dignity has little value without freedom; for without freedom personal development and fulfilment is not possible.
- There is an overlap between dignity as self-actualisation and dignity as autonomy or freedom. In a court case that was decided by the Constitutional Court of South Africa, the Court explained the relationship between dignity, self-actualisation and freedom in the following terms²:
 - *"Human dignity has little value without freedom; for without freedom personal development and fulfilment are not possible. Without freedom, human dignity is little more than an abstraction. Freedom and dignity are inseparably linked. To deny people their freedom is to deny them their dignity. Although freedom is indispensable for the protection of dignity, it has an intrinsic Constitutional value of its own. It is likewise the foundation of many of the other rights that are specifically entrenched. Viewed from this perspective, the starting point must be that an individual's right to freedom must be defined as widely as possible, consonant with a similar breadth of freedom for others."*

4.3 Dignity as self-actualisation.

- Human dignity may also be conceptualised as requiring the State to promote the individual's quest for self-actualisation. This conception of human dignity revolves around the individual's capacity to will or to desire to shape their future through rational thinking or reason.
- Dignity gives an individual the drive to achieve the goals which they set for themselves and to reach their full potential.
- To ensure that individuals achieve self-actualisation, it is necessary for the State to remove barriers that limit people's capacity or potential to achieve their goals.

4.4 Dignity as a value

- Human dignity is the basis for the enjoyment of all other rights. Section 3 of the Constitution of Zimbabwe recognises dignity as a founding value and legal principle.
- Dignity is upheld when people are guaranteed access to basic human rights in the context of equal opportunities without discriminatory treatment based on sex, age, social status, place of residence and physical conditions of the individual.
- Human dignity allows for recognition, consideration and involvement of all citizens in decision-making and participation in community affairs.

■ 2. *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others, 1996 (1) SA 984 (CC) para 49* State

5 HUMAN DIGNITY IN REGIONAL AND INTERNATIONAL HUMAN RIGHTS INSTRUMENTS

- The right to human dignity is provided for in a number of regional and international instruments. For example,
- Article 5 of ACHPR provides that “Every individual should have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status...”
- Article 10 (1) ICCPR which provides that “All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.”
- The right to human dignity is also provided for in the UDHR (Article 1), CRPWD (Article 1), Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Article 3), ICESCR (preamble) and Article 13 ACRWC.

6 LIMITATIONS

- In terms of section 86(3) as read with section 87 (4) (b) of the Constitution of Zimbabwe, the right to human dignity can neither be limited by a law of general application nor be derogated from during a public emergency.
- In the event that a court decides that a particular law or conduct limits the right to human dignity, such law or conduct should then be declared unconstitutional.

7 CASE LAW

- The case of *Chawira and Thirteen others v Minister of Justice, Legal and Parliamentary Affairs* CCZ 47/ 2015 concerned fifteen prisoners who were on death row for years ranging from four to twenty years. They applied to have their sentences commuted to life imprisonment.
- In the case of *Makoni v Commissioner of Prisons and Minister of Justice Legal and Parliamentary Affairs* CCZ 08/2016 the Constitutional Court of Zimbabwe decided that a sentence of life imprisonment without the possibility of parole is an affront to dignity. In this case, the Court stated that:

“A life sentence imposed on a convicted prisoner without the possibility of parole or release on licence constitutes a violation of human dignity and amounts to cruel, inhuman or degrading treatment or punishment in breach of Sections 51 and 53 of the of the Constitution”

8 ACTIVITIES



- The picture above is from one of ZHRC's prison visit report in August 2015. Discuss the conditions depicted within the context of the right to human dignity.



Figure 4: See D M Fatao Denten 'Beautiful and Eyes Cleansing Culture in Swaziland' available at <https://www.google.com/search>: (accessed 11 June 2018)

- b. Look at the picture above. Discuss if harmful cultural practices such as virginity testing infringe on the right to human dignity.

9 KEY POINTS

- The concept of dignity requires that every person is recognized, respected and protected as a rights holder who is a unique and valuable human being with an individual personality, distinct needs and interests and should have his or her privacy respected.
- The right to human dignity applies to everyone including people who are deprived of liberty under the laws and authority of the State. This includes persons who are held in prisons, hospitals, detention camps or correctional institutions or elsewhere. The State should ensure that respect of human dignity is observed in all institutions.
- The State has an obligation to ensure that persons who are particularly vulnerable because of their status in society are protected from violations of their dignity.
- The right to human dignity goes hand in hand with and complements the ban on torture or other cruel, inhuman or degrading treatment or punishment.
- This right must be upheld without distinction of any kind, such as race, colour, sex, language, religion, political or other opinions, national or social origin, property, birth or any other status.
- It should be noted that Section 44 of the Constitution of Zimbabwe obligates everyone to respect, protect, promote and fulfil all the rights provided in the Constitution including the right to human dignity.

10 CONCLUSION

- Treating all persons with humanity and with respect for their dignity is a fundamental and universally applicable rule. Consequently, the application of this rule, as a minimum, cannot be dependent on the material resources available to the State.
- The Constitution emphasizes that every person has inherent dignity in both their private and public life; as well as the right to have their dignity respected and protected.
- All persons are therefore equally entitled to the right to human dignity.

CHAPTER FIVE: SECTION 52: THE RIGHT TO PERSONAL SECURITY

1 OBJECTIVES

At the end of this section, learners should be able to:

- Explain the scope and content of the right to personal security;
- Discuss the duties and responsibilities of the State and private persons in realising this right;
- Assess whether the right to personal security can be limited and, if so, under what circumstances; and
- Identify the provisions governing the right to personal security under national regional and international law.

2 DEFINITION OF KEY TERMS

Autonomy	independence or freedom from external control or influence.
Bodily integrity	the right of each human being to autonomy and self-determination over their own body.
Self- determination	the ability or power to make decisions for yourself.
Corporal punishment (CP)	physical punishment, such as caning or flogging.
Informed consent	permission granted in full knowledge of the possible consequences.
Psychological integrity	entails the mental aspect of freedom and autonomy that should not be disturbed without just cause.
Reproductive autonomy	the freedom to make decisions concerning reproduction and to decide on the number and spacing of children.

3 INTRODUCTION

- The right to personal security is one of the fundamental rights protected in the Declaration of Rights. This right is an important innovation in the current Constitution because it was not there in the previous Constitution.
- An element of personal autonomy is at the core of all the rights that form part of the broader right to personal security.

4 SCOPE AND CONTENT OF THE RIGHT

- Section 52 of the Constitution of Zimbabwe protects the right to personal security. It provides that every person has the right to bodily and psychological integrity. The right to bodily and psychological integrity includes three components: freedom from violence from all private or public sources; the right to make decisions concerning reproduction; and the freedom to consent to the extraction of bodily tissue or scientific experimentation.
- Bodily and psychological integrity means that everyone has the right to security in and control over their body
- The right empowers adults and mature children, especially adolescents, to make decisions about whether, and if so, how to use their own bodies.
- Generally, every rational person is entitled to decide what is or is not done to their body.
- Bodily self-determination implies that all forms of coercive contact with the physical person of another, including that of a child, is unlawful and violates their bodily integrity.

4.1 Freedom from all forms of violence from public and private sources

- Violence comes in many forms and takes place in both the public and private spheres. It includes physical, sexual, psychological and emotional abuse that violates the bodily integrity of the human person.
- Violence can be perpetrated by those in authority or by any person on another, for example, in parent-child, nurse/ doctor-patient, employer-employee, police-public, prison officials-inmates, army-public, superior-subordinate, husband-wife, child-child, teacher-pupil and many other relationships.
- It implies that no one, including a prison officer, a school head, a teacher and a parent at home should inflict corporal punishment (CP) on children. Similarly, children should not bully each other. Corporal punishment by a prison officer is known as 'judicial corporal punishment'. It is done where a court orders that a juvenile who has committed an offence should be caned. On the 3rd of April 2019, the Constitutional Court of Zimbabwe decided that judicial corporal punishment is cruel, inhuman punishment which violates section 53 of the Constitution and banned it³.
- Corporal punishment constitutes not only physical abuse of children, but a violation of the child's right to bodily and psychological integrity.
- More importantly, CP is dangerous in that it is administered indiscriminately without any measure or control over those administering it, be they parents or teachers.



Figure 5: Zimbabwean boys in school uniform being caned by a teacher while assuming a Korean-style "push-up" posture. See 'Corporal punishment in Zimbabwe' available at [https:// www.corpun.com/vidzws01.htm](https://www.corpun.com/vidzws01.htm) (accessed 19 June 2018). The question that arises is whether CP violates the right to personal security?

4.2 The right to make decisions concerning reproduction

- Section 52(b) of the Constitution provides for the right to make decisions concerning reproduction. This provision should be read with, section 76(1) of the Constitution, which provides that everyone has the right to health care services, including reproductive health care.
- The right to make decisions concerning reproduction raises questions about the reach of individual autonomy in matters related to medical treatment, surgical operations and reproduction.
- Matters of reproductive choice and sexual autonomy depend on the individual's capacity to make informed decisions.
- Section 52 protects everyone's bodily self-determination and reproductive autonomy, including matters relating to 'whether or when to have children.' Remember, the Constitution of Zimbabwe outlaws abortion unless it is authorised by law and the Termination of Pregnancy Act provides the limited circumstances in which abortion is allowed by law.
- The right of access to reproductive health care and to make decisions concerning reproduction are constitutive elements of bodily self-determination and permit individuals to make autonomous

³ *State v Chokuramba CCZ 10/19*

reproductive decisions.

- They entitle adults and mature adolescents to practice safe sexual relations, to be provided with the conditions necessary for optimal foetal survival and development, and to maintain their reproductive health.
- The right to make decisions concerning reproduction implies that women are entitled to decide on the number and spacing of their children. Decisions on whether to have children or not, while preferably made in consultation with a spouse or partner, must not be limited by the spouse, parent, partner or by the Government

4.3 The right to consent to medical or scientific experiments and to the extraction of bodily tissue

- The term medical or scientific experiment is very broad and includes both major and minor experiments on human beings.
- For a patient or participant to be subjected to a medical or scientific experiment, they should give informed consent to the proposed experiment.
- The ultimate determination on whether an individual is entitled to make independent treatment or surgical decisions depends on whether they have sufficient maturity and mental capacity to understand the benefits and risks of the treatment in question.
- Accordingly, the patient or participant should be of sufficient maturity to understand the nature, risks and benefits of the proposed medical procedure or scientific experiment.

5 RIGHT TO PERSONAL SECURITY IN REGIONAL AND INTERNATIONAL INSTRUMENTS

The right to security of the person is protected in some regional and international instruments such as Article 3 of the UDHR which provides that “everyone has the right to life, liberty and security of the person,” and Article 6 of the African Charter on Human and Peoples’ Rights which states that “every individual shall have the right to liberty and to the security of his person...” This right is also protected in Article 9(1)-(5) of the ICCPR and Article 14 CRPD.

6 LIMITATION OF THE RIGHT TO PERSONAL SECURITY

- All components of the right to bodily and psychological integrity are limitable. As such, a law of general application may limit any of the three components of the right.
- The freedom to make decisions concerning reproduction is limited by the laws protecting the life of the foetus before birth.

7 CASE LAW

In the High Court case of *Pfungwa & Another v Headmistress, Belvedere Jnr Primary School & Others* (HH 148-17 HC 6029/16) [2017] ZWHHC 148 it was the case of the applicants that no one, whether a school, a teacher or a parent at home should inflict corporal punishment on children. They submitted that corporal punishment was physical abuse of children. They averred that the punishment more often than not resulted in physical trauma or injury to children. They insisted that corporal punishment in school was dangerous in that it was administered indiscriminately without any measure or control over the teachers.

NB: The High Court found that the argument of the applicants had substance, gave a judgment in their favour and referred its judgement for confirmation by the Constitutional Court. This confirmation is pending before the Constitutional Court.

8 ACTIVITIES

- i. Read the judgment on the case; *Pfungwa and Another v Headmistress of Belvedere Junior Primary School and Others* HC 148.
- ii. What are your views about this judgment in light of the right to personal security?
 - b. Debate on whether the ban on elective abortion violates women's right to bodily and psychological integrity, especially the right to make decisions concerning reproduction?
 - c. Dramatise a domestic violence scene. Identify the legal protection measures for domestic violence. Are they effective? What else can be done to curb domestic violence?

9 KEY POINTS

- Bodily and psychological integrity means that everyone has the right to security in and control over their body.
- The right empowers adults and adolescents to make decisions about whether, and if so, how to use their own bodies.
- To this end, section 52 of the Constitution enshrines the right to bodily self-determination and protects an individual's physical integrity against infringement by public officials and private persons.
- Bodily and psychological integrity includes three components which are: freedom from violence from all public or private sources; the right to make decisions concerning reproduction and the freedom to consent to the extraction of bodily tissue or scientific experimentation.

10 CONCLUSION

- The right to personal security is one of the fundamental rights protected in the Zimbabwean Constitution.
- The freedom to make decisions concerning reproduction empowers women to make independent decisions on whether or not to take contraceptive medication.
- An element of personal autonomy is at the core of all the rights that form part of the broader right to bodily and psychological integrity.

CHAPTER SIX: SECTION 53: FREEDOM FROM TORTURE OR CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

1 OBJECTIVES

At the end of this section learners must be able to:

- Discuss the scope and content of the right to freedom from torture or cruel, inhuman or degrading treatment or punishment;
- Differentiate what constitutes torture, cruel, inhuman or degrading treatment;
- Explain the legal framework on torture in Zimbabwe;
- Explain whether there are limitations to the freedom from torture; and
- Discuss the right to freedom from torture or cruel, inhuman or degrading treatment or punishment under regional and international instruments.

2 DEFINITION OF TERMS

Corporal punishment
Torture

physical punishment, such as caning or flogging.

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity⁴.

Inhuman treatment

an intentional, hostile infliction of physical or mental suffering upon another individual.

Degrading

causing loss of self-respect; humiliating.

3 INTRODUCTION

The right to freedom from torture or cruel, inhuman or degrading treatment or punishment was developed with the aim of protecting the dignity, physical and psychological integrity of a person. Freedom from torture or cruel, inhuman or degrading treatment or punishment is accepted by the international community as a norm which is universal and must be upheld regardless of the circumstances. Torture or cruel, inhuman or degrading treatment or punishment is a crime against humanity.

4 SCOPE OF THE RIGHT

- Freedom from torture is entrenched in section 53 of the Constitution of Zimbabwe. This section provides that 'No person may be subjected to physical or psychological torture or to cruel, inhuman or degrading treatment or punishment.'
- Section 53 must be read with Section 86 which deals with the limitation of rights and fundamental human freedoms. Section 86(3)(c) and reads: - 'No law may limit the following rights enshrined

■ 4. Article 1 (1) of the Convention Against Torture.

in this Chapter and no person may violate them:

(c) The right not to be tortured or subjected to cruel, inhuman or degrading treatment or punishment.'

- It follows that the right to freedom from torture or cruel, inhuman or degrading treatment or punishment is an absolute right which cannot be limited by any law no matter the circumstances.
- It is important to note that subsidiary legislation specifically the Criminal Law Codification and Reform Act does not provide for the crime of torture and instead it has relied on section 89 which provides for the crime of assault when dealing with cases of torture. However, people have approached the Constitutional Court alleging torture and have accessed remedies such as claiming damages (see Jestina Mukoko case).
- Torture is a crime and serious human rights violation that has devastating consequences for its victim. The practice of torture is in stark contrast to the rule of law. The abhorrent nature of the crime is recognised in Constitutions around the world and in international law under which torture is absolutely prohibited. This absolute prohibition means that there are no exceptions and no justifications for this crime, even in times of emergency.
- Zimbabwe must take effective legislative, administrative, judicial or other measures to prevent acts of torture in the whole country. The State therefore, has a duty to enshrine the prohibition of torture in its domestic legal order. In addition, the State must ensure that such prohibition is enforced in practice, particularly by ensuring that domestic institutions comply with laws which seek to prevent torture.
- It is crucial to note that some acts, conducts or events may be viewed as torture in certain circumstances, while they will not be viewed as torture in some other situations. The defining aspect for torture is that it is committed by a public official or at his or her instigation.
- The European Court of Human Rights held that stripping someone naked, tying their arms behind their back, and then suspending them by their arms, amounted to torture; as did rape of a detainee by an official of the State; and subjection to electric shocks, hot and cold water treatment, blows to the head and threats of ill-treatment to the applicant's children.
- It should be noted that usually in legal circumstances, torture is linked with cruel, inhuman and degrading treatment or punishment or ill-treatment. The difference between the two depends on the circumstances of each case.
- Section 53 stipulates that 'no person may be subjected to physical or psychological torture...' Physical and psychological torture can be defined as acts prepared and carried out deliberately against the victim in order to suppress their psychic resistance and force him/her to incriminate himself/herself or confess certain criminal behaviour or to submit him to punishment modalities additional to deprivation of liberty itself⁵.
- Civil Society Organizations including non-governmental organisations have repeatedly called on the State to enshrine the prohibition of torture in all settings to emphasize the seriousness of torture as a crime and human rights violation.
- The prohibition of torture and other ill-treatment entails an overarching duty for the State to take measures to prevent torture, including by legislative means and a series of specific obligations relating to preventive measures, criminal accountability and compensation. The State must both refrain from torture and take positive steps with a view to ensuring that torture does not take place and where it does, that justice is done.
- When establishing whether an act of torture has been committed, the most important criteria would be the identity of the perpetrator and the purpose and intent of the infliction of pain. The perpetrator should be a public official or someone acting on the instigation of a public official and the perpetrator's actions need to serve a specific purpose for the act to constitute torture.

⁵ www.undoc.org/e4j/en/terrorism/module-9/key-issues/regional-human-rights-instruments.html

4.1 Cruel, inhuman and degrading treatment



Figure 6: Law enforcement agents should refrain from actions that constitute cruel, inhuman and degrading treatment or punishment no matter the circumstances. Source: Zim Daily, 'Civic groups condemn police brutality' 21 February 2016, available at <http://www.zimdaily.com/?p=45262> (accessed 12 June 2018).

- If treatment or punishment causes intense physical or mental suffering but is not severe enough to amount to torture, it is defined as cruel and inhuman treatment. Thus, physical assaults can amount to cruel and inhuman treatment if they are sufficiently serious. Deliberate cruel acts may also amount to inhuman treatment.
- Degrading treatment or punishment means treatment that is grossly humiliating and undignified. It also induces a feeling of inferiority.
- The question whether the treatment or punishment is degrading is a subjective one because it is sufficient for the victim to feel humiliated, even if the State agent does not perceive the treatment as humiliating.
- An example of a specific purpose would be the extraction of a confession. An indicator that is considered to be helpful when determining the intent and purpose of the conduct is the degree of control that a person exercises over another or whether a situation of unequal power exists, as is the case in situations of detention.
- The right to be free from cruel, inhuman or degrading treatment or punishment is not confined to detainees or prisoners, but can apply to individuals in situations that increase their vulnerability, such as people who are destitute or in care institutions.
- The State must ensure that non-State or private actors do not violate the right to be free from cruel or degrading treatment or other abuse (duty to protect) for example, the State must take measures to protect people from inhuman or degrading conditions in both public and private institutional settings.
- Furthermore, the State must also take positive steps to ensure the enjoyment of the right to be free from cruel or degrading treatment (obligation to fulfill) for instance, the State must conduct an effective investigation where an individual raises a claim of abuse, such as ill-treatment at the hands of police or prison officials in prison or police cells.

5 FREEDOM FROM TORTURE OR CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT IN REGIONAL AND INTERNATIONAL INSTRUMENTS

- The international instrument that specifically provides for the prohibition of torture or cruel, inhuman or degrading treatment or punishment is the United Nations Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (commonly known as the Convention Against Torture or CAT). It is important to note that Zimbabwe has not yet ratified the CAT.
- The right, however, is protected in other instruments which Zimbabwe is party to such as Article 7 of the ICCPR, Article 15 of the CRPD, Article 5 of the UDHR, Article 4 of the Maputo Protocol, Article 37 of the CRC and Article 16 of the ACRWC.
- Articles 7 of the ICCPR and Article 15 of the CRPD provide that no one shall be subjected to torture or cruel, inhuman or degrading treatment or punishment.

6 LIMITATION

- This right is an absolute right and cannot be limited in any situation.

7 CASE LAW

- In the case of *Jestina Mukoko v Attorney-General SC11/12*, it was held that the evidence before the court established that Ms. Mukoko had been forcibly taken from her home and transported to an unknown place where, when not under interrogation by her captors, she was kept totally incommunicado in solitary confinement for nearly three weeks. During interrogation, she was severely beaten on the soles of her feet and made to kneel on gravel for a prolonged period. She was questioned about a man she was said to have helped to leave the country for training in future insurgent and terrorist activities in Zimbabwe.
- The court held that “no exceptional circumstance such as the seriousness of the crime the person is suspected of having committed or the danger he or she is believed to pose to national security can justify infliction of torture or inhuman or degrading treatment----such treatment should never form part of the techniques of investigation of crimes employed by law enforcement agents.”
- In the case of *Jennifer Williams and Others v Ministry of Home Affairs and Others CCZ 4/14*, the court noted that detention ought not to reduce the detainee to humiliation and indignity. Every detainee is entitled to be treated with some degree of decency and respect. The court declared the following about police holding cells: The holding cells should have clean and salubrious flushing toilets with toilet paper and a washing bowl. The flushing toilets should be cordoned off from the main cell to ensure privacy. A good standard of hygiene should be maintained in the holding cells. Every person detained in police custody overnight should be furnished with a clean mattress and adequate blankets. Adequate bathing facilities should be provided for all persons detained in custody overnight. Every person detained should have access at all times to wholesome drinking water from a source other than the tap above the toilet. Women detained in police custody should be allowed to keep their undergarments including brassieres, and to wear suitable footwear.

8 ACTIVITIES

- a. Assuming that the child in the picture below has misbehaved and the parent decides to administer corporal punishment to discipline the child, does that constitute a violation of the right to freedom from torture or cruel, inhuman or degrading treatment or punishment?



Figure 7: S Calltorp 'End violence against women and children' available at <https://www.herald.co.zw/end-violence-against-women-and-children/> (accessed 11 June 2018)

7 KEY POINTS

- In order to ensure the full realisation of freedom from torture, one must understand what amounts to torture or cruel inhuman or degrading treatment or punishment.
- Freedom from torture or cruel, inhuman or degrading treatment or punishment is an absolute right which must be respected all the time.
- Both State and private actors have a duty to refrain from engaging in activities that amount to torture or cruel, inhuman or degrading treatment.
- States have a duty under national, regional and international law to provide redress to victims of torture.

8 CONCLUSION

- In a nutshell, it is clear that freedom from torture or cruel, inhuman or degrading treatment or punishment is an absolute right which must be respected by the State and private individuals.
- Zimbabwe must do more to ensure the promotion and fulfillment of this right through several steps that include ratifying CAT and its optional protocol, criminalize torture in national legislation and design and implement relevant training for public officers on this right.

CHAPTER SEVEN: SECTION 54: FREEDOM FROM SLAVERY OR SERVITUDE

1 OBJECTIVES

At the end of this section, learners should be able to:

- Define slavery or servitude;
- Identify any modern forms of slavery that exist in Zimbabwe; and
- Discuss the duties and responsibilities of the State and private actors to prevent slavery or servitude.

2 DEFINITION OF KEY TERMS

Slavery	when someone exercises ownership rights over another person as if that person were a piece of property.
Servitude	when a person lives on another person's premises who is more powerful and exercises control over them, works for them, and are so dependent on them that they are unable to leave but they are not owned by that person.

3 INTRODUCTION

The right to be free from slavery or servitude is one of the fundamental human rights enshrined in the Constitution. Its importance is reflected in the fact that it is also provided for in some international and regional human rights instruments such as the Universal Declaration of Human Rights (UDHR) and the African Charter on Human and People's Rights (ACHPR). This right is absolute, which means that it can never be restricted or limited by any law or administrative conduct. In other words, there is no set of circumstances which can justify the limitation of an individual's right to be free from any form of slavery or servitude.

4 SCOPE AND CONTENT

- In ancient days, slavery involved open capture, acquisition and disposal of people on open markets. However, in modern times, the practice has evolved to new forms including trafficking in persons, debt bondage and serfdom.
- Debt bondage means a pledge by a debtor of their personal services or labour or those of a person under their control as security or payment for a debt.
- This implies that the debtor consents to this unfortunate and unlawful state of affairs due to their insolvency or poverty. However, this consent is not considered as a defence at law since it perpetuates the infringement of a fundamental human right that is regarded as illimitable and non-derogable.
- Trafficking in persons is modern day slavery, involving victims who are recruited, transported, transferred or harboured through force, fraud, control or abduction for purposes of exploitation.⁶ Trafficking may occur within the borders of a country or across borders.
- In Zimbabwe, trafficking is prohibited in terms of the Trafficking in Persons Act Chapter 9:25 of 2014.
- Slavery or servitude is also evidenced where a woman, without the right to refuse, is given in marriage on payment of a consideration in money or in kind, being made to her parents, guardian, family or any other person or group.
- This scenario is still prevalent in Zimbabwe, in certain sections of society, where young girls are pledged into marriage on the pretext of religion or culture.

⁶ Article 3 UN Trafficking Protocol

- Another typical example of what constitutes slavery or servitude is where a child or young person under the age of 18 years is delivered by either or both of their parents or guardian to another person, whether for a reward or not, with a view to exploit the child or young person or their labour.
- This usually happens to children whose parents live in abject poverty or who have been orphaned.

4.1 Legislative framework governing freedom from slavery or servitude

- Section 54 of the Constitution provides for the right to freedom from slavery or servitude.
- In Zimbabwe, different forms of slavery and servitude are proscribed in different pieces of legislation among them the Domestic Violence Act, the Labour Act Chapter 28:01 and the Trafficking in Persons Act. The Children's Act which is being aligned to the Constitution and the Marriage Bill which is in the process of being enacted into law will also address issues of slavery and servitude.
- The enactment of the Trafficking in Persons Act in 2014 was celebrated in most quarters with the belief that it would go a long way in tackling the problem of human trafficking which exposes people, particularly, young women and the girl child in Zimbabwe to modern-day slavery.
- A case in point is the 2016 Zimbabwe-Kuwait saga wherein women and girls were trafficked to the latter State and made to work as domestic workers in conditions that amounted to slavery and subjected to sexual exploitation. This is quite a disheartening episode in the 21st century, which lays bare the reality of the gross violations of the victims' rights to be free from slavery or servitude, to human dignity (Section 51), to personal security (Section 52) and to be free from forced or compulsory labour (Section 55), among others.

5 FREEDOM FROM SLAVERY AND SERVITUDE IN INTERNATIONAL AND REGIONAL INSTRUMENTS

The right to be free from slavery received serious attention in international law in the early 20th century through the Slave Convention of 1926, which was later followed up with the Supplementary Convention on the Abolition of Slavery, Slave Trade and Institutions and Practices Similar to Slavery. The right to be free from slavery or servitude is provided for in a number of international human rights instruments, chief among them the UDHR.

It is also enshrined in Article 8 of the International Covenant on Civil and Political Rights (ICCPR) which prohibits slavery and slave trade in all their forms, holding someone in servitude and forcing someone to perform compulsory labour.

At the regional level, the African Charter on Human and People's Rights espouses this very right in Article 5 which proscribes all forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment.

6 CASE LAW

- In the case of *S v Norest Maruma* (2018), the Magistrates Court convicted the accused for facilitating the trafficking of five Zimbabwean women to Kuwait where they were subjected to sexual slavery⁷.
- Section 46(1) (e) provides that when interpreting a provision in the Declaration of Rights, domestic courts may consider relevant foreign law.
In the case of *R v Wei Tang* (2007) 16 VR 454, the High Court of Australia upheld the conviction of a Melbourne brothel owner, Wei Tang for slavery. Section 270 of the Commonwealth Criminal Code of 1995 expressly prohibits slavery. This provision was considered in this case, where it was alleged that the accused kept five women who came to Australia from Thailand to work as prostitutes. Each woman entered into an agreement whereby they incurred a debt of approximately

■ 7. See T Rupapa 'Kuwait saga: Human trafficker jailed 50 years' *The Herald Newspaper* (day?March 2018)

\$40 000 which was to be paid off by having sex with men in Australia. The Court noted that the presence of consent does not necessarily rule out the existence of a state of slavery and it is possible for slavery to result from a contract.

7 ACTIVITY

- a. A domestic worker wakes up at 04:00 hours and is made to work continuously until 23:00 Hours. Her employer does not allow her to take breaks and off days. She is not entitled to sick leave or to access medical treatment whenever she needs it. She has not been paid her dues for 6 months and the employer argues that they provide her with food and accommodation. Moreover, the employer says he has not been paid for the same period by his own employer. He often forces her to perform acts of a sexual nature with him in the absence of his wife who is a cross-border trader.
 - i. Does this amount to slavery, servitude or forced labour?
 - ii. Which domestic and international laws prohibit these acts?

8 KEY POINTS

- Freedom from slavery or servitude is a constitutionally guaranteed right that cannot be limited in any way.
- The existence of slavery (in its modern forms) or servitude in the Zimbabwean society has been noted in various settings, which calls for both the State and private actors to ensure the full realisation of this important right.
- Under international law, the State has a duty to provide redress to victims of slavery or servitude.

9 CONCLUSION

It is clear from the discussion that the right to be free from slavery or servitude is protected in the Constitution of Zimbabwe. The inclusion of the absolute and non-derogable right to be free from slavery or servitude is commendable since it is in line with international and regional human rights instruments, to which Zimbabwe is a party.

CHAPTER EIGHT: SECTION 55: FREEDOM FROM FORCED OR COMPULSORY LABOUR

1 OBJECTIVES

At the end of this section, learners should be able to:

- Define forced or compulsory labour.
- Identify some regional and international human rights instruments that provide for the protection of freedom from forced or compulsory labour; and
- Explain whether there are limitations to the right to freedom from forced or compulsory labour.

2 DEFINITION OF KEY TERMS

Forced or compulsory labour all work or service which is exacted from any person under a threat of any penalty and for which the said person has not offered himself voluntarily⁸.

3 INTRODUCTION

- Freedom from forced or compulsory labour is provided for in Section 55 of the Constitution. This right is violated whenever persons are coerced to work through the use of violence or intimidation.
- Not only is forced or compulsory labour a serious violation of a fundamental human right, but is also a leading cause of poverty and a hindrance to economic development. It is also one of the most common elements of modern day slavery, which often affects the most vulnerable and excluded groups such as women, children and migrant workers.

4 SCOPE AND CONTENT OF THE RIGHT

- Forced or compulsory labour manifests itself in several forms such as compulsory participation in public works projects.
- Other acts that were discussed in the previous chapter such as trafficking in persons, commercial sexual exploitation of women and children and bonded labour constitute forced or compulsory labour.
- Forced or compulsory labour usually happens in the context of poverty, lack of sustainable jobs and education, as well as weak rule of law, corruption and an economy dependent on cheap labour. The fact that these situations are undoubtedly existent in Zimbabwe, serves to prove that the violation of this particular right is a reality.

4.1 Freedom from forced or compulsory labour under domestic law

- Section 55 of the Constitution prohibits forced or compulsory labour as it provides that 'no person may be made to perform forced or compulsory labour.'
- It has to be noted that, this right is not absolute since it is not part of the illimitable rights listed in section 86(3) of the Constitution.
- Freedom from forced or compulsory labour can be limited in accordance with section 86(2) of the Constitution. This provision stipulates that: 'the fundamental rights and freedoms set out in this Chapter 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.'

■ 8. Article 2(1) of Forced Labour Convention, 1930 (No. 29).

- An example of the law of a general application that limits this particular right in the Zimbabwean legal system is Section 4A of the Labour Act [Chapter 28:01]. Section 4A provides that any labour in fulfilment of an order of the court and labour offered by detained people in the interest of hygiene does not constitute forced or compulsory labour.

2 FREEDOM FROM FORCED OR COMPULSORY LABOUR IN REGIONAL AND INTERNATIONAL INSTRUMENTS

- There are a number of international conventions that provide for the abolition of forced labour. The predominant ones are the ILO Forced Labour Convention, 1930 (No. 29) and ILO Abolition of Forced Labour Convention, 1957 (No. 105).
- The former convention prohibits all forms of forced or compulsory labour and provides for exceptional circumstances in which this fundamental freedom is limited in Article 2(2). These include work required by compulsory military service, normal civic obligations as a consequence of a conviction in a court of law and for minor communal services performed by the members of a community in the direct interest of the community. The latter scenario includes instances where all members of the community are required to contribute towards the construction of classroom blocks or the repair of a communal borehole.
- It also requires that the illegal extraction of forced or compulsory labour be punishable as a penal offence. Since Zimbabwe ratified this Convention on 27 August 1998, its domestic laws should be consistent with this international requirement. To this end, it is vital to note that section 4A (3) of the Labour Act [Chapter 28:01] criminalises forced labour.
- Article 8(3) (a) of the ICCPR provides that 'no one shall be required to perform forced or compulsory labour.' This provision is almost synonymous to section 55 of the Constitution. More importantly, however, Zimbabwe is a party to the ICCPR.
- Some international conventions do not explicitly provide for this particular freedom, but refer to it impliedly when they provide for the right to work and to free choice of employment, aspects which are non-existent in instances of forced or compulsory labour (see Articles 6(1) of ICESCR, 23(1) of the UDHR and 15 of the ACHPR at the regional level).

3 LIMITATION OF FREEDOM FROM FORCED OR COMPULSORY LABOUR

- In Zimbabwe, the limitation of the right to be free from forced or compulsory labour is provided for in the Labour Act [Chapter 28:01] in Section 4A (2) as already noted above.
- Its provisions are almost similar to the exceptions found in Article 2(2) of the ILO Forced Labour Convention, 1930 (No. 29).
- However, the domestic legislation goes a step further, where it provides that forced labour does not include labour required of any person while he is lawfully detained, which though not required in consequence of the sentence of a court, is necessary in the interests of hygiene.
- It further provides for exceptions of the labour of a member of the disciplined forces in pursuance of his duties and labour required for parental discipline, all of which are absent in international conventions.

4 ACTIVITIES

- a. Discuss examples of forced labour in Zimbabwe and give examples of measures that may be taken by Government to prevent forced or compulsory labour.
- b. Children have been reported to work during the day on Zimbabwe's Tea Estates in return for part-time secondary education in the form of night classes. Discuss whether this amounts to forced or

compulsory labour and suggest solutions to the problem.

5 KEY POINTS

- Freedom from forced or compulsory labour is not absolute since there are exceptional instances in which it can be limited.
- It is provided for in ILO Forced Labour Conventions and the ICCPR.
- The significant overlap between forced labour and human trafficking lays bare the modern-day forms through which this right is being violated, which underscores the need for urgent action by the government and the international community to eliminate both practices.

6 CONCLUSION

- Freedom from forced or compulsory labour is one of the constitutionally guaranteed rights, though it is subject to limitations, provided for in the Labour Act.
- This right is usually violated both in private and in public instances and the victims are mostly the vulnerable groups in the society. Its importance is shown in that several international conventions are aimed at eradicating forced labour in all its forms.

CHAPTER NINE: SECTION 56: RIGHT TO EQUALITY AND NON- DISCRIMINATION

1 OBJECTIVES

At the end of this section, learners should be able to:

- Explain the scope and content of the right to equality and non-discrimination;
- Describe the duties of the State and private persons in the realisation of the right to equality and non-discrimination;
- Discuss situations where discrimination is justified; and
- Identify regional and international human rights instruments that provide for the right to equality and non – discrimination.

2 DEFINITION OF TERMS

Formal equality	Presumes that all persons are born free and equal and that any differential treatment on the basis of any ground is prohibited. It prescribes equal treatment of all people regardless of their social, economic or other status.
Substantive equality	Equality is about making sure people are treated fairly and given fair chances. Equality is not about treating everyone in the same way, but it recognises that individuals' needs are sometimes best met in different ways.
Discrimination	Consists of subjecting any person, whether directly or indirectly, to a condition or restriction to which other people are not subjected; or according other people, directly or indirectly, a privilege or advantage which the person being prejudiced is not accorded.
Non- discrimination	Fair and unprejudiced treatment of different categories of people.

3 INTRODUCTION

- The right to equality and non-discrimination is provided for in Section 56 of the Constitution.
- Its relevance is underlined by both the historical injustices that were perpetrated against certain classes in society and the emerging forms of inequality between members of the same ethnic or social groups.
- The right to equality does not necessarily make people equal, but seeks to create a legal framework that ensures that persons are presented with equal opportunities to achieve their goals and to live happy and fulfilling lives.

4 SCOPE AND CONTENT OF THE RIGHT

The right to equality is comprised of the following components; equal protection and benefit of the law, gender equality; non-discrimination; presumption of unfair discrimination and substantive equality or affirmative action. These components are analysed in detail below.

4.1 Equal protection and benefit of the law

- Section 56(1) of the Constitution provides that 'all persons are equal before the law and have the right to equal protection and benefit of the law.'
- Generally, law or administrative conduct should treat all people equally and should not confer on

a social group benefits it does not accord to other social groups.

- It is unconstitutional for any law or conduct to accord preferential treatment to specific social groups for no apparent reason. Any such law or conduct is arbitrary and infringes upon the equal protection and benefit of the law clause.
- The equal protection of the law clause seeks to ensure that the exercise of public power by the executive and other functionaries of the State is not arbitrary.
- Administrative decisions must be rationally related to the purpose for which the power to make such decisions was given, otherwise, they become arbitrary and inconsistent with the Constitution.

4.2 Gender equality clause

- Section 56(2) of the Constitution guarantees women's rights in political, economic and social activities. It provides that: 'women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.'
- Examples of equal opportunities include equal recognition of women before the law, the ability to participate in politics and occupy positions of power in the government, the economy and society at large.
- Sections 120(2) (b) and 124 of the Constitution gives the State the obligation to ensure the participation of women in the Senate and National Assembly. Section 120(2) (a) provides for the election of Senators under a party system of proportional representation, in which male and female candidates are listed alternately, with females heading the list.
- In the same way, Section 124 provides that for the first two Parliaments after the 2013 Constitution entered into force, an additional sixty (60) women, six from each of the ten provinces of Zimbabwe, shall be elected on a proportional representation basis to the 270 existing National Assembly seats that are open to both women and men. This arrangement as popularly referred to as the "Women's Quota".
- The approach of reserving seats for women in leadership positions improves gender equality in politics and government decision making structures.
- The Constitution also recognises equal opportunities for men and women in economic activities. Employment creation for women is covered in the constitutional provisions that require the State to create opportunities for women's participation in entrepreneurial activities and the world of work (sections 17 and 80). Employment creation for women is important for ending the vicious cycles of poverty and vulnerability of women to abuse, neglect and degradation.
- In addition, the Zimbabwean Constitution under section 65(6) and (7) provides for fair and reasonable labour practices for all employees. It guarantees the right to equal pay for women and fully paid maternity leave for a period of at least three months. The clause came as a relief to women employees, especially in the private sector where the right to full pay during maternity leave and guarantee of being reinstated after maternity leave was at the discretion of the employer.

4.3 Non-discrimination

- Section 56(3) of the Constitution provides for prohibited grounds of discrimination. These grounds include '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, pregnancy, disability or economic or social status, or whether they were born in or out of wedlock.'
- The list of the prohibited grounds of discrimination is however not exhaustive. The Constitution also outlaws discriminatory conduct based on unstated or analogous grounds such as HIV status.
- The only difference is that if the discrimination is based on a stated ground, then it is presumed to be unfair, but if it is based on an unstated or analogous ground, the person alleging the discrimination must prove that there is unfair discrimination.
- In terms of Section 56 (4), a person is treated in a discriminatory manner if they are subjected directly or indirectly to a condition, restriction, or disability to which other people are not subjected or other people are accorded directly or indirectly a privilege or advantage which they are not accorded.

4.4 Presumption of unfair discrimination

- Section 56(5) States that discrimination that is based on a prohibited ground that is specifically mentioned in section 56(3) is presumed to be unfair unless the person or institution perpetrating the discrimination proves that it is fair. For example, restricting the right to vote based on nationality is not unfair discrimination.
- To prove that presumptively unfair discrimination is in fact not discriminatory, an entity or institution has to demonstrate the existence of a legitimate purpose that is being served by the discrimination.

4.5 Substantive equality and affirmative action

- Section 56 (6) of the Constitution envisages substantive equality. It provides that the State must 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. Such measures must be taken to redress circumstances of genuine need and no such measure is to be regarded as unfair. Examples of promoting substantive equality include the female students entering scientific fields in local tertiary institutions with lower points as compared to their male counterparts as well as affirmative action in relation to the sixty (60) seats reserved for women in the National Assembly.

5 Regional and International Human Rights Instruments that provide for right to equality and non - discrimination

- Article 7 of the UDHR provides that “All people are equal before the law and are entitled without any discrimination to equal protection of the law.”
- Article 26 of the ICCPR states that “All persons are equal before the law and are entitled without any discrimination to equal protection of the law. In this respect, the law shall prohibit discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”
- Article 3 of the ACHPR provides that: “Every individual shall be equal before the law...Every individual shall be entitled to equal protection of the law.”
- This right is also provided for in Articles 1 and 2 of the UDHR and Articles 2 (3) and 3 of the ICESCR.

6 LIMITATION OF THE RIGHT TO EQUALITY

- The right to equality does not mean identical treatment for all social groups under all circumstances. As shown above, different social groups can be treated differently for the State to achieve substantive equality at a broader social level.
- Section 56(6) of the Constitution provides that the State must 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.
- These legislative and other measures include affirmative action measures designed to give marginalised groups such as women, children, persons with disabilities and older persons, preferential treatment in order to ensure the achievement of equality.
- Affirmative action measures appear to be a derogation from the right to equality, but it is a composite part of it.

- The only condition to the adoption of affirmative action measures is that they must serve a legitimate government purpose.

7 CASE LAW

- In the case of *Bhila v Master of the High Court and Others* (HH549/15), it was held that excluding children born out of wedlock from inheriting from their father, who died without leaving a will, violates their rights to protection of the law and freedom from discrimination.
- In the case of *Margaret Dongo v the Registrar General and Another* (SC292/08), the court ruled that the Registrar General's office, which is responsible for issuing passports, should allow married women to apply for their minor children's passports without having to prove their husbands' consent. Previously, the Registrar General's office discriminated against women on the basis of gender since women were required to seek the consent of the child's father in order to obtain a passport for the child.
- Since its inception, the ZHRC has investigated a number of cases of partisan food aid distribution and Presidential agricultural inputs involving discrimination on the basis of political affiliation.

8 ACTIVITIES

1. What are the different forms of discrimination prevalent in Zimbabwean society?
2. Identify solutions to address these forms of discrimination.
3. Examine the Sections in the Constitution that provide for women's participation in politics, specifically, Sections 120(2) and 124.
 - i. Discuss whether this is the best way to ensure the representation of women in Party politics and in Parliament?
 - ii. What are the shortcomings of these provisions and how can they be remedied?

9 KEY POINTS

- The right to equality and non-discrimination can be divided into five components namely equal protection and benefit of the law, gender equality, non-discrimination, presumption of unfair discrimination, and substantive equality or affirmative action.
- The right to equal protection and benefit of the law requires that the law or administrative conduct should treat all people equally and should not confer on a particular individual or social group benefits it does not accord to other individuals or social groups.
- Gender equality guarantees all men and women the right to equal opportunities in all contexts. It was designed to address the multiple barriers women face in many areas of their lives.
- The non-discrimination clause provides for prohibited grounds for discrimination. Although over twenty (20) grounds are listed in the Constitution, they are not exhaustive.
- In terms of the presumption of unfair discrimination, discrimination that is based on a prohibited ground is presumed to be unfair unless the person or institution perpetrating the discrimination proves that it is fair.
- Finally, substantive equality and affirmative action seeks to address injustices of the past and to create a legal framework within which the distribution of power, privilege and wealth should take place equally now and in the future.

10 CONCLUSION

Despite the constitutionalisation of the right to equality and non-discrimination, discrimination is still prevalent in Zimbabwean society. There still remain challenges of implementation of Constitutional provisions relating to this right.

CHAPTER TEN: SECTION 57: RIGHT TO PRIVACY

OBJECTIVES

At the end of this section, learners should be able to:

- Explain the scope and content of the right to privacy;
- Assess the circumstances under which this right can be limited; and
- Outline the protection of this right in national legislation, regional and international instruments.

2 DEFINITIONS OF KEY TERMS

Privacy	is the right to be let alone, or freedom from interference or intrusion by the State or any private person.
Seizure	the action of capturing someone or something using force.
Premises	includes, in addition to any land, building or structure, any vehicle, conveyance, ship or boat.
Home	a house, apartment or other shelter that is the usual residence of a person, family or household.
Communications	imparting or exchanging of information by speaking, writing, or using some other media. This media may include telephone, social media or any other forms.

3 INTRODUCTION

- Privacy is a fundamental human right, enshrined in domestic and other numerous international human rights instruments. Section 57 of the Constitution protects the right to privacy and can be sub-divided into two parts.
- The first part of the section guarantees a general right to privacy. The second part protects against specific enumerated infringements of privacy, namely unlawful searches and seizures of someone's person, property, home or possessions, infringement of privacy of communications and disclosure of someone's health condition without his or her consent.
- When someone's home or property is searched or when someone's possessions are seized or their communications intercepted, section 57 of the Constitution would be violated.
- Nevertheless, because the right against searches and seizures is a subordinate element of the right to privacy, the Constitution's protection is triggered only when an applicant shows that the search, seizure or interception of communication has infringed the general right to privacy.

4 SCOPE OF THE RIGHT



Figure 9: C Buttice 'Internet Browsing and Security - Is Online Privacy Just a Myth?' <https://www.techopedia.com/internet-browsing-and-security-is->

online-privacy-just-a-myth/2/33007 (accessed 14 June 2018).

- People have a right to protection of information on electronic devices
- The right to privacy and protection of information, on electronic devices, should be guaranteed.
- Section 57 of the Constitution provides that 'every person has the right to privacy.' This right gives every person protection against arbitrary or unlawful interference with their privacy, property, family, home or correspondence as well as against unlawful attacks on their honour and reputation.
- Every person is protected against all such interferences and attacks whether they emanate from State authorities or from natural or juristic persons.
- The obligations imposed by this right requires the State to adopt legislative and other measures to give effect to the prohibition against such interferences and attacks as well as to the protection of the right to privacy.
- In addition, the right to privacy is not simply a right to be left alone, but rather its essence concerns an individual's autonomous development in the community, and the ability to communicate with others in order to fulfil their personal development.
- Privacy is central to the protection of human dignity and forms the basis of any democratic society. It also supports and reinforces other rights, such as freedom of expression, information, and association. The right to privacy is a liberty right, protecting an individual's choice or autonomy.

4.1 The right not to have one's home or premises entered without permission.



Figure 10: Police Officers generally require warrants to conduct searches in people's premises and homes. See P Saraf 'Your Property Being Trespassed? Here is What You Should Know!' available at <https://www.google.com/search/> (accessed on the 23 of June 2018).

- Section 57(a) of the Constitution specifically protects the right not to have one's home, premises or property entered without one's permission.
- A person's home or premises is widely accepted as giving the individual the highest expectation of privacy, which reflects the old adage that the home is a person's castle.
- The right to authority or search another person's premises is a significant invasion of the rights of an individual and must, therefore, be exercised within certain clearly defined limits so as to interfere as little as possible with the rights and liberties of the person concerned.
- Section 54 of the Criminal Procedure and Evidence Act allows a police officer who is investigating an alleged offence to enter premises without a warrant for the purpose of interrogation and obtaining a statement or to obtain other evidence which he or she reasonably believes to be in those premises.
- Where a police official wishes to enter a private home or other private property for the purpose of a search, he/she is generally required to have a search warrant or search with the consent of an authorised person so that the right to privacy is not violated.

4.2 Freedom from searches and seizure



Figure 11: Searches and seizures by police generally require a search warrant.

C Goba 'Latest on shooting incident that occurred at ZEC official's house few hours after ConCourt election ruling' available at <https://www.google.com/search?> (accessed on 30 June 2018)

- Section 57 of the Constitution guarantees freedom from search and seizure by the State or by private persons.
- Search and seizure is currently regulated by the Criminal Procedure and Evidence Act, which employs the standard of reasonable belief that a particular article located on certain premises is connected with the commission of an offence.
- An important power given to the police is that of entry and search of premises and the seizure of articles required for a trial.
- All searches are prima facie unlawful and the onus is on the person conducting the search to justify it.
- In terms of Sections 41(2) and 49 of the Criminal Procedure and Evidence Act, a law enforcement officer or private person making an arrest may search the arrested person and, if he or she does so, he or she must keep in safe custody all articles found as a result of the search. If the person making the arrest is not a police officer, he or she must deliver the articles to a police officer.
- A search warrant may be issued before trial by a magistrate or justice of the peace.
- For a search warrant to be valid, it must satisfy the requirements set out in s 50(1) of the CPEA. The premises or persons to be searched must be precisely described and the items to be searched for must be specifically stated.
- The warrant may only be issued if the person issuing it is satisfied that there are reasonable grounds for carrying out the search in that there is a reasonable basis for believing that the search will lead to the seizure of items used to commit a crime or provide evidence of the commission of a crime.
- Since a search may also infringe upon the rights to dignity, to bodily security and the freedom from cruel, inhuman or degrading treatment, it must be conducted with the best possible respect for these rights



Figure 12: A search of the person must respect the right to bodily integrity taking account of gender considerations. The picture above appeared on the Zim Eye website on the 30th March 2016 'Police Cops Fondle Women's Private Parts' available at <https://www.google.com/search?> (accessed 30 June 2018)

4.3 Informational Privacy



Figure 13: A person has the right to privacy in personal communications.

- The invention and adoption of information and communication technologies (ICTs) has seen more personal data being collected, processed and shared forcing an expansion in the understanding of privacy to include the right to protection of personal information.
- Section 57(d) of the Constitution provides that: 'Every person has the right to privacy, which includes the right not to have the privacy of their communications infringed.'
- A person's right to privacy entails that such a person should have control over his or her personal information and should be able to conduct his or her own personal affairs relatively free from unwanted intrusions.
- Information protection is an important aspect of safeguarding a person's right to privacy. It provides for the legal protection of a person in instances where such a person's personal particulars are being processed by another person or institution.
- The right to the protection of personal data relates to the generation, collection, publication, storage, retention or analysis of data.
- A person who gives publicity to a matter concerning the private life of another is liable to the other for invasion of the right to privacy.

4.4 The right to non-disclosure of a person's health condition



Figure 14: Medical practitioners have a duty to protect the right to privacy. Health privacy cartoons and comics Available at <https://www.google.com/search?> (accessed on 30 July 2018)

- The right to privacy includes the right to non-disclosure of a person's health condition. Confidentiality is usually an ethical issue, but it is also a legal obligation not to disclose information pertaining to others without their informed consent.
- The Public Health Act makes it an offence to divulge information about health service users without the user's consent. The only permissible exceptions are when the law or a court order requires disclosure, or if non-disclosure would pose a serious threat to public health or safety.
- The obligation of confidentiality goes beyond undertaking not to divulge confidential information; it includes a responsibility to make sure that all records containing a patient's information are kept securely.
- Confidential records should not be left where other people may have casual access to them and information about patients should be sent under private and confidential cover, with appropriate measures to ensure that it does not go astray.

5 THE RIGHT TO PRIVACY IN REGIONAL AND INTERNATIONAL INSTRUMENTS

- The right to privacy is provided for under numerous regional and international human rights instruments such as Article 12 of the UDHR, Article 22 of the CRPD, Article 17 of the ICCPR, Article 10 of the ACRWC and Article 16 of the CRC.
- Article 17 of the ICCPR states that no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
- According to Article 22 of the Convention on the Rights of Persons with Disabilities (CRPD), Persons with Disabilities have the right to the protection of the law against arbitrary or unlawful interference with their privacy, family, home or correspondence or other types of communication or unlawful attacks on their honour and reputation.

6 LIMITATIONS OF THE RIGHT TO PRIVACY

- The fundamental rights and freedoms set out in the Declaration of Rights 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, taking into account all relevant factors.

- The right to privacy is not absolute. Wherever possible, searches are conducted in terms of search warrants, because the procedure of obtaining a warrant serves to protect, to some extent, the rights of the individual. The law does, however, permit searches to be conducted without search warrants in special circumstances.
- Medical practitioners may disclose confidential information without the patient's consent in certain specifically defined circumstances.

7 CASE LAW

- In *Chizano v Commissioner of Police HH-392-88; Associated Newspapers of Zimbabwe (Pvt) Ltd v Madzingo NO & Anor HH-157-03*, the court held that the police have powers to search without a warrant under Section 28 of the Serious Offences (Confiscation of Profits) Act [Chapter 9:17]. They may go onto land or into premises and search for and seize 'tainted property' without warrant or consent of the occupier if they believe on reasonable grounds that this course is necessary to prevent the destruction or loss of the property and the circumstances are so serious and urgent as to require an immediate search.
- In the case of the *State v Nsoro (HH190/16)* the accused stabbed her husband to death whilst fighting with him over his refusal to disclose a message that he had received on his cellphone. The deceased had started the physical fight by assaulting her. The court commented on the accused's demand to see the cell phone message as follows: "Section 57 (d) of the constitution provides that every person has the right to privacy of their communications. There is no law which provides that a husband or wife has a right to infringe on the privacy of the other's communications. The accused's insistence that the deceased should divulge a communication made to him on his phone was in itself an infringement upon the right of the deceased to privacy of communication. The deceased was lawfully entitled to refuse to divulge the message he had received on his phone to the accused albeit the accused being his wife." The accused was convicted of culpable homicide and sentenced to 10 years imprisonment of which 2 years imprisonment were suspended for 5 years on condition that the accused would not within that period commit any offence involving the loss of human life.

8 ACTIVITIES

- Read the case below and answer the questions which follow.



Figure 15: E Mushava 'Developing: Cops seize Mawarire's phone' available at

Assume that members of the Criminal Investigation Department visit Nyandoro Legal Practitioners' Offices and search the premises without the consent of the owner. They begin to read communications between clients and their lawyer.

- i. Do the actions of the police constitute lawful entry and search of the premises?
 - ii. Do the actions of the police constitute a legitimate limitation of the right to privacy?
 - iii. Suppose Nyandoro Legal Practitioners feel the actions of the police are unlawful, what remedies are available to them?
- b. Is it justifiable for the right to privacy to apply to spouses in terms of cell phone communications?

9 KEY POINTS

- Section 57 of the Constitution provides that every person has the right to privacy which includes the right not to have their home, premises or property entered without their permission; their person, home, premises or property searched; their possessions seized; the privacy of their communications infringed; or their health condition disclosed.
- The right to informational privacy is a significant measure that has been taken to address the need to protect the privacy of communications between individual persons or groups of people.
- The right to privacy supports and reinforces other rights, such as the right to dignity, freedom of expression, information, and association.
- Activities that restrict the right to privacy, such as search and seizure can only be justified if they are prescribed by law, necessary to achieve a legitimate aim and proportionate to the aim pursued.

10 CONCLUSION

- Privacy is a fundamental human right enshrined in the Constitution and numerous regional and international human rights instruments.
- The modern privacy benchmark at domestic and international level specifically protects property, informational privacy and the privacy of health records.
- The right is at the core of democratic values. An individual, therefore, has an interest in the protection of his or her privacy.

CHAPTER ELEVEN: SECTION 58: FREEDOM OF ASSEMBLY AND ASSOCIATION

OBJECTIVES

At the end of this section, learners should be able to:

- Explain the scope and content of the right to freedom of assembly and association;
- Determine what constitutes freedom of peaceful assembly and association;
- Explain the State's obligation to facilitate and protect peaceful assembly and association;
- Identify regional and international instruments protecting freedom of assembly; and
- Discuss the limitation of this right.

2 DEFINITIONS OF KEY TERMS

Association is an organised, independent, not for profit body based on the voluntary grouping of persons with a common interest, activity or purpose. Such an association may be formal or informal.

Assembly refers to an act of intentionally gathering, in private or in public, for an expressive purpose and for an extended duration.

3 INTRODUCTION

- Freedom of assembly and association is the cornerstone of any democratic State and includes the right not to be forced to assemble or to belong to an association.
- In Zimbabwe rallies, processions, gatherings and public meetings are some of the various ways in which the right to freedom of assembly and association can be exercised.
- Freedom of assembly and association is an important right for it is generally only organised opinion that carries weight and it is extremely difficult to organise if there is no right of public assembly.
- Assemblies and associations provide an effective means of communication for those who feel that their needs are not being adequately addressed by the State.

4 SCOPE AND CONTENT OF THE RIGHT

- Freedom of assembly and association is protected by Section 58 of the Constitution and applies to both political and non-political assemblies and associations.
- Participation in public assemblies and associations should be entirely voluntary.
- Freedom of assembly and association ensures that citizens are able to articulate their expectations to the rulers thereby rendering the rulers accountable. It is difficult to participate democratically in instances where individuals are prohibited from meeting and debating burning political issues as a political party or some other association.

4.1 Freedom of peaceful assembly and association

- Freedom of peaceful assembly and association is a fundamental human right that can be enjoyed and exercised by individuals, groups, associations, legal entities and corporate bodies. Assemblies and associations may serve many purposes, including the expression of diverse, unpopular or minority opinions.
- The protection of the freedom to peacefully assemble is crucial to creating a tolerant and pluralistic

society in which groups with different beliefs, practices or policies can exist peacefully together.

- It can be noted that only peaceful assemblies are protected. An assembly should be deemed peaceful if its organisers have professed peaceful intentions and the conduct of the assembly is non-violent and does not unnecessarily hinder, impede or obstruct the activities of third parties.



Figure 16: Solidarity March, November 2017. See 'Zimbabwe tells Robert Mugabe to go' Solidarity March, 18 Nov 2017 in Bulawayo available at <https://www.google.com/search?>(accessed 14 June 2018)

4.2 The State's positive obligation to facilitate and protect peaceful assembly and association

- It is the primary responsibility of the State to put in place adequate mechanisms and procedures to ensure that the freedom is practically enjoyed and not subject to undue bureaucratic regulation.
- In addition, the State should always seek to facilitate and protect public assemblies and associations at the organisers' preferred location and should also ensure that efforts to disseminate information to publicise forthcoming assemblies are not impeded.
- Inspections of associations by State agencies should only be permitted following a judicial order in which clear legal and factual grounds justifying the need for inspection are presented.
- Freedom of assembly and association should be enjoyed equally by everyone that includes women, men and children, persons with disabilities, nationals and non-nationals and individuals belonging to minority groups.

5 FREEDOM OF ASSEMBLY AND ASSOCIATION IN REGIONAL AND INTERNATIONAL INSTRUMENTS

- The right to freedom of assembly and association is provided for in a number of regional and international instruments that include Article 21 of the ICCPR, Article 20(1) of the Universal Declaration of Human Rights, Article 15(1) of the Convention on the Rights of the Child and Articles 10 and 11 of the ACHPR.
- Article 21 of the ICCPR States that: 'The right of peaceful assembly shall be recognised. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others.'
- Article 20 (1) of the UDHR States that: 'Everyone has the right to freedom of peaceful assembly and association.'
- Article 15 (1) of the CRC provides that: 'State Parties recognize the rights of the child to freedom of association and to freedom of peaceful assembly.'

6 LIMITATIONS OF THE RIGHT

- The Constitution places a limitation on freedom of assembly and association by allowing actions taken under the law to limit the right as long as they do not contravene the Constitution.
- Section 24(1) of Public Order and Security Act (POSA) provides that organisers of public gatherings have to give four days written notice. As an attempt to put a veil of constitutionality, the Act States that 'the notice should not be taken as application for holding of a gathering.' It should be noted that Government intends to review POSA and align it with the Constitution.
- It can be noted that the regulating authority can use reasonable force to disperse the gatherings. Where individuals resist the directives, the police are entitled in terms of the POSA to use such force as is reasonably justifiable in the circumstances of the case to overcome any resistance.

7 KEY POINTS

- The freedom of assembly and association is a constitutionally guaranteed right that is limitable.
- Freedom of assembly and association can be enjoyed by political and non- political assemblies and associations.
- Only peaceful assemblies and associations are constitutionally protected.

8 CONCLUSION

- Freedom of assembly and association is protected by Section 58 of the Constitution of Zimbabwe and other international human rights instruments. Since time immemorial, protests, rallies, assemblies and mass demonstrations have played a central role in the political struggles in Zimbabwe.

9 CASE LAW

- There are numerous cases that revolved around the rights to freedom of assembly, demonstrations and petitions. In the case of *In reMunhumeso & Ors* 1994 (1) ZLR 49 (S) the Supreme Court of Zimbabwe addressed extensively the constitutional right to assemble and protest. It highlighted that public assemblies and protests are a highly effective method of bringing grievances to the attention of the authorities and seeking redress for grievances and violations of rights. However, it pointed out that there was a need to reconcile this important right with the governmental responsibility to ensure sound maintenance of public order to prevent members of the public from being harmed by violent protest action.
- In *Zimbabwe Congress of TradeUnions v Officer Commanding Zimbabwe Republic Police Harare District & anor* 2002 (1) ZLR 323 (H) Chinhengo J stated that organisations such as, but in particular the trade unions are not governed by the notification in terms of POSA as their activities are not of a political nature.

10 ACTIVITIES

- Ahead of a by-election, political party X is forcing every villager in the Constituency to attend its rallies and has ordered that all shops and vending sites should be closed and only be re-opened after the rally. Each villager was made to contribute a dollar towards the campaign costs.
 - Do the actions of political party X violate freedom of assembly and association?
 - Is there anything the villagers can do to remedy the situation?

Four Milk and Honey Church members who are parents and guardians of pupils attending Chitondo School owned by Fire of God Church filed a Constitutional application against the school's decision to compel every student to attend religious sessions at the institution. Discuss whether the school's decision violated freedom of assembly and association as protected in the Constitution of Zimbabwe.

CHAPTER TWELVE: SECTION 59: FREEDOM TO DEMONSTRATE AND PETITION

OBJECTIVES

At the end of this section, learners should be able to:

- Explain the scope and content of the freedom to demonstrate and petition;
- Explain the State's obligations to facilitate and protect the freedom to demonstrate and petition.
- Discuss national laws, regional and international instruments protecting the freedom to demonstrate and petition; and
- Discuss justifiable limitations of the freedom to demonstrate and petition.

2 DEFINITIONS OF KEY TERMS

Demonstration	A march or gathering in which people take part in order to show their opposition to something or their support for something.
Petition	A formal written request, typically one signed by many people appealing to someone in authority in respect of a particular cause.

3 INTRODUCTION

- Generally speaking, demonstrations and petitions are manifestations of public assemblies. They are usually aimed at expressing support for or disapproval of a particular point of view, whether political, moral or religious.
- The right to petition and engage in peaceful demonstrations is an important element of democracy. Peaceful demonstrations are an indicator of citizens' ability to express themselves and the commitment of a State to an open and transparent society.
- In terms of the Public Order and Security Act, organisers of demonstrations are required to give prior notification to the police, especially where large numbers of people are involved, because such demonstrations are generally perceived as a threat to peace and public order.

4 SCOPE AND CONTENT OF THE RIGHT

- The freedom to demonstrate and petition is protected in Section 59 of the Constitution. It is the cornerstone of a democratic State based on openness, human dignity and freedom.
- The presentation of petitions remains one of the most cost-effective forms for tabling grievances and seeking responses from the authorities responsible for service delivery to communities with the nation at large.
- It is fairly constitutionally legitimate to require all institutions and agencies of government to acknowledge receipt of the petitions and to give a brief well thought-out response to the petitioners. Anything less than this would render the right to present petitions meaningless.

4.1. Demonstrations and petitions must be peaceful



Figure 17: People have a right to peacefully demonstrate and petition the government. See N Sibanda)Members of Women of Zimbabwe Arise protesting in Bulawayo on Thursday. Available at <https://www.google.com/>: (accessed 14 June 2018).

- The Constitution provides that the rights to demonstrate and to petition 'must be exercised peacefully.'
- The right to peaceful demonstration is a mixture of the right to freedom of expression, assembly, association and the right to participate in the conduct of political affairs. These rights interplay and mutually reinforce each other.
- Accordingly, both the Constitution and the Labour Act prescribe that demonstrations should be non-violent and peaceful.
- Demonstrations should be deemed non-peaceful if acts of physical violence against persons or property are committed or threatened.
- Demonstrations and petitions, especially those of a political nature, are primarily used by individuals and groups that are dissatisfied with the prevailing economic, political or social system.
- If a peaceful petition or demonstration is hijacked by violent supporters or opponents, law enforcement must take steps to act solely against the violent minority, without denying the majority of the participants the legal protection to which they are entitled.
- The duty of the police is to ensure that Zimbabweans enjoy this and other rights peacefully and not to impede the enjoyment of this right.
- Moreover, the government has an obligation under domestic, regional and international law to take reasonable steps to facilitate the enjoyment of the right to peacefully assemble, demonstrate and petition.

4.2 International and regional instruments protecting the right

- There is an intricate relationship between the right to assemble freely with others, in Article 11, the right to freedom of association in Article 10 and freedom of expression in Article 9 of the ACHPR.
- Freedom of assembly, demonstration and petitions is also protected in the ICCPR under Article 21 which States that the right of peaceful assembly shall be recognised.

5 LIMITATIONS OF THE RIGHT

- The Constitution places a limitation by allowing only peaceful demonstrations and petitions. This is an internal limitation of the right to freedom to petition or to demonstrate.
- The mere fact that citizens have a right to demonstrate does not mean that they should do so with total disregard to other people's rights. Any disturbance of the public order or national security in

the process of demonstrating will attract the intervention of the security forces.

- There is an obligation on the State to take reasonable steps to facilitate the enjoyment of the right to freedom of demonstration and petition, and to protect participants in peaceful demonstrations from disruption by others.
- Section 24(1) of POSA requires organisers of public gatherings to give four days written notice to the police prior to the gathering. However, Section 24(2) of POSA provides that the notice should not be taken as an application for holding of a gathering.
- Under Section 25 of POSA, public assemblies and demonstrations should not interfere with the rights of members of the general public. Nonetheless, the directives given by the responsible authorities must be reasonable and justifiable in an open and democratic society.

6 CASE LAW

- In the case of *Democratic Assembly for Restoration and Empowerment and others v Newbert Saunyama and others* (CCZ/5/18), the court held that Section 27 of the Public Order and Security Act which granted wide powers to the police to ban demonstrations for a period of up to one month in the interests of the preservation of public order is in violation of Section 59 of the Constitution. The judgement was suspended for six months from the date of delivery to allow the Commissioner General of Police and the Minister of Home Affairs to propose amendments to the Section.

7 ACTIVITY

Study the picture below.



Figure 18 See C Tutani 'Violence breeds violence' available at <https://www.google.com/search?>(accessed on 29 July 2018):

- Discuss whether the actions of the police as shown in the picture are justifiable.

8 KEY POINTS

- Freedom to demonstrate and petition is a constitutionally guaranteed right that is subject to certain limitations or derogations.
- To comply with constitutional standards, the limitation of the right must be justifiable in a democratic society based on human dignity, equality and freedom.
- The prevalence of continuous violations of the freedom to demonstrate and petition in Zimbabwe has been noted in many instances.
- The Executive and the Judiciary must promote the freedom to demonstrate and petition by all citizens without discrimination based on political grounds or whatever reason.

9 CONCLUSION

- In summation freedom to demonstrate and petition is protected under the Constitution, regional and international human rights instruments.
- There must be a balance between the maintenance of public order by the State and the exercise of freedom to demonstrate and petition.

CHAPTER THIRTEEN: SECTION 60: FREEDOM OF CONSCIENCE

OBJECTIVES

At the end of this section, learners should be able to:

- Explain the scope and content of the right of freedom of conscience;
- Discuss the duties of the State in realising this right;
- Discuss national laws, regional and international instruments protecting freedom of conscience; and
- Assess whether the right can be limited and, if so, under what circumstances.

2 DEFINITIONS OF KEY TERMS

Conscience a person's moral sense of right and wrong, viewed as acting as a guide to one's behaviour. It broadly includes freedom of thought, opinion, religion or belief to emphasise the Constitution's unique concern with the protection of persons with diverse beliefs and opinions

Religion action or conduct indicating a belief in, reverence for, and desire to please a divine ruling power, the exercise or practice of rites or observances.

Oath is a religious or solemn affirmation to tell the truth or to take a certain action.

3 INTRODUCTION

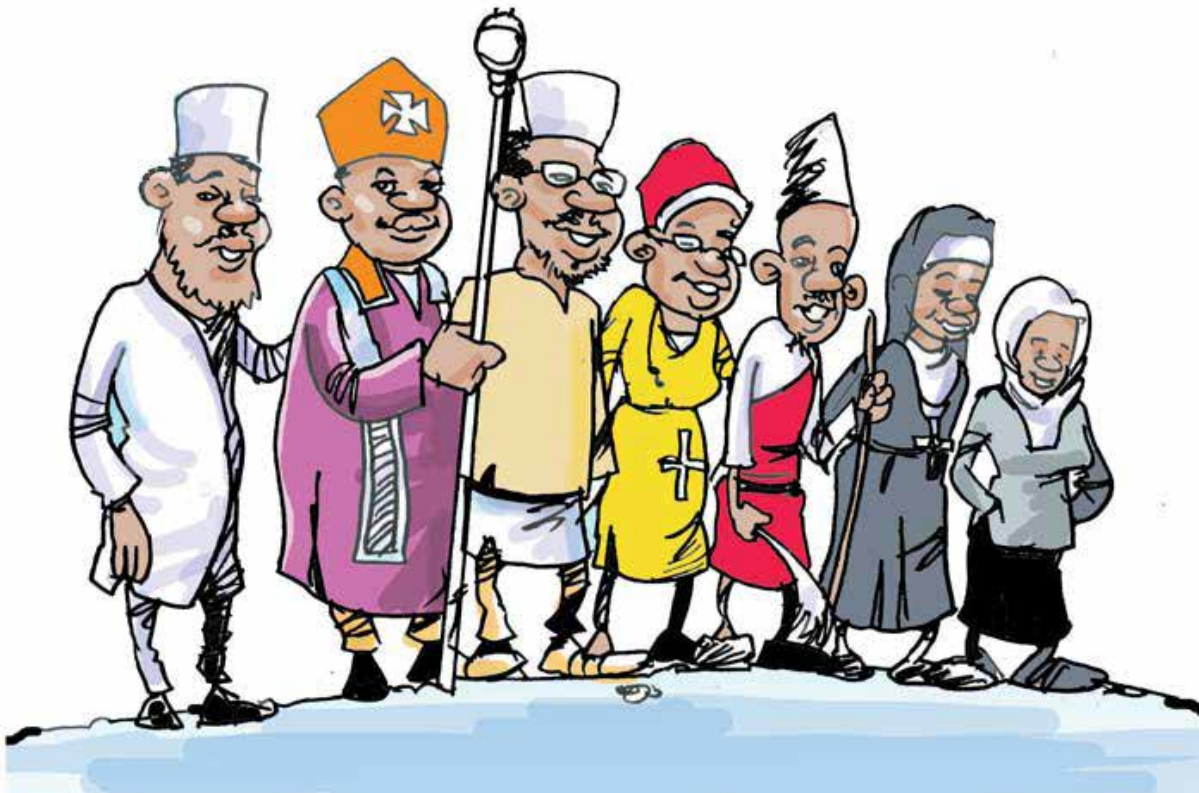


Figure 19 Expression of freedom of conscience through different religions. See Religion Clipart freedom religion16 - 700 X 467 available at (Accessed on 30 June 2018)

- Freedom of conscience derives from every individual's liberty to hold views/beliefs about religious and other moral issues and to practice such beliefs without fear of being victimised.
- In the democratic society prescribed by the Constitution, the religious beliefs of the majority of

Zimbabweans, the 'beliefs' of non-believers and minority faiths must be fully recognised and respected.

- Religious beliefs have the capacity to stimulate ideas of self-worth and human dignity which form the basis of human rights and freedoms. They provide a moral basis for the believer's view of the world and influence individual or social perceptions of right and wrong.
- Freedom of conscience and religion requires great levels of engagement with the twin ideas of diversity and inclusion. It revolves around the question of how best to respect and accommodate various and usually diametrically opposed beliefs and views about the world.
- To accommodate diversity in the domains of conscience and religion, Section 60(1) - (4) of the Constitution protects the right of everyone to freedom of conscience.
- Section 60(1) (b) of the Constitution protects the right to act in accordance with one's beliefs or non-beliefs and entrenches every person's right to organise their own life in a manner that demonstrates allegiance to the preferred belief system.

4 SCOPE AND CONTENT OF THE RIGHT

- Determining the exact scope of the right to freedom of conscience and religion is difficult due to the various belief systems in the country. Nonetheless, freedom of conscience, religion, opinion and belief comprises the following aspects:
 - a) The freedom to choose one's religious or other beliefs without direct and indirect pressure from the State, individuals or other sources. This suggests that religious entities may not bar people from leaving their fold and converting to other religions;
 - b) The right to declare one's faith or religious beliefs openly and without fear of victimisation means that every person has the right to profess or express their religious beliefs in public and the State or any person or entity should not compel members of a particular religion to worship in private;
 - c) It entails the right to express one's religious beliefs by worship and/or to practice them by teaching and dissemination. To this end, Section 60(1) (b) of the Constitution provides that freedom of conscience includes the 'freedom to practice and propagate and give expression to their thought, opinion, religion or belief whether in public or in private';
 - d) It entails the right to assemble to practice religious or other observances with other members of the same religious or other community. Members of similar religious or belief system have the right to interact with fellow believers to advance their religion and to regulate their affairs. This right arises from the fact that whilst belonging to a religious or other community is a personal choice, religious activities often take place in a communal context.
- Section 60(2) accords people the right not to take an oath in conflict with one's religion or beliefs.
- In terms of Section 60(3) of the Constitution, parents and guardians have the right to determine, in accordance with their beliefs, the moral and religious upbringing of their children. However, the parents should not prejudice the rights to which their children are entitled under the Constitution including the rights to education, health, safety and welfare.
- In terms of Section 60(4), religious communities have the right to establish institutions where religious instruction may be given.



Figure 20: Traditional healers have a right to practise their faith. See H Mutasa 'Swaziland's traditional healers' <https://www.google.com/search?> (Accessed 26 June 2018)

5 FREEDOM OF CONSCIENCE IN REGIONAL AND INTERNATIONAL INSTRUMENTS

- Freedom of conscience is also protected in regional and international law in the following instruments: Article 18 of the UDHR, Article 18 of the ICCPR, Article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination, Article 14 of the CRC, Article 9 of the ACRCW, Article 8 of the African Charter, Article 12 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families.
- UDHR Article 18 States that: 'Everyone has the right to freedom of thought, conscience and religion. This right includes freedom to change his religion or belief, freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.'
- ACHPR Article 8 states that: 'Freedom of conscience, the profession and free practice of religion shall be guaranteed. No one may, subject to law and order be subjected to measures restricting the exercise of these rights.'

6 LIMITATION OF THE RIGHT

- The Constitution permits restrictions on the freedom to manifest religion or belief only if limitations are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others.
- The freedom from coercion to have or to adopt a religion or belief and the liberty of parents and guardians to ensure religious and moral education cannot be restricted.

7 CASE LAW

The case of *In Re Chikweche* 1995 (4) SA 284 (ZS), concerned the opposition of an application for admission of the applicant to the Bar, i.e. to practise as a lawyer, on the basis that he did not satisfy the requirements in terms of the Legal Practitioners Act, which provides that one needs to be a 'proper and fit' person to join the honourable profession. The basis of the opposition was that, as a Rastafarian, the dreadlocks worn by the applicant were inconsistent with the etiquette of the legal profession. The court concluded that Rastafarianism was indeed a protected religion and therefore the decision to reject his application for admission to practice law was reversed.

8 ACTIVITIES

- a. Look at the picture on the following page.



Figure 21: Apostolic sect members exercising their right to religion. See Bulawayo 24News 'Council wants apostolic sects out of the bush' <https://www.google.com/search?> (Accessed 11 July 2018)

Suppose this apostolic sect does not believe in their children accessing education and immunisation. What should the State do?

- b. Can parents force their teenage children to go to the same church as they do? What if the child concerned refuses to obey the parents' command?

9 KEY POINTS

- Section 60 of the Constitution protects freedom of conscience which includes freedom of thought, opinion, religion or belief.
- People have freedom to practise and propagate their religion and beliefs in public or in private and whether alone or together with others.
- No person may be compelled to take an oath contrary to their religion and beliefs.
- Parents and guardians of minors have a right to determine the religious upbringing of their children provided they do not prejudice children's rights including the right to education and health care services.
- Religious communities have the right to establish institutions where religious instruction may be given.
- This right is limitable.

10 CONCLUSION

Freedom of conscience is protected by Section 60 of the Constitution as well as regional and international instruments. The Constitution permits restrictions on the freedom of conscience only if such restrictions are permitted by the law.

CHAPTER FOURTEEN: SECTION 61: FREEDOM OF EXPRESSION AND FREEDOM OF THE MEDIA

1 OBJECTIVES

By the end of this section, learners will be able to:

- Explain the scope and content of freedom of expression and freedom of the media;
- Explain the State's duty to facilitate freedom of expression and freedom of the media;
- Discuss national laws, regional and international instruments protecting freedom of expression and freedom of the media; and
- Discuss justifiable limitations of freedom of expression and freedom of the media.

2 DEFINITION OF KEY TERMS

Expression	the act of making known one's thoughts or feelings.
Media	includes a whole range of modern communications channels such as television, the cinema, video, radio, photography, advertising, newspapers and magazines, recorded music, computer games and the internet.
Information	facts provided or learned about something or someone.
Opinion	a view or judgement formed about something not necessarily based on fact or knowledge.

3 INTRODUCTION

- The rights to freedom of expression and freedom of the media are provided for in national laws, regional and international human rights instruments. These rights are interdependent, as the enjoyment of freedom of expression depends on freedom of the media and vice versa.
- These rights play an important role in ensuring the protection of other rights, and they are necessary to ensure and maintain an open and democratic society.
- These rights are however not absolute. Limitations on the exercise of these rights are found in national laws, regional and international human rights instruments.

4 SCOPE AND CONTENT OF THE RIGHTS

4.1 Freedom of expression

- Section 61 of the Constitution provides for freedom of expression and freedom of the media. This provision should be read together with Sections 248 and 249 of the Constitution which establish and outline the functions of the Zimbabwe Media Commission.
- Section 61(1) of the Constitution guarantees every person's right to freedom of expression. This right includes the freedom to seek, receive, and communicate ideas and other information; freedom of artistic expression and scientific research and creativity; as well as academic freedom. It can also be extended to political discourse, commentary on one's own affairs and on public affairs, canvassing discussion of human rights issues, journalism, cultural expression, teaching, and religious discourse.
- The Broadcasting Services Act (BSA)⁹ Chapter 12:06 in Section 7 provides for the planning,

9. The Broadcasting Services Act is currently (May 2019) under review in order to align it with the Constitution and update it to suit recent developments in broadcasting.

management, allocation, regulation and protection of the broadcasting frequency spectrum and the licensing of broadcasting services and systems.

- The BSAin Section 2 (a) provides for the development of creative arts through broadcasting content standards. The Access to Information and Protection of Privacy Act¹⁰ Chapter 10:27 provides members of the public with the right of access to records and information held by public bodies.
- Freedom of expression is an indispensable condition for the full development of the person. It is essential for any society. Freedom of expression constitutes the foundational stone for every free and democratic society.
- Freedom of expression is inter-linked to freedom of opinion. The two freedoms are closely related, with freedom of expression providing the vehicle for the exchange and development of opinions.
- Freedom of expression is a necessary condition for the realisation of the principles of transparency and accountability that are, in turn, essential for the promotion and protection of human rights.
- A critical analysis of this right shows that it protects all forms of expression and the means of their dissemination. Such forms include spoken, written and sign language and non-verbal expression such as images and objects of art.
- There are various means of expression such as books, newspapers, pamphlets, posters, banners, dress and legal submissions. They include all forms of audio-visual as well as electronic and internet-based modes of expression.
- The State has a duty to refrain from interfering directly or indirectly with people's enjoyment of freedom of expression and freedom of the media. It also has the duty to prevent private parties from interfering with the enjoyment of freedom of these rights through the adoption of legislative and other regulatory measures.
- The State must also take positive measures that assist individuals to exercise their right to freedom of expression, and for the media to exercise sufficient freedom.
- Freedom of expression does not include incitement of violence, advocacy of hatred or hate speech, malicious injury to a person's reputation or dignity as well as malicious breach of a person's right to privacy.

4.2 Freedom of the media



Figure 22: Everyone is entitled to freedom of the media. See MISA 'Defendon freedom of Expression' <https://www.google.com/search?> (accessed on 01 July 2018)

- Every person is also entitled to freedom of the media in terms of Section 61(2). This includes protection of the confidentiality of journalists' sources of information. The Constitution, however, does not define what the 'media' is.
- In terms of Section 61(3) of the Constitution, broadcasting and other electronic media of communication have the freedom of establishment.

¹⁰ The Access to Information and Protection of Privacy Act is currently (May 2019) being aligned to the Constitution.

- A free, uncensored and unhindered press or other media is essential in any society to ensure freedom of opinion and expression and the enjoyment of other constitutional rights. It constitutes one of the cornerstones of a democratic society.
- The Constitution embraces a right whereby the media may receive information on the basis of which it can carry out its function. The free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion.
- As a means to protect the rights of media users to receive a wide range of information and ideas, the State should take particular care to encourage an independent and diverse media.
- All State-owned media of communication must have editorial independence to determine the content of their broadcasts and communications. It should also be impartial and it should ensure that divergent views and dissenting opinions are freely and largely shared.
- Section 248 of the Constitution provides for the establishment and composition of the Zimbabwe Media Commission.

4.3 Academic freedom

- The most comprehensive definition of academic freedom was formulated by UNESCO in 1997 when it adopted the Recommendation concerning the Status of Higher-Education Teaching Personnel (para 27–29).
- Section 61(1) (c) of the Constitution provides that everyone has the right to academic freedom. Academic freedom should guarantee freedom of expression and of action, freedom to disseminate information and freedom to conduct research and distribute knowledge and information without restriction.
- According to the UNESCO definition, 'Academic freedom includes freedom from institutional censorship, freedom to participate in professional or representative academic bodies, freedom to teach without any interference and freedom to determine the curriculum.'
- The right to freedom of opinion and expression and the right to education constitute the two essential pillars of the right to academic freedom. The right to education can only be enjoyed if accompanied by the academic freedom of staff and students.
- The right to academic freedom is not absolute. It should be exercised with adherence to accepted professional principles including professional responsibility and intellectual rigour with regard to standards and methods of teaching.
- It should also be exercised in accordance with professional responsibility and within the parameters of nationally, regionally and internationally recognized professional principles of intellectual rigour, scientific inquiry and research ethics.

5 FREEDOM OF EXPRESSION AND FREEDOM OF THE MEDIA IN REGIONAL AND INTERNATIONAL LAW

- Freedom of expression and freedom of media is also protected in regional and international law. For example, Article 19 of the UDHR, Article 21 of the CRPD, Article 9 of the ACHPR and Article 19 of the ICCPR.
- Article 19 of the UDHR provides that: 'Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.'
- Article 9 of the ACHPR States that: 'Every individual shall have the right to receive information, every individual shall have the right to express and disseminate his opinions within the law.'

6 LIMITATIONS OF THE RIGHTS



Figure 23: The rights of freedom of expression and freedom of the media are not absolute. See 'Zimbabwe InstituteForFreeExpression' <https://www.google.com/search?> (Accessed 01 July 2018).

- Section 61(5) of the Constitution outlines the following limitations to the rights to freedom of expression and freedom of the media:
 - o Incitement to violence is prohibited;
 - o Advocacy of hatred or hate speech is not allowed;
 - o It does not include malicious injury to a person's reputation or dignity;
 - o There should be no malicious or unwarranted breach of a person's right to privacy.
- Any person who perpetrates any of the above is not covered by the right to freedom of expression and freedom of the media.
- Paragraph 6(c) of the Code of Conduct in the Electoral Act Chapter 2:13 (Amendment No. 6/2018) prohibits use of hateful language which incites violence towards any individual or group including in speeches, songs and slogans. Furthermore, paragraph 13(1) prescribes sanctions for offences which include imprisonment, fines as well as disqualification from voting or filling a public office.
- In terms of Section 61(3) of the Constitution, broadcasting and other electronic media of communication have the freedom of establishment. This right is, however, limited in that it is subject to State licensing procedures that are necessary to regulate the airwaves and other forms of signal distribution as provided for in the BSA.
- Section 86(2) also regulates the limitation of the rights to freedom of expression and freedom of the media. These rights may be limited only in terms of a law of general application.
- A law of general application includes all forms of legislation, as well as the rules of common law and customary law such as Section 64 of AIPPA which makes abuse of freedom of expression a criminal offence and criminalises the publication of statements which are untrue if the person who published them did not have reasonable grounds for believing they were true.
- In addition, Section 13(1) of the Censorship and Entertainment Control Act Chapter 10:04 criminalises the production and dissemination of publications which the Board of Censors has declared undesirable.
- Section 4(c) of the Official Secrecy Act Chapter 11:09 criminalises the disclosure of information by a public official who has been entrusted with information in confidence, and discloses the information without authority.
- The Criminal Law Codification and Reform Act Chapter 9:23 in Section 31 criminalises the publishing of a false statement intending to undermine public confidence in any of the security services, including instances where the offender is unaware that the statement is false. Section 33 of this Act criminalises the publishing of a statement which may bring the President into hatred, ridicule or contempt. The crime can be committed if, when the offender published the statement he or she realised it might be untrue – even if it turns out to be true. In addition, Section 177 of the Act criminalises publishing a false statement, with the realisation that it may expose members of the Police Service to "contempt, ridicule or disesteem".
- The limitation is permissible only 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.

- When assessing whether a limitation is fair, reasonable, necessary and justifiable, a number of factors, including the purpose of the limitation, are taken into consideration.
- The exercise of freedom of expression and freedom of the media often gives rise to conflict with other constitutionally guaranteed rights. Examples include instances where the State needs to protect the rights and interests of others and the public at large.

7 CASE LAW

- Chimakure & others v Attorney General 2013 (2) ZLR 466 S
- Constantine Chimakure, a former editor of the Zimbabwe Independent, and Vincent Kahiya, the group editor and chief, are Zimbabwean journalists. These two were prosecuted for publishing a story, which stated that intelligence and police officials were involved in the abduction of opposition and human rights activists in 2008.
- The provision in question is Section 31 (a) (iii) of the Criminal Law Codification Reform Act. Section 31 makes the reporting of false news a crime punishable with a high fine or a prison sentence of up to twenty years. To fall within this provision, the news must be that which would undermine public confidence in the uniformed forces.
- The Zimbabwean Constitutional Court found that Section 31(a)(iii) of the Criminal Law Codification Reform Act violated section 24(5) of the former Constitution of Zimbabwe.
- The Minister did not submit an affidavit arguing that the Act was justifiable, despite its interference with citizen's right, and, instead submitted a challenge to the provision itself, which was later withdrawn.
- Given the Minister's failure to submit an affidavit on this matter, the Court was not required to consider the Minister's views, and it held that the Act interfered with the right to freedom of expression.

8 ACTIVITIES

- a. A photographer with a national newspaper was reportedly manhandled by supporters of a certain political party while covering demonstrations at the party's headquarters in the capital city. According to media reports, the photographer had to run for his life after some supporters of the party pounced on him. They reportedly manhandled and commanded him to delete the pictures he had taken during the demonstrations.
 - i. Discuss whether the alleged conduct by supporters of the political party constituted a reasonable and justifiable limitation of the freedom of expression and freedom of the media.
- b. With reference to freedom of expression and freedom of the media, where does one draw the line between legitimately criticizing and undermining the authority of or insulting the President?

9 KEY POINTS

- Freedom of expression requires protection of the right to hold opinions without interference. The Constitution guarantees the right to freedom of expression, including the right to seek, receive and impart information and ideas of all kinds regardless of frontiers.
- Freedom of the media requires that all State-owned media of communication must have editorial independence to determine the content of their broadcasts and communications.
- State-owned should also be impartial and it should ensure that divergent views and dissenting opinions are shared.
- However, freedom of expression is not absolute and can be limited to serve particularly compelling interests.
- Academic freedom should guarantee freedom of expression and of action, freedom to disseminate

information and freedom to conduct research and distribute knowledge and information without restriction.

10 CONCLUSION

- Freedom of expression as guaranteed by the Constitution includes the freedom to seek, receive, and communicate ideas and other information; freedom of artistic expression and scientific research and creativity; as well as academic freedom.
- Every person's right to freedom of the media is also constitutionally guaranteed. This right includes the protection of journalistic privilege.

CHAPTER FIFTEEN: SECTION 62: ACCESS TO INFORMATION

1 OBJECTIVES

By the end of this section, learners will be able to:

- Explain the scope and content of the right of access to information;
- Explain the State's obligation to facilitate access to information;
- Discuss national laws, regional and international instruments protecting access to information; and
- Discuss justifiable limitations of access to information.

2 DEFINITION OF KEY TERMS

Access to information	is the ability of an individual to seek, receive and impart information effectively.
Accountability	the acknowledgement and assumption of responsibility for actions.
Public accountability	the obligation of agencies and public enterprises who have been trusted with public resources to be answerable publicly for their acts and omissions, for their decisions, their policies and their expenditures.
Horizontal application	describes the application of human rights provisions between individuals as opposed to vertical application, which describes the application of human rights provisions between the State and individuals.

3 INTRODUCTION

- Access to information is provided for in several international human rights instruments and in the Constitution of Zimbabwe. The importance of this right has been emphasised at the United Nations (UN) General Assembly since 1946 when it passed Resolution 59(1), which stated that 'freedom of information is a fundamental human right and the touchstone of all freedoms.'
- Access to information is also a critical element of good governance, as it enhances democracy, transparency and accountability. It is an empowering tool, which can enable all members of the community to participate in governance and decision making processes and to hold their leaders and governments to account.
- Access to information is not absolute. Limitations on the exercise of this right are found at national, regional and international law. In terms of the Constitution access to information may be restricted in the interests of defence, public security or professional confidentiality to the extent that the restriction is fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom.

4 SCOPE AND CONTENT OF THE RIGHT

- Section 62 of the Constitution provides for access to information. This provision should be read together with Section 6 (3) and (4) of the Constitution which oblige the State and all agencies of government to ensure the equal treatment, promotion, use and development of all languages.
- Other relevant sections of the Constitution highlight the importance of access to information for purposes of promoting transparency and accountability (Section 9, 194(1) (h), 196(3) (c), 298(1) (a)); whilst Sections 248 and 249 establish and outline the functions of the Zimbabwe Media

Commission.

- The discussion in this section is primarily based on Section 62 of the Constitution. Section 62, read with Section 44 of the Constitution, imposes on the State and private persons the duties to respect, protect and promote the right of access to information.
- Firstly, the duty to respect requires the State and private persons to refrain from interfering directly or indirectly with people's right of access to information.
- Secondly, the duty to protect requires the State to prevent private parties from interfering with the enjoyment of access to information through the adoption of legislative and other regulatory measures.
- Thirdly, the duty to fulfill or promote requires the State to take positive measures to assist individuals to gain access to and enjoy the full realisation of the right of access to information.

4.1 Access to information held by the State

- Section 62(1) of the Constitution provides that every Zimbabwean citizen or permanent resident, including juristic persons and the Zimbabwean media, is entitled to access to information held by the State or any institution or agency of the government at every level, in so far as the information is required in the interests of public accountability.
- Clearly, the right to information held by the State can only be exercised by citizens and permanent residents of Zimbabwe. Foreign nationals cannot oblige government agencies to share with them information relating to the day to day functioning of the government.
- The legislation that gives effect to the right of access to information is the Access to Information and Protection of Privacy Act (AIPPA). This Act provides members of the public with a right of access to records and information held by public bodies; outlines categories of information that are protected; makes public bodies accountable by giving the public a right to request correction of misrepresented personal information; prevents the unauthorised collection, use or disclosure of personal information by public bodies; protects personal privacy; and provides for the regulation of the mass media.
- Whilst the right to require State authorities to reveal information held by the State is limited to citizens and permanent residents, these terms are widely defined to include companies and media houses that are registered in this country.
- Members of the public are entitled to information held by public authorities provided that the information required serves to make the functioning of these authorities more transparent and accountable.
- The power to govern is derived from the people and it is therefore legitimate for State institutions to be bound to disclose certain pieces of information for purposes of ensuring transparency and accountability.
- Sections 9, 194(1)(h), 196(3)(c) and 298(1)(a) of the Constitution highlight the importance of access to information for purposes of promoting transparency and accountability with respect to good governance, the principles of public administration and leadership, and the principles of financial management.

4.2 Access to information held by any person

- Section 62(2) entitles every person, including the Zimbabwean media, to access any information held by any person in so far as it is required for the exercise or protection of a right. The right of access to information held by private persons is extended to every person, not just citizens and permanent residents.
- Unlike the information that is required in the interest of public accountability that may only be accessed from the State, information which is required for the exercise or protection of a right can be accessed from both individuals and the State.
- The right of access to information held by private persons further reinforces the idea that the Constitution also governs horizontal disputes and relationships.
- The horizontal application of the right of access to information arises mainly from the privatisation

of public power and utilities.

- Many functions, such as the provision of energy, water, education, health care and the like, have largely been privatised and private companies performing these functions need to be held to the same level of accountability as public institutions.
- As the country and the world are trending toward privatisation, it is important to have Constitutional provisions requiring these new centres of power to release information that is needed for the exercise or protection of rights.
- Finally, Section 62(2) is important because it shows that access to information leverages the enjoyment of other rights in the Constitution. For example, an individual who is denied free basic medication for their child at a public hospital can ask for information indicating that this is government policy.

4.3 The right to the correction of erroneous information

- Section 62(3) of the Constitution confers on every person the right to correction of information or the deletion of untrue, erroneous or misleading information held by the State or any institution or agency of government at every level.
- The right to the correction or deletion of untrue, erroneous or misleading information is a remedy for the publication of incorrect or partially incorrect information.
- This right should be read together with exceptions to freedom of expression and of the media. Section 61(5) (c) provides that freedom of expression and the media excludes malicious injury to a person's reputation or dignity.
- More importantly, the right to the correction or deletion of untrue, erroneous or misleading information protects people from the reputational damage that will arise if untrue, erroneous or misleading information and the custodian of the information was not constitutionally required to correct the information they hold.

5 ACCESS TO INFORMATION IN REGIONAL AND INTERNATIONAL INSTRUMENTS

- Access to information is protected by Article 9 of the ACHPR which provides that: 'Every individual shall have the right to receive information and every individual shall have the right to express and disseminate his opinions within the law.'
- Article 21 of the CRPD provides that State parties shall take appropriate measures to ensure that PWDs can exercise freedom to seek, receive and impart information and ideas on an equal basis with others and through all forms of communication of their choice.

6 LIMITATION OF THE RIGHT



Figure 24: People should demand access to information

See CJEF 'Access to information' <https://www.google.com/search/> (accessed on the 01 July 2018)

- The legislation which must be enacted to provide for the right of access to information in terms of Section 62(4) of the Constitution may restrict the exercise of the right in the interests of defence, public security or professional confidentiality.
- Such restrictions may only be permissible to the extent that they are fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom.
- Limitations on access to information are also provided for in Section 86(2) of the Constitution. The right of access to information may be limited only in terms of a law of general application.
- Some of the limitations that are possibly justifiable include the non-disclosure of classified information in the interests of defence or other compelling interest. Section 4(1) of the Official Secrets Act prohibits and criminalises the disclosure to any unauthorised person of any secret official code or password or any model, article, document or information.
- Section 4(2) of the same Act prohibits the disclosure of any model, article, document or information which relates to (i) armaments of war or any military matter; or (ii) the preservation of the security of Zimbabwe or the maintenance of law and order by the Police Force or any other body or organisation appointed or established by the Government for the purpose of assisting in the preservation of the security of Zimbabwe.
- Persons who commit these offences are liable to imprisonment for more than 20 years.
- Overall, the provisions of the Official Secrets Act limit the public's access to information held by the State, in cases where the limitation is justified by the national interest.

7 CASE LAW

- In the case of *Hitschmann v City of Mutare & Anor* (HH 211/16), the applicant wanted Mutare City Council to disclose information about the procedures used in selling a piece of land which he was interested in buying because he suspected that proper procedures had not been followed thereby violating his rights.
- The court found that the applicant's right of access to information had been violated and that the public authority had failed to act in accordance with Section 3 of the Administrative Justice Act (Chapter 10:28)¹¹.
- Access to the required information was necessary for the exercise or protection of the applicant's rights. The court ordered the Council to furnish the applicant with the records and documents showing that they complied with Section 152 of the Urban Councils Act, Chapter 29:15.¹²

11. To act lawfully, reasonably and in a fair manner in taking an administrative action which may affect the rights, interests or legitimate expectations of any persons.

12. The advertisement and the notice published relating to the sale and alienation of the piece of land in question.

8 ACTIVITY

- a. In the village of Tatambura, a group of 18 orphaned and vulnerable children used to be beneficiaries of the Government's Basic Education Assistance Module (BEAM) programme. However, in March 2017, these children were struck off from the list of beneficiaries and no reason was provided for this decision. The children's guardians suspect that the BEAM selection committee is corrupt because whilst these children were removed from the programme, certain undeserving children from the local community were added onto the programme.
 - i. Discuss the human rights issues emanating from this case.
 - ii. Discuss what legal advice you would give to the parents of these children to assist them to enforce their right of access to information.
- b. Could there be any circumstances which allows the government, its agencies and institutions to limit access to information?

9 KEY POINTS

- Access to information acts as a leverage right for the enjoyment of all the other rights that are protected in the Declaration of Rights.
- Members of the public are unequivocally entitled to information held by public authorities provided that the information required serves to make the functioning of these authorities more transparent and accountable.
- Unlike the information that is required in the interest of public accountability that may only be accessed from the State, information that is required for the exercise or protection of a right can be accessed from both individuals and the State.
- The horizontal application of the right of access to information arises mainly from the privatisation of public power and utilities.
- Many functions, such as the provision of energy, water, education, health care and the like, have largely been privatised and private companies performing these functions need to be held to the same level of accountability as public institutions.
- The right to access to information also includes the right to have erroneous or misleading information corrected or deleted.
- Like many other rights in the Constitution, the right of access to information can be justifiably limited by a law of general application in the interests of national security or defence.

10 CONCLUSION

- Access to information held by the State or government required in the interests of public accountability may be accessed by every Zimbabwean citizen, permanent resident, juristic persons and the Zimbabwean media.
- Legislation which gives effect to this right is already existent but may need some Constitutional alignment. The legislation may however, restrict the right of access to information in the interests of defence, public security or professional confidentiality.

CHAPTER SIXTEEN: SECTION 63: LANGUAGE AND CULTURE

1 OBJECTIVES

At the end of this section, learners should be able to:

- Explain the scope of the right to language and culture in Zimbabwean law;
- Outline Articles in regional and international instruments that provide for the right to language and culture; and
- Identify limitations to the right to language and culture.

2 DEFINITION OF KEY TERMS

Language is the method of human communication, either spoken or written, consisting of the use of words in a structured and conventional way.¹³

Culture A people's way of life, the whole complex of distinctive spiritual, material, intellectual and emotional features that characterise a society or social group. Culture includes not only arts and literature, but also modes of life, the fundamental rights of the human being, value systems and traditions and beliefs.¹⁴

3 INTRODUCTION

- Zimbabwe is rich in cultural diversity by virtue of it being home to different indigenous groups, each with its own specific language. The importance of this fact is reflected in the Constitution which provides for the right to language and culture in the Declaration of Rights.
- The protection of social and cultural rights is a new and commendable development when one compares the current Constitution to its predecessor, as this provides individuals and communities with an avenue to combat injustices.

4 THE SCOPE OF THE RIGHT TO LANGUAGE AND CULTURE

- The right to language and culture entails the right of all individuals to express and enjoy their culture. It is also linked to the right to self-determination especially to the expression of minority interests.
- The preservation of cultural heritage is central to the maintenance of diversity and creativity in any modern society. The individuals and communities involved should jealously guard their cultures against extinction if there is to be any meaningful heritage to be carried on to posterity.
- The right to language and culture is interdependent and indivisible from many other human rights. For example, freedom of expression, of association, the right to hold opinions without interferences and the right to constitute a family are very much interrelated with the right to language and culture.
- The relevance of this particular right in the Zimbabwean context is that there are different indigenous groups, wherein 80% of Zimbabweans identify with the Shona ethnic group which consists of several clans such as Manyika, Zezuru, Karanga, and Korekore.
- The second most common ethnic group is the Ndebele which is approximately 14% of the Zimbabwean population.
- Other indigenous groups include the Kalanga, Tonga, Shangani and Venda. It is imperative to

13. <https://en.oxforddictionaries.co./definition/language> (accessed on 25 April 2018 at 19:36).

14. *Culture Policy of Zimbabwe* (2006) at p 6.

note that each of these groups has distinct spiritual beliefs and cultural practices.

- In light of the diversity of cultural heritage in Zimbabwe, the right to language and culture has to be protected at all costs. This is so due to the fact that ensuring the cultural rights of individuals results in the protection of the interests of these various ethnic groups and the subsequent preservation of the rich Zimbabwean cultural heritage.

5 LANGUAGE AND CULTURE IN THE CONSTITUTION

- Section 63 of the Constitution guarantees the right to use a language and engage in cultural practices of one's choice.
- In light of the different ethnic groups that are found in Zimbabwe, such a provision in the Constitution is a notable improvement, which ensures that even the minority groups' languages and cultures are recognised as much as the languages and cultures of the majority.
- Section 63(b) further provides for the 'right to participate in the cultural life of their choice'; but no person exercising these rights may do so in a way that is inconsistent with other human rights provided for in the Constitution.
- Under the founding provisions, languages are catered for in Section 6(1) wherein a list of sixteen languages that are officially recognised is given. These are Chewa, Chibarwe, English, Kalanga, Koisan, Nambya, Ndaou, Ndebele, Shangani, Shona, Sign language, Sotho, Tonga, Tswana, Venda and Xhosa.
- Section 6(2) provides for an Act of Parliament which may prescribe other languages as officially recognised languages and may prescribe languages of record. However, this has not yet materialised since there were only proposals for the Language Bill by an Inter-Ministerial Committee sometime in 2017.
- It is noteworthy that English is the main official language of education, business, media and government, owing to Zimbabwe's British colonial heritage.
- There was a time when, of all the indigenous languages, only Shona and Ndebele were recognised to the extent of being examined in the education system.
- Later on, six of the minority languages became recognised for use in education and on radio namely Kalanga, Shangani, Chewa, Venda, Tonga and Nambya.
- In the Constitution, preservation of culture is further provided for in Section 16 as part of the National Objectives.
- In this Section, the State and all institutions and agencies of government at every level are mandated to promote and preserve cultural values and practices which enhance the dignity, well-being and equality of Zimbabweans and to take measures to ensure due respect for the dignity of traditional institutions.
- Section 16(2) of the Constitution provides that apart from the State and its institutions and agencies, all Zimbabwean citizens must endeavour to preserve and protect Zimbabwe's heritage, which serves to show how important cultural heritage is to the whole nation at large.

6 LANGUAGE AND CULTURE IN REGIONAL AND INTERNATIONAL INSTRUMENTS

- At international law, Zimbabwe bears an obligation to ensure that the right to language and culture is realised within its territory.
- International human rights law recognises the right of all individuals to express and enjoy their culture. This right is explicitly protected in numerous instruments.
- In 2003, the United Nations Educational Scientific and Cultural Organisation (UNESCO) member States drafted the Convention for the Safeguarding of the Intangible Cultural Heritage, which Zimbabwe accepted on 30 May 2006.
- This Convention recognises that intolerance and processes of social transformation, such as

globalisation, threaten cultural practices.

- In addition, Article 27 of the UDHR provides that: 'Everyone has the right to freely participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.'
- Article 15 of the ICESCR also provides that State parties must recognise the right of everyone to take part in cultural life as well as enjoy the benefits of scientific progress and its applications.
- Article 2 of the Convention on the Prevention and Punishment of the Crime of Genocide has been interpreted broadly to prohibit the intentional destruction, in whole or in part, of a particular culture.
- On the regional platform, Article 17 of the ACHPR also provides that: 'Every individual may freely take part in the cultural life of his community.'
- Similarly, Article 17 of the Optional Protocol to the ACHPR on the Rights of Women in Africa and Article 11(c) of the ACRWC also provide for the right to language and culture for women and children respectively.

7 LIMITATIONS OF THE RIGHT

- Although the right to language and culture is interdependent and indivisible from many human rights and freedoms, it is not absolute.
- It is trite that this right often exists in tension with other human rights especially in the African context.
- Some of the rights that are usually violated by cultural beliefs and practices are the right to education, to bodily and psychological integrity, to health and non-discrimination, to mention but a few.
- There are certain cultural practices which may have a negative impact on an individual's well-being, e.g. the genital mutilations that are performed on some adolescents in some cultures on the pretext that they are being prepared for manhood or womanhood and the practice of primogeniture (male preference) in inheritance issues.
- Again, there are some cultural practices that interfere with other basic human rights to which all individuals are entitled. For instance, in some cultures, it is not acceptable to educate a girl child since it is believed that doing so would benefit the family of her in-laws once she gets married. This belief violates not only her right to education but also the girl child's right to be treated equally without having to be discriminated against.
- Cultural beliefs and practices that have harmful consequences are outlawed by the Constitution and other national laws.
- Language and cultural rights can only be protected to the extent that cultural practices do not infringe on other people's human rights.

8 CASE LAW

- In *Mabena v Letsoalo*,¹⁵ a husband and wife had a marriage under customary law. When the husband died, his widow applied for an exemption from customary law to allow her to exert property rights upon his death, because customary wives were not traditionally eligible to inherit property. The deceased husband's family challenged the validity of the marriage on two grounds, namely that the husband's father never consented to the marriage and the payment of lobola was made to the wife's mother and women were not valid guardians under customary law. The judge rejected the first contention because cultural practices had changed such that men had begun to negotiate their own marriages. The second contention was also rejected because single female-headed households had become sufficiently common that women could be considered guardians. In this ruling, the judge respected the marriage formed by customary

¹⁵ 1998 (2) SA 1068 (T).

law and reinterpreted potentially discriminatory customary norms in light of the changing cultural practices and perceptions toward gender equality.

9 ACTIVITIES

- a. Discuss the scope of the right to language and culture in domestic law as well as the limitations to the right.
- b. Officials in State institutions and agencies responsible for service delivery are not compelled to learn sign language. Which rights of people with hearing impairment are violated?

10 KEY POINTS

- The fact that Zimbabwe is home to different indigenous groups lays bare its richness in cultural diversity. This partly necessitated the incorporation of the right to language and culture into the current Constitution, which was not the case under the previous Constitution i.e. prior to the adoption of the current Constitution in 2013. This particular right ensures that the cultural rights of individuals are upheld, thereby protecting the interests of the different ethnic groups and preserving the rich cultural diversity of our country.
- Though the right to language and culture is interdependent and indivisible from other human rights, it can be limited in instances where it violates other constitutionally guaranteed rights.
- Its importance is shown by the fact that it is provided for in some regional and international treaties.

11 CONCLUSION

- The right to language and culture is important in the human rights discourse particularly under the category of economic, social and cultural rights. Its importance is reflected by the fact that it is provided for not only in the Constitution but also in regional and international human rights instruments.
- Though the right to language and culture is interdependent and indivisible from most of the human rights, in some cases, it exists in tension with other human rights. For that reason, it is subject to some limitations that are reasonable and justifiable in an open and democratic society.

CHAPTER SEVENTEEN: SECTION 64: FREEDOM OF PROFESSION, TRADE OR OCCUPATION

1 OBJECTIVES

At the end of this section, learners should be able to:

- Explain the scope and content of freedom of profession, trade or occupation;
- Discuss the State's obligations in realising this right;
- Identify articles in regional and international instruments that provide for freedom of profession, trade or occupation; and
- Identify limitations of the right to freedom of profession, trade or occupation.

2 DEFINITION OF KEY TERMS

Profession An occupation carried on by a person by virtue of her/his specialised qualifications, training or skill.

Occupation Any regular work, profession, job, principal activity, employment, business or a calling in which an individual is engaged.

Trade Includes any bargain or sale, any occupation or business carried on for subsistence or profit. It is an act of buying and selling of goods and services. It may include any business carried on with a view to profit.

3 INTRODUCTION

The right to freedom of profession, trade or occupation is intended to guarantee to all citizens the right to practice any profession or to carry on any occupation, trade or business to enable all persons to exercise their right to earn a livelihood.

4 SCOPE AND CONTENT OF THE RIGHT TO FREEDOM OF PROFESSION, TRADE OR OCCUPATION

- Freedom of profession, trade or occupation is provided for in Section 64 of our Constitution.
- The Constitution provides that: 'Every person has the right to choose and carry on any profession, trade or occupation, but the practice of a profession, trade or occupation may be regulated by law.' Two elements of the right are evident from this clause. These include freedom from interference in choosing one's profession, trade or occupation and the fact that the exercise of this right can be regulated by law. These elements are explored in turn.
- Freedom to choose one's profession, trade or occupation presupposes the absence of coercion in choosing one's career or business path. The exercise of this freedom is subject to the condition that whatever career or business path one chooses to follow, it should be lawful and not be characterised by criminality.
- A person should not choose unlawful career paths such as drug/human trafficking, child prostitution or selling prohibited substances. An individual does not have a right to occupy themselves with something that is openly regarded as a crime.
- Apart from the implicit requirement of lawfulness of the profession, trade or occupation, no person may be compelled to take in or be a member of a particular profession. For instance, forced conscription into the military violates the freedom of choice in the context of employment

or occupation.

- Violations of occupational freedoms often take various forms. The most blatant violation of the right to occupational freedom is when the State or non-State actors deny groups of people access to a particular trade or reserve particular trades for particular groups.
- Apartheid South Africa and colonial Zimbabwe could provide perfect examples of violation of this right because there was reservation of skilled, technical and professional work for white people. In addition, compulsion can also be subtle and indirect, as when the family pressurises someone to follow a particular career path.

4.1 Freedom of profession, trade or occupation in the Constitution and other national laws.



Figure 25: Every person has freedom of profession, trade or occupation
Available at <https://www.google.com/search?> (accessed 01 July 2018).

- Every person is entitled to exercise freedom of profession, trade or occupation, hence it applies to both men and women, as well as to citizens and non-citizens.
- The State's duties in realising this right are to respect, protect, promote and fulfil this right as outlined in Section 44 of the Constitution.

5. THE REGULATION OF CONDUCT BY PROFESSIONAL BODIES

- Whilst every person has the right to choose and carry on any profession, trade or occupation, the practice of a profession, trade or occupation may be regulated by law. This condition calls for the regulation of professions and acknowledges that specific occupations require particular qualifications described by law. This implies that persons who do not have the requisite qualifications are not allowed to take part in certain professions.
- Professional bodies such as the Law Society of Zimbabwe are constitutionally required to regulate the conduct of their members and such regulation should not be taken as a violation of a person's right to freedom of profession, trade or occupation.
- Legal Practitioners should not commit offences that violate the code of conduct of the members of the legal profession and can be struck off the roll or suspended from practice if they do so. In other words, both professional bodies and the courts have the authority to regulate the conduct of legal practitioners who practice in their jurisdiction.
- Furthermore, it is constitutionally permissible for a court to grant an order that limits or has negative implications for the exercise of the right to choose a profession, trade or occupation. For instance, convictions for fraud, theft or other trust-related crimes tend to limit, substantially, one's

chances to secure employment in the public sector.

- In the absence of adequate protection against arbitrary regulation of the practice of an occupation, the freedom to choose an occupation or profession would be tacitly reversed.

6 FREEDOM OF PROFESSION, TRADE OR OCCUPATION IN REGIONAL AND INTERNATIONAL INSTRUMENTS

- Freedom of profession, trade or occupation is provided for in several international and regional human rights instruments such as Article 23(1) of the UDHR, Article 6 of the ICESCR, Article 11(1) (c), Article 27(1) of the CRPD and Articles 8 and 15 of the ACHPR.
- Article 23(1) of the UDHR provides that everyone has a right to free choice of employment.
- Article 11(1)(c) of the CEDAW obliges State Parties to 'take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular ... the right to free choice of profession and employment.'
- Article 8 of the ACHPR provides that freedom of the profession shall be guaranteed and that no one may be restricted in the exercise of this freedom except through the law.

7 LIMITATION OF THE RIGHT

- Whilst every person has the right to choose and carry on any profession, trade or occupation, the practice of a profession, trade or occupation may be regulated by law. This condition calls for the regulation of professions and acknowledges that specific occupations require particular qualifications described by law. This implies that persons who do not have the requisite qualifications are not allowed to take part in certain professions.
- As already discussed, professional bodies such as the Law Society of Zimbabwe are constitutionally required to regulate the conduct of their members and such regulation should not be taken as a violation of a person's right to freedom of profession, trade or occupation.
- Freedom of profession, trade and occupation can also be limited by restraint of trade where a former employee or business partner is legally restricted from joining a competitor or setting up a business in direct competition with his or her former employer or partner for a limited period after the end of their business relationship. The restriction usually covers a defined geographical area.
- In terms of common law principles, a restraint of trade contract is enforceable provided the stipulated radius and time period are not unreasonably long.

8 CASE LAW

- a. In the case of the *Law Society of Zimbabwe v Muchandibaya* (HH 114/17), the applicant filed an application seeking the deletion of the respondent from the Register of Legal Practitioners, Notaries Public and Conveyancers. The respondent was in violation of the Legal Practitioner's Act (Chapter 27:02) namely, acting in an unprofessional, dishonourable or unworthy conduct. He abused clients' trust monies, notwithstanding his duty to keep intact the trust funds he held, except to the extent necessary to make payment for which part of the funds was destined; he failed to account to the client; and he failed, refused or neglected to respond to the Applicant's correspondence. The court ordered that the respondent's name be deleted from the Register of Legal Practitioners, Notaries Public and Conveyancers in terms of s 28 (1) (c) (1) of the Legal Practitioners Act.
- b. In *Law Society of the Transvaal v Machaka and Others* (No 2) 1998 (4) SA 413, 416 (T) the

respondents failed to take the conditions imposed on members of the legal profession seriously and had their names struck from the roll of attorneys. Respondents argued that the Constitution deprived the court of the right to strike off an attorney from the roll or to suspend him from practice. They further argued that striking off an attorney from the roll would violate their right to 'choose their trade, occupation or profession' in a free manner. The Court held that the respondents had exercised their right to choose their profession, trade or occupation freely. However, the right to choose one's profession, trade or occupation does not allow any person to abuse this right by trampling upon the rules or principles governing a particular profession. As such, attorneys are not entitled to commit offences that violate the code of conduct of the members of the legal profession and can be struck off the roll or suspended from practice if they abuse the right to choose a particular profession. In other words, both professional bodies and the courts have the inherent power over practitioners who practice in their jurisdiction and can interfere with the right to freedom to choose a profession, trade or occupation.

9 ACTIVITIES

- a. Tembo Jonas was employed as a mechanic by Fix It Mechanics Pvt Ltd. After having undergone apprenticeship training with the company, he left without fully serving his bonding period to open his own company offering similar services as Fix It Mechanics Pvt Ltd.
 - i. Does Fix It Mechanics have grounds to sue Tembo Jonas alleging restraint of trade?
 - ii. Can Tembo Jonas raise the defence of freedom of profession, trade or occupation?

10 KEY POINTS

- Section 64 of the Constitution provides that: 'Every person has the right to choose and carry on any profession, trade or occupation, but the practice of a profession, trade or occupation may be regulated by law'.
- It is constitutionally permissible for a court to grant an order that limits or has negative implications for the exercise of the right to choose a profession, trade or occupation.
- Freedom of profession, trade or occupation is also protected under regional and international law.

11 CONCLUSION

Whilst every person has the right to choose and carry on any profession, trade or occupation, the practice of a profession, trade or occupation may be regulated by law.

CHAPTER EIGHTEEN: SECTION 65: LABOUR RIGHTS

1 OBJECTIVES

At the end of this section, learners must be able to:

- Explain the scope and content of labour rights protected in the Constitution and Labour Act;
- Discuss the duties of the State and private employers in realising these labour rights;
- Explain the circumstances under which labour rights can be justifiably limited; and
- Outline articles in regional and international instruments that provide for labour rights.

2 DEFINITION OF KEY TERMS

Labour rights are a group of legal rights having to do with working relations between workers and their employers.

Unfair dismissal is when an employee is dismissed from their job in a harsh, unjust or unreasonable manner.

Maternity leave The Labour Act provides for maternity leave upon production of a medical certificate. Female employees are granted maternity leave for a period of 98 days on full pay.

Vacation leave an employee accrues annual leave days. For each year served, an employee is given one month or 30 days leave.

3 INTRODUCTION

- There is no single definition or definitive list of workers' rights. The United Nations International Labour Organization (ILO) identifies what it calls 'fundamental principles and rights at work' that all ILO Members have an obligation to respect and promote, which are:
 - o freedom of association and the effective recognition of the right to collective bargaining;
 - o elimination of all forms of forced or compulsory labour;
 - o effective abolition of child labour; and
 - o elimination of discrimination in respect of employment and occupation.
- Labour rights include freedom from forced labour, the rights to fair wages and equal pay for equal work, to leisure and reasonable limitation of working hours, to safe and healthy working conditions, to join and form trade unions, and to strike among others.
- Labour law mediates the relationship between workers, employing entities, trade unions and the government.

4 SCOPE AND CONTENT OF THE RIGHT

- Section 65 of the Constitution provides for labour rights. This section makes a distinction between the rights of 'every person', 'every employee', 'member of the security services', 'women', and the rights of 'every employer, trade union and employee or employer's organisation.'

4.1 Labour rights in the Constitution and domestic law

- Section 65(1) and (4) provide that every person has the right to fair and safe labour practices and standards, to be paid a fair and reasonable wage and to just, equitable and satisfactory conditions of work.
- Fair and safe labour practices are not defined in the Constitution. However, since Zimbabwe has signed and ratified a number of international labour standards, guidance can be sought from

international law which defines fair labour practices as including but not being limited to:

- o right to protection against unfair dismissal;
- o right to maternity leave;
- o right to vacation leave;
- o right to fair conditions and terms of employment;
- o right to organize; and
- o right to join a trade union of choice.
- With the exception of members of the security services, every person has the right to form and join trade unions and employee or employers' organizations of their choice; as well as to participate in the lawful activities of those unions and organizations.
- With the exception of members of the security services, every employee has the right to participate in collective job action, including the right to strike, sit in, withdraw their labour and to take other similar action. The exercise of this right may however be restricted by a law for the purposes of maintaining essential services.
- Collective job action is an action, such as a strike or slowdown, taken by workers as a means of increasing bargaining power with management; whilst a strike is the refusal of union members to work and is recognized as a basic union right.
- With the exception of members of the security services, every employee, employer, trade union and employee or employer's organization has the right to engage in collective bargaining, organize and to form and join federations of such unions and organizations. Collective bargaining is a process of negotiation between employers and a group of employees aimed at agreements to regulate salaries, working conditions, benefits, and other aspects of workers' compensation and rights for workers.
- Women and men have a right to equal remuneration for similar work, and women employees have a right to fully paid maternity leave for a period of at least three months.
- At the domestic level, the principal Act that regulates labour rights is the Labour Act [Chapter 28:01]. The Labour Act provides for the fundamental rights of employees; including employees' entitlement to membership of trade unions, prohibition of forced labour, protection against discrimination and employees' right to democracy in the work place and fair labour standards.
- The Labour Act outlines what constitutes unfair labour practices by the employer, trade union or workers' committees as well as the power of the Minister of Public Service, Labour and Social Welfare to prescribe further unfair labour practices.
- The Labour Act outlines general conditions of employment, wage and salary control, the formation and functions of workers' committees and works councils.
- The Labour Act provides for Trade Unions, Employers' Organisations and Federations of Trade Unions.
- It also provides for Employment Councils.
- Furthermore, the Labour Act provides for the establishment of the Labour Court and outlines its functions, powers and jurisdiction.
- The Labour Act outlines the procedure for the determination of labour disputes and remedying unfair labour practices.
- it also provides for the right to collective job action.

5 LABOUR RIGHTS IN REGIONAL AND INTERNATIONAL INSTRUMENTS

- Labour rights are provided for in several international and regional human rights instruments. These include various ILO Conventions, Articles 6(1) and 7 of the ICESCR, Article 11 of the CEDAW, Article 32(1) of the CRC, Article 15(1) of the ACRWC, Articles 27(1a), (g) and (h) of the CRPD, Article 13(1) of the ACHPR Protocol on the Rights of Women in Africa (Maputo Protocol) and Article 23 of the UDHR.

- Article 23 of the UDHR states that everyone has the right to work, to free choice of employment, to just and favourable conditions of work, and to protection against unemployment.
- The role of rural women in the economic survival of their families is recognized by Article 14 of CEDAW. State Parties are obligated to take into account the particular problems faced by rural women, and their work in the non-monetised sectors of the economy.
- The CRC and the ACRWC explicitly provide for the rights of the child in so far as labour rights are concerned, whilst the Maputo Protocol briefly outlines the basic principles that govern children and labour rights with an emphasis on the girl child.
- Articles 32(1) of the CRC and 15(1) of the ACRWC do not completely prohibit children from working, but rather recognize the right of the child to be protected from economic exploitation and from performing work which is likely to be hazardous or interferes with the child's education, or is harmful to the child's health or physical, mental, spiritual, moral or social development
- The Maputo Protocol obliges State Parties to promote the dissemination of information on the hazards of child labour to all sectors of the community and to punish all forms of exploitation of children, especially of the girl-child. (Article 15 (2)(d) of the Maputo Protocol)
- Unlike the CRC, the ACRWC specifically highlights that its provisions regulate both the formal and informal sectors of employment, and that regard should be paid to relevant provisions of the International Labour Organization's instruments that relate to children (Article 15(2) of the ACRWC).
- State Parties are obligated to take legislative, administrative, social and educational measures to ensure the provision of a minimum age or ages for admission to employment. (Article 32(2) (a) of the CRC), Article 13(g) of the Maputo Protocol). They are further obliged to appropriately regulate the hours and conditions of the employment of children (Article 32(2) (b) of the CRC and Article 15(2) (b) of the ACRWC).
- The CRPD provides for State Parties' obligations in so far as the labour rights of Persons with Disabilities are concerned.
- State Parties are to recognize the right of Persons with Disabilities to gain a living by work which is freely chosen on an equal basis with others. State Parties are to ensure that the labour market and work environment is open, inclusive and accessible to Persons with Disabilities (Article 27(1) of the CRPD).
- Article 27(1) (a) of the CRPD prohibits discrimination on the basis of disability in the conditions of recruitment, hiring, during employment, in career advancement and in the provision of safe and healthy working conditions.
- Article 27(1)(g) and (h) of the CRPD provides that State Parties are obligated to employ Persons with Disabilities in the public sector and to promote their promotion in the private sector, including through appropriate policies and measures, which may include affirmative action programmes, incentives and other measures.

6 LIMITATIONS OF THE RIGHT

- Workers' rights are entitlements recognised by law and claimable by workers. These rights were developed out of the need to protect workers' interests.
- Workers' rights are limited in terms of the law. Workers' rights are constitutionally limited, particularly for members of the security services. With the exception of members of the security services, every person has the right to form and join trade unions and employee or employers' organisations of their choice; as well as to participate in the lawful activities of those unions and organisations.
- With the exception of members of the security services, every employee has the right to participate in collective job action, including the right to strike, sit in, withdraw their labour and to take other similar action.
- Apart from limiting the labour rights of security forces, States may also pass laws prohibiting collective job action by employees offering essential services. This would normally include

employees working in the health sector.

7 ACTIVITIES

- a. Look at the picture below of nurses on strike against unfavourable working conditions in State hospitals.



Figure 26: Zimbabwean nurses on strike

See OM Nunurai Jena 'Death stalks Zimbabwe hospitals as crippling strike deepens crisis' Available at <https://www.google.com/search?> (accessed 30 June 2018)

- i. If the Government goes on to fire them for participating in the strike, would this constitute unfair dismissal or not?

8 KEY POINTS

- Most of the labour rights that were historically regulated by the common law are now explicitly regulated by the Constitution and the Labour Act.
- The Constitution protects a broad range of labour rights that matches categories of labour rights protected by international law.
- In general, workers' rights are regulated by the Labour Act [Chapter 28:01] whose main purpose is to provide for the fundamental rights of employees; to give effect to the international obligations of the Republic of Zimbabwe as a member State of the ILO and as a member of or party to other international instruments or agreements governing conditions of employment. To this end, most of the instruments ratified by Zimbabwe define unfair labour practices; regulate conditions of employment and provide for the control of wages and salaries.
- Workers' rights issues that cause conflict include unsafe working conditions, irregular retrenchments, dismissals, low or non-payment of salaries and restrictive legal requirements for workers to strike.
- Under international law and domestic law, the State has a duty to take measures to protect citizens' labour rights.

9 CONCLUSION

- The labour rights that are provided for under international and regional instruments are also largely protected under domestic law, particularly the Constitution of Zimbabwe and the Labour Act. From the discussion, it is clear that labour rights are not absolute and can be restricted especially for security forces and those working in the essential services sector. However, these restrictions must be fair, reasonable, necessary and justifiable in a democratic society as provided for in section 86(2) of the Constitution.

CHAPTER NINETEEN: SECTION 66: FREEDOM OF MOVEMENT AND RESIDENCE

1 OBJECTIVES

At the end of this section, learners should be able to:

- Explain the scope and content of the right to freedom of movement and residence;
- Determine what constitutes a deprivation of freedom of movement and residence;
- Outline national laws, regional and international instruments protecting freedom of movement; and
- Discuss the limitation of the right to freedom of movement and residence.

2 DEFINITION OF KEY TERMS

Freedom of movement	The right of individuals to travel from place to place within the territory of a country, and to leave and return to it without restrictions.
Residence	the act of living in a place, whether permanently or for a short period of time.
Passport	an official document issued by a government, certifying the holder's identity and citizenship and entitling them to travel under its protection to and from foreign countries.

3 INTRODUCTION

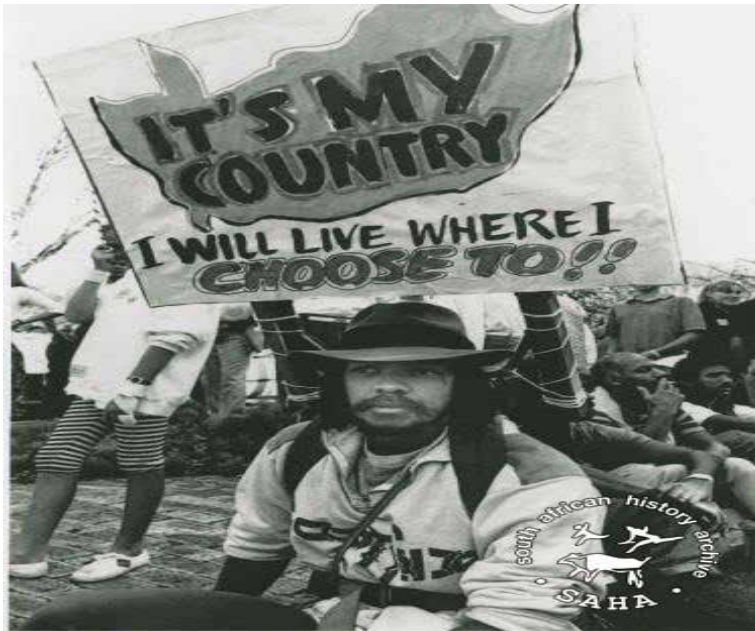


Figure 27: Every person has freedom of movement and residence

See B Square 'Freedom of Movement and Residence' available at <https://www.google.com/search?> (accessed on 26 June 2018).

- Freedom of movement and residence is one of the fundamental rights that are protected in the Constitution and broadly includes the right to move freely within Zimbabwe, residence in any part of Zimbabwe and travel from and back to the country.
- Freedom of movement and residence applies where the individual is lawfully within the State's borders.
- Freedom of movement and residence may be limited including for reasons of public health, national security and safety.

- The Constitution allows limitations on the rights to freedom of movement and choice of residents, but such limitations must be reasonable, fair, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom.

4 SCOPE OF THE RIGHT

- Liberty of movement is an indispensable condition for the free development of the human person. It is inter-linked with several other rights enshrined in the Constitution.
- Freedom of movement and residence is protected in section 66 of the Constitution and is a key aspect of respecting individual freedom.
- Everyone who is lawfully within the territory of Zimbabwe enjoys the right to move freely therein and to choose their place of residence. In principle, citizens of a State are always lawfully within the territory of that State.
- Additionally, an individual may not be expelled from their country of birth or origin.
- Freedom to leave the country should not depend on any condition such as the purpose for leaving and the period of time the individual chooses to stay outside the country.

4.1 Freedom of residence for citizens and everyone legally in Zimbabwe

- The Constitution extends the freedom to reside in any part of the country to two categories of persons: First, to every Zimbabwean citizen and, second, to everyone else who is legally in Zimbabwe.
- However, foreign nationals' right to reside anywhere in Zimbabwe depends on the legality of their residence i.e. whether they have the required documents allowing them to reside in Zimbabwe. Foreign nationals without passports or visas or other travel documents may not avoid arrest, detention and deportation on the basis of their right to reside in any part of the country.
- With regards to citizens, the freedom to choose a residential place is concretised by every citizen's right not to be expelled from Zimbabwe. Section 66(1) (b) of the Constitution provides that: 'Every Zimbabwean citizen has immunity from expulsion from Zimbabwe.' According to this provision, by virtue of being a citizen a person is immune to expulsion from the territory of one's country.
- Any person lawfully within the territory of a State has the right to choose his/her place of residence. This right is guaranteed in Section 66(2) (b) of the Constitution which States that: 'Every Zimbabwean citizen and everyone else who is legally in Zimbabwe has the right to reside in any part of Zimbabwe.' The right to choose where to live includes protection against all forms of forced internal dislocation.

4.2 Immunity of Citizens from expulsion from Zimbabwe

- A State has no right to expel its own citizens as citizens are protected from arbitrary deprivation of the human right to live in one's own country and it also means that deportation or expulsion of citizens is strictly prohibited. This reveals overlaps between freedom of movement and residence as a violation of either of the freedoms is invariably likely to lead to the violation of the other.
- No one can be arbitrarily or unlawfully forced to remain within a certain territory, area or region. Similarly, no one should be arbitrarily or unlawfully forced to leave his or her State or not to enter their State.
- To this end, the Constitution provides that every Zimbabwean has the right to immunity from expulsion from Zimbabwe.

4.3 Right of Citizens to enter Zimbabwe

Zimbabwean citizens have the right to enter or re-enter into Zimbabwe, whether for purposes of residence or visiting their families, at any time of their choice. The right of a person to enter Zimbabwe recognises the special relationship of a person to their country. The right has various facets. It includes not only the right to return after having left the country, but also entitles a citizen to come to the country for the first time if he or she was born outside the country.

4.4 Freedom of movement for Citizens and Everyone legally in Zimbabwe

- Section 66(2) (a) of the Constitution provides that: 'Every Zimbabwean citizen and everyone else who is legally in Zimbabwe has the right to move freely within Zimbabwe.' This shows that everyone lawfully within the territory of a State has the right to move freely within that territory. It is pertinent to note that the freedom of movement is also constitutionally conferred on citizens of other States who are lawfully within the territorial borders of Zimbabwe.
- Conferring freedom of movement on foreign nationals who are lawfully within Zimbabwe fulfils the Constitution's provision that fundamental rights and freedoms must be enjoyed without any distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

4.5 The Right to a Passport or other travel document for Citizens



Figure 28: Every Zimbabwean citizen has a right to a passport or other travel document. D Matsengarwodzi 'Getting A Passport in Zimbabwe' Available at <https://www.google.com/search?> (accessed on the 26 June 2018)

- Section 66 (1) (c) of the Constitution provides that: 'Every Zimbabwean citizen has the right to a passport or other travel document.' This provision should be read together with the right to leave Zimbabwe. The State is primarily obligated to avoid interfering with the individual's freedom to leave their country of birth or residence and is under a positive duty to ensure effective possibilities to leave by issuing the necessary travel documents.
- The issuing of passports is normally incumbent on the State of nationality of the individual. The refusal by a State to issue a passport for a national residing abroad may deprive the person of the right to travel elsewhere freely.

4.6 The right to leave Zimbabwe for citizens and everyone legally in Zimbabwe

- The right to leave Zimbabwe, which is closely linked to the right to a passport, is another component of freedom of movement. It involves the right to depart for a short or long period outside Zimbabwe. This right stems from the universal principle that no State owns an individual and that the right to move from one place to another is of a personal nature. The right to leave any country including one's own does not however guarantee an unrestricted right to travel from one country to another.
- The right to enter one's own country is a right enjoyed by a person who is abroad. Accordingly,

the State has the positive obligation to take all necessary measures to ensure that a citizen abroad has the right to return to their own country.

- If a citizen is detained abroad, positive obligations require the State of nationality to deal with the State where the citizen is detained in order to secure the enjoyment of the right to return to one's country since the citizen may not have the capacity to deal with the governmental authorities of the foreign country on their own.
- However, the right to return does not imply that a person who has committed a crime shall be freely entitled to serve the prison sentence in his/her home country.

5 FREEDOM OF MOVEMENT IN REGIONAL AND INTERNATIONAL INSTRUMENTS

- Freedom of movement is also protected under international and regional law in Article 13 of the UDHR, Article 12 of the ICCPR, Article 18 of the CRPD, Article 10 of the CRC and Article 12 of the ACHPR.
- Article 13 of the UDHR States that, 'Everyone has the right to freedom of movement and residence within the borders of each State. Everyone has the right to leave any country, including his own and to return to his country'
- Article 12 of the ICCPR States that, 'Everyone lawfully within the territory of a State shall within that territory, have the right to liberty of movement and freedom to choose his residence...'
- Article 12(1) (2) of the ACHPR States that, 'Every individual shall have the right to freedom of movement and residence within the borders of a State provided he abides by the law...'

6 LIMITATIONS OF THE RIGHT

- There are legitimate restrictions of freedom of movement and residence. The Constitution authorises the State to restrict these rights to protect national security, public order, public health or morals as well as the rights and freedoms of others.
- To be permissible, restrictions must be fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom. The law itself has to establish the conditions under which the rights may be limited. Restrictive measures must be appropriate and sufficient to achieve their protective function.
- The principle of proportionality has to be respected not only in the law that frames the restrictions or limitations, but also by the administrative and judicial authorities in applying the law. The State should ensure that proceedings relating to the exercise or restriction of these rights are expeditious and that reasons for the application of restrictive measures are provided.
- The limitation needs to be consistent with other rights guaranteed in the Constitution and with the fundamental principles of equality and non-discrimination. Thus, it would be a clear violation of the Constitution if the rights enshrined in section 66 were restricted by discriminatory conduct of any kind, such as on the basis of race, colour, sex, language, religion, political or other opinion, national or other status.
- Freedom of residence is an entitlement of every Zimbabwean citizen and everyone else who is legally in Zimbabwe.
- Once a person is lawfully within the territory of a State, any restriction on their rights as well as any treatment different from that accorded to nationals have to be justified.

7 ACTIVITY

- a. Assume that there is an outbreak of the Cholera disease in Harare in Zimbabwe and the government passes a law which prohibits freedom of movement. In terms of the Prevention of

Cholera Act, no person is allowed to move in or out of the affected suburb until the risk of its spread is eliminated. There is no deadline for the lifting of the ban on freedom of movement. Are the actions of the government legitimate?

8 KEY POINTS

- Freedom of movement and residence is guaranteed in Section 66 of the Constitution.
- The right to enter Zimbabwe, immunity from expulsion from Zimbabwe and the right to a passport and other travel documents apply to every citizen.
- The right to move freely within Zimbabwe, to reside in any part of Zimbabwe and to leave Zimbabwe apply to every citizen and everyone else who is legally in Zimbabwe.
- There are exceptional circumstances in which freedom of movement and residence may be restricted. The application of the restrictions needs to be consistent with the other rights guaranteed in the Constitution and with the fundamental principles of equality and non-discrimination.

9 CONCLUSION

- Freedom of movement and residence is protected by Section 66 of the Constitution, regional and international human rights instruments. Freedom of movement is an indispensable condition for the free development of any person.
- It is inter-linked with several other rights enshrined in the Constitution. However, the right may be limited in exceptional circumstances.
- To be permissible, restrictions must be provided by law, necessary, fair, reasonable, and justifiable in a democratic society.

CHAPTER TWENTY: SECTION 67: POLITICAL RIGHTS

1 OBJECTIVES

At the end of this section, learners should be able to:

- Identify political rights;
- Explain the political rights as provided in the Constitution;
- Explain the correlation between citizenship and the right to vote;
- Explain the importance of concept of secret ballot;
- Outline national laws, regional and international instruments and guidelines protecting political rights.

2 DEFINITIONS OF KEY TERMS

Political Rights	These rights give the citizens power to participate directly or indirectly in political processes allowing them to stand for public office or elect political leaders of their choice. They are given to the citizens by the Constitution.
Political Party	An organised group of people with at least roughly similar political aims and opinions that seek to influence public policy by getting its candidates elected into public office. It is a voluntary association of individuals united for common political purposes.
Free elections	'Freedom' is about participation and making choice as one wishes without being controlled or coerced.
Fair election	'Fairness' is about equality of participation in the voting process, and about impartiality and non-discrimination. Together, the words 'free' and 'fair' imply respect for human rights at large and the absence of coercion.
Voting	Is a political process in terms of which every eligible citizen has the opportunity to take part in selecting political leaders.
Secret ballot	A method of voting in which each person writes their choice on a piece of paper so that no one else knows how they voted.
Regular elections	A process of holding elections at intervals specified in the Constitution which in the case of Zimbabwe is after every five years.
Election Campaign	A planned group of political activities that are intended to influence the peoples' decision making process. It includes holding of rallies.
Multiparty System	A system in which many political parties across the political spectrum run for national or local election, and all have the capacity to gain control of Government offices, separately or in coalition.

3 INTRODUCTION

- Political rights include such rights as the right to make political choices freely, campaign freely and peacefully, stand for public office and voting in secret. They guarantee individual rights to involvement in public affairs and the affairs of State.
- Overall, freedoms such as freedom of expression, conscience, association, and assembly must be protected so that candidates and political parties can campaign without hindrance and have the opportunity to convey their messages to the voters.
- Apart from providing for other related civil and political rights stipulated above, the Constitution devotes an entire section to 'political rights.' These rights are also provided for in subsidiary

legislation such as the Electoral Act, POSA and AIPPA. The political rights provided for in the Constitution are in sync with the regional and international instruments and guidelines such as the SADC Principles and Guidelines Governing Democratic Elections and African Charter on Democratic Elections and Good Governance.

4 SCOPE AND CONTENT OF THE RIGHT

4.1 The right to free, fair and regular elections.

- It should be stated at the outset that there are no precise definitions of the phrase 'free, fair and regular elections' in the Constitution.
- Elections constitute a manifestation of the citizenry's political rights. Electoral laws must offer equal conditions and opportunities for citizens to have access to polling stations and to vote. They also must offer equal conditions and opportunities to participate in the electoral processes for all parties and candidates taking part in the election in order to ensure that there is fairness.
- Such equality requires that political parties and candidates be allowed to register for elections without unreasonable requirements such as paying special fees; that they have balanced access to the media; that laws governing the financing of campaigns are the same for all candidates and do not give one candidate or party an unequal advantage; and that the entire electoral process is fair and not skewed towards one party or candidate.
- It should be noted that the right to free, fair and regular elections gives content and meaning to the right to vote. Section 67(1)(a) protects the right to free, fair and regular elections for any elective public office established in terms of the Constitution or any other law.
- It is important to create an independent Commission to manage elections for the elections to be deemed free and fair. In Zimbabwe, the Zimbabwe Electoral Commission is responsible for organizing and supervision of free and fair elections.
- The Zimbabwe Electoral Commission performs three functions of superintendence, direction and control of elections. It is responsible for preparation, revision and updating of the Voters' Roll from time to time for elections to be free and fair.
- It is imperative to note that no State department or political party may tell the Commission how to perform functions such as the registration of voters. The independence of the Commission is the essential ingredient of free and fair elections in any democratic society based on openness.
- It goes without saying that if the independence of the Commission is undermined, then any individual with substantial interest in the matter may approach the Constitutional Court for appropriate relief.
- Citizens must not be allowed to vote more than once in the elections and it should be noted that persons not allowed to vote must not be permitted to do so for elections to be free and fair.
- Generally, the duty to ensure free, fair and regular elections predominantly falls on the State. However, the fairness of any game or contest also depends both on the role of the referee or umpire and on the conduct of the competing players and their supporters.
- Section 67 of the Constitution provides for an overarching right to make political choices freely, including the right to form a political party and to campaign for a political party or cause. It treats the right to make political choices as a discrete right and the other three rights as separate, but related rights.
- Arguably, Section 67(3)(a) of the Constitution, which gives content to the right to vote, is not horizontally applicable because the duty to create an environment that is conducive to free, fair and regular elections falls squarely on the government.

4.2 The freedom to make political choices freely.

- Section 67(1) (b) of the Constitution provides that: 'Every Zimbabwean citizen has the right to make political choices freely.' The purpose of this provision is to ensure that citizens are free to align themselves with the political cause or party of their choice without fear of adverse consequences.

- As such, elections are only fair if the electorate have the space to make personal choices freely. The right to make political choices is essentially in the same category as the right to equality, freedom of expression, freedom of conscience and freedom of assembly and association.
- The right to make political choices imposes on State and non-State actors the duty to refrain from forcing individuals to vote for a particular party or candidate.

4.3 The right to form, to join and to participate in the activities of a political party of one's choice.

- A political party may be seen as a voluntary association of individuals united for common political purposes. Parties provide the link between the citizens and government and between the electorate and other institutions involved in elections and politics.
- Political parties act as transmitters of ideas, opinions and approaches to social needs and national goals. They are vehicles of political ideas.
- Political parties are expected to provide political education to citizens, widen their awareness of social problems and mobilise them for political participation and election and for socio-economic development. They are indispensable for a democracy.
- Section 67(2) (a) of the Constitution protects the right to form, to join and participate in the activities of a political party or organisation of one's choice. The right to participate in the activities of the political party forms part of the freedom to make political choices and must be interpreted in this context.
- Section 155(1) (d) of the Constitution prohibits violence and other electoral malpractice. Furthermore, paragraph 13 (1) and (2) of the Code of Conduct for Political Parties provides as follows: "In case of non-compliance with the Code of Conduct, political parties commit to take measures, including disciplinary action and to first seek resolution of disputes within multiparty liaison committees". The Electoral Act prescribes sanctions for offenses in the electoral process, including violence, intimidation and corrupt practices. These sanctions include imprisonment, fines as well as disqualification from voting or contesting for public office.

4.4 The right to campaign for a political party or cause and participate in peaceful political activity

- Citizens' right to campaign freely for a political party or cause of their choice aims to prevent intimidation and other forms of political violence. Every party and every candidate participating in an election can freely hold political meetings, marches, demonstrations to influence, challenge or support the policies of Government.
- According to Section 67(2) (b), (c) and (d) participation in politics, including campaigning by political parties and individuals, should be conducted freely and peacefully.
- Section 67(4) of the Constitution provides that: 'For the purpose of promoting multi-party democracy, an Act of Parliament must provide for the funding of political parties.'
- It is pertinent to note that the funding must be used for purposes compatible with the functioning of a political party in a modern democratic society.

4.5 The right to vote in all elections and referendums

- Like eligibility to stand for election, the right to vote may be subject only to reasonable restrictions. Zimbabwe must take effective measures to ensure that all persons entitled to vote are able to exercise that right.
- Every citizen has the right to vote regardless of race, gender, ethnicity, religion, physical disability, property considerations, or level of education. There should be no burdensome impediments against any citizen's registering to vote. Only legitimate requirements such as age, proof of residence, and citizenship may restrict the right to vote.
- Section 67(3) of the Constitution provides that: 'Every Zimbabwean citizen who is of or over eighteen years of age has the right to vote in all elections and referendums to which this Constitution or any law applies and to do so in secret.' The rights in section 67 are directed to

elections, to voting and to participation in political activities.

- Voting is a political right given to any eligible citizen and one becomes eligible by being a citizen and reaching the legal age of majority which is 18 years. Age is definitely one factor considered in determining eligibility to vote and in no country are children given the right to vote in national elections.
- It should be clearly stated that no person may interfere with a voter's secrecy. In order to exercise the right to vote every citizen must register to vote with the Zimbabwe Electoral Commission to ensure that their names are placed on the Voter's Roll.
- Zimbabwe uses secret ballot type in every election. In this system the voter casts his/her vote in favour of a candidate without the knowledge of another person. A voter can exercise his/her right without fear or intimidation.
- In the polling station, an enclosure is provided for every voter to mark his/her vote and put the ballot paper in the ballot box. The ballot papers are mixed and nobody can identify the exact vote polled by any voter.
- Secret ballot method is used for all elections and referendums to which the Constitution or any other law applies. If a voter's choice is observable by others, voters may be subject to intimidation by the party in power or by a party seeking power. Elections would then have no integrity. Thus, protecting the right to a secret ballot is essential to a free and fair election.

4.6 The Right to stand for election for public office

- Section 67 (3) (b) of the Constitution provides that: "Every Zimbabwean citizen over the age of eighteen has the right to stand for election for public office and if elected, to hold such office". Such public office includes offices of President, Councillors, and National Assembly Members of Parliament. Senators are elected on the basis of a party list system of proportional representation.

5 POLITICAL RIGHTS IN REGIONAL AND INTERNATIONAL INSTRUMENTS

- Political rights are protected in regional and international instruments and guidelines. The regional and international instruments that provide for political rights and participation include, Article 21 of UDHR, Article 25 of ICCPR, Article 7 of CEDAW, Article 29 of CRPD and Article 13 of ACHPR. The regional and International guidelines include the SADC Principles and Guidelines Governing Democratic Elections and the African Union Declaration on Principles Governing Democratic Elections in Africa (2002).
- Article 21 of the UDHR recognises that everyone has the right to take part in the Government of his country, directly or through freely chosen representatives. It states: "The will of the people shall be the basis of the authority of Government. This shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures". (Article 21(3))
- Article 7 of CEDAW States that States must take steps to end discrimination against women who enter politics and take part in civic activities on equal terms with men including the right to vote in elections, to be candidates for elections, to determine Government policies and to participate in Non-Governmental Organisations involved in public and political life.
- The SADC Principles and Guidelines Governing Democratic Elections provide that member States have an obligation to ensure the transparency and integrity of the entire electoral process by facilitating the deployment of representatives of political parties and individual candidates at polling and counting stations and by accrediting national and other observers/monitors.
- The African Union Declaration on Principles Governing Democratic Elections in Africa (2002), highlights that democratic elections should be conducted freely and fairly, under democratic Constitutions and in compliance with supportive legal instruments. Elections should be held at regular intervals, as provided for in national Constitutions by impartial, all-inclusive competent

accountable electoral institutions staffed by well trained personnel and equipped with adequate logistics.

6 LIMITATIONS OF THE RIGHTS

- The right to vote is limited to every Zimbabwean citizen who is of or over eighteen years of age.
- The right to vote is limited to every citizen who is a registered voter with ZEC and whose names are placed on the Voters' Roll.
- Section 23(3) of the Electoral Act, prohibits any Zimbabwean citizen, who would have been living outside the country for a continuous period of 18 months, to participate in the country's electoral processes. Therefore, people living in the diaspora are not eligible to vote. The right to vote does not also apply to prisoners and people detained in other institutions.

7 CASE LAW

- In *Doctors for Life International v Speaker of National Assembly & Others* 2006 (6) SA 416 (CC) the court concluded that the international law position in respect of political rights is as follows: The international law right to political participation encompasses a general right to participation in the conduct of public affairs and a more specific right to vote and/ or be elected into public office. The general right to participate in the conduct of public affairs includes engaging in public debate and dialogue with elected representatives at public hearings. But that is not all; it includes the duty to facilitate public participation in the conduct of public affairs by ensuring that citizens have the necessary information and effective opportunity to exercise the right to political participation.
- In the case of *Amalgamated Rural Teachers Union of Zimbabwe (ARTUZ) and Another Vs Zimbabwe African National Union Patriotic Front (ZANU PF) and Another* (HMA 36-18, HC 263/18) (2018) ZWMSVHC 36 (28 June 2018) the Masvingo High Court interdicted ZANU-PF from: a) encouraging or forcing school children to attend rallies; b) causing the closure of schools for any of its rallies or activities; c) compelling teachers to attend rallies, to wear party regalia, to prepare performances for children to deliver at rallies, or to make contributions towards rallies; d) holding rallies on school premises; and e) using school property for political purposes, which covers commandeering buses to ferry people to and from their rallies. The court also prohibited the Minister of Primary and Secondary Education and his officials from assisting political parties in any of the above activities, and ordered the Minister to take active measures, including the making of regulations, to prevent political parties from abusing school property, staff and school children. Although the court's interdict was directed against ZANU-PF it applies to other parties as well. This decision was overturned following an appeal. It should be noted that the Zimbabwe Human Rights Commission had made similar recommendations in an investigative report in the matter between: Teachers Unions of Zimbabwe as Complainants and Ministry of Primary and Secondary Education as 1st Respondent and ZANU PF as 2nd Respondent.
- In the case of *Election Resource Centre v Chief Fortune Charumbira and National Council of Chiefs and the Ministry of Local Government, Public Works and National Housing* HH 270 – 18 HC 1718/18, the Court held that remarks made by Chief Charumbira on 28 October 2017 on the occasion of the Annual Conference of the Council of Chiefs and on 13 January 2018 to the effect that traditional leaders have been supporting and must continue to support ZANU (PF) and its Presidential Candidate at the forthcoming 2018 elections were in contravention of the Constitution of Zimbabwe. Chief Charumbira has since sought rescission of the judgement.
- It should be noted that according to Section 281 (2) (a-c) of the Constitution, traditional leaders should be apolitical, which means they should not act in a partisan manner, should not be members of a political party or further the interests of any political party or cause. Section 45 of the Traditional Leaders Act Chapter 29:17 States that traditional leaders as any other voter are entitled to exercise their right to vote for any candidate of their choice.

8 ACTIVITIES

- a. Conduct a debate on the topic 'Children should be allowed to participate in political campaign rallies for political parties of their choice.'
- b. Imagine that an ethnic group has formed a political party. The political party is then involved in serious political violence. The government then decides to ban that political party for protection of peace in the country. Discuss whether the Government can legitimately limit the right to form a political party in that manner.

9 KEY POINTS

- Every Zimbabwean citizen has the right to free, fair and regular elections as well as the right to make political choices freely.
- Every citizen has the right to form, join and participate freely and peacefully in activities of a political party of their choice.
- Every citizen has the right to stand for elections for public office and the right to vote by secret ballot in all elections and referendums provided they are at least eighteen years of age and are a citizen of Zimbabwe.
- In Zimbabwe the Zimbabwe Electoral Commission is responsible for organizing and supervision of elections without any influence from any political party for elections to be deemed free and fair elections.
- Political rights are protected in regional and international instruments and guidelines that include Article 21 of UDHR, Article 25 of ICCPR, Article 7 of CEDAW, Article 29 of CRPD and Article 13 of ACHPR.

10 CONCLUSION

- Political rights are protected by Section 67 of the Constitution of Zimbabwe. Electoral laws must offer equal conditions and opportunities for all political parties for free and fair election as provided for in the Constitution as well as regional and international human rights instruments and guidelines. The minimum age required for one to vote in Zimbabwe is eighteen years.

CHAPTER TWENTY ONE: SECTION 68: THE RIGHT TO ADMINISTRATIVE JUSTICE

1. OBJECTIVES

At the end of this section, learners should be able to:

- Explain the scope and content of the right to administrative justice;
- Identify and explain the duties of the State and private persons towards the realisation of this right;
- Explain the statutory provisions regulating administrative justice; and
- Identify and discuss the circumstances under which the right to administrative justice may be limited.

2 DEFINITION OF KEY TERMS

Administrative action defined as any decision taken, or any failure to take a decision by an organ of State in the exercise of public power or performance of a public function by public officials and entities in terms of the Constitution or legislation.

Reasonable administrative action This is a decision that a person in the position of a decision-maker, who exercises average care, skill and judgement, could have made under the circumstances.

Proportionality This principle encompasses the notion that one asks themselves whether the action is suitable or effective to achieve the desired aim. If no lesser form of interference with the rights of a person is possible in order to achieve the desired aim and if the measure does not place an excessive burden on the individual, then the measure is deemed to be proportional.

3. INTRODUCTION

- The right to administrative justice is provided for under Section 68 of the Constitution and the Administrative Justice Act Chapter 10:28 which encompass fundamental principles of lawfulness, promptness, efficiency, reasonableness, proportionality, impartiality and both substantive and procedural fairness.
- All functionaries, agencies and institutions of government are expected to abide by the fundamental principles in the exercise of their administrative power.
- Administrative functions are traditionally undertaken by government departments at the national, provincial and local levels. Functions that usually come to mind include the issuance of national identity documents, passports and supply of utility services such as water and electricity.
- The Constitution further gives mandate on the legislature to give effect to the right to just administrative action by enacting legislation that will ensure that these rights are fully realised. The Administrative Justice Act Chapter 10:28 is the main piece of legislation that is in place to give effect to section 68 of the Constitution. The Act gives an elaborate explanation of the right to administrative justice as well as the remedies available to citizens in the event of violations.

4 SCOPE AND CONTENT OF THE RIGHT

- The right to administrative justice entrenches the common law rules and principles that existed

with regards to how public power should be exercised. The exercise of public power by both State and non-State actors should meet the minimum requirements stipulated in the Constitution for it to be lawful.

- In today's era, administrative conduct or the exercise of public power is undertaken by either State, local authorities or parastatals. Regardless of government's increased reliance on delegating some of its functions to private entities, such delegated functions may still fall within the ambit of administrative conduct or exercise of public power.
- In order for one to decide whether an action amounts to public power, one should at the bare minimum establish whether the decision taken has a bearing on the public or the public interest.
- It should be reiterated that administrative conduct as clearly provided for within the Administrative Justice Act excludes any exercise or performance of the executive powers or functions of the President or Cabinet.
- Decisions to institute or continue or discontinue criminal proceedings and prosecutions and decisions relating to the appointment of judicial officers are also excluded from the ambit of administrative conduct.
- Scenarios where government and the other parties are negotiating on an equal footing also fall outside the ambit of administrative action.

4.1. The right to just administrative conduct or action

- Section 68(1) of the Constitution provides that: 'Every person has a right to administrative conduct that is lawful, prompt, efficient, reasonable, proportionate, impartial and both substantively and procedurally fair.'
- To be lawful, administrative action must be authorised by law, whether in the form of the Constitution, an Act of Parliament, subordinate legislation as long as it does not contravene the Constitution.
- The idea that administrative conduct should be prompt is based on the principle that justice delayed is justice denied. It is therefore imperative for organs of the State and other entities exercising public power to ensure that they swiftly respond to public demands.
- To be efficient, administrative action should be capable of achieving the purposes for which it is designed, in good time, at a reasonable cost and without imposing unbearable burdens on ordinary citizens or specific sections of society.
- To be reasonable, administrative conduct should be considered by a reasonable person in the position of the decision-maker under the circumstances to be appropriate for purposes of rendering services.
- To meet the requirement of proportionality, there should be a delicate balance between the goal at which the administrative action is targeted and the means chosen to achieve that goal.
- Administrative conduct is impartial if it is not based on preferences or bias for one particular social or ethnic group, geographical area or persons of a stipulated or implied class or economic status.
- Administrative action is substantively fair if it is intended to achieve noble objectives and does not discriminate against a particular social group. In addition, procedural fairness takes into account minimum considerations such as giving adequate notice of the nature and purpose of the proposed administrative action; reasonable opportunity to make representations; a clear statement of the administrative action; adequate notice of any right of review or internal appeal, where applicable, and adequate notice of the right to request reasons.
- Together with substantive and procedural fairness, compliance with all these elements makes the exercise of public power and performance of public functions just and consistent with the Constitution.

4.2 The right to receive reasons

- Section 68(2) of the Constitution provides that: 'Any person whose right, freedom, interest or legitimate expectation has been adversely affected by administrative conduct has the right to be

given, promptly and in writing, the reasons for the conduct.'

- Any person who wants to challenge any administrative action that affects his or her rights, interests or legitimate expectations would not be able to find a basis if reasons were not provided. Furthermore, reasons give insights as to the basis upon which a decision was made and thus safeguarding against unreasonable arbitrary administrative decisions.
- In all instances where the decision-maker is aware that they are constitutionally obliged to give reasons for their decisions in writing, the decision-maker is likely to better apply their minds before they make the decision.
- Furnishing reasons is one of the fundamentals of good public administration, makes it easier for the person to appeal against the decision, satisfies the desire on the part of any person to know why a decision was reached and encourages open and transparent public administration.
- In circumstances where an administrator fails to furnish adequate reasons for the administrative action, a presumption will arise that the action was taken 'without good reason.' Accordingly, the onus will then be on the administrator to show that the action was taken lawfully notwithstanding the failure to give reasons.

4.3 Judicial review of administrative conduct

- Section 68(3) provides that an Act of Parliament must give effect to the right to administrative justice which must provide for the review of administrative conduct by a court or, by an independent and impartial tribunal. The legislation must also impose a duty on the State to give effect to the right to administrative justice and to promote an efficient administration.
- One of the main common law rights entrenched by section 68(3) relates to natural justice. The tenets of natural justice require that where a decision that is likely to cause impact, prejudice on an individual or group of individuals is about to be made, there is a legitimate expectation that those persons should be heard before the decision is made.
- Such principles of natural justice entail that persons affected by a decision should be given a fair hearing by the decision maker prior to the making of the decision and that the decision maker must be reasonably perceived to be impartial.

4.3.1 The Role of the Zimbabwe Human Rights Commission (ZHRC) in Administrative Justice

- The Zimbabwe Human Rights Commission is in terms of Section 243 (1) (e) of the Constitution mandated to protect the public against abuse of power and maladministration by State and public institutions and by officers of those institutions. In this regard, ZHRC receives and investigates complaints of maladministration from the public and secures appropriate redress including recommending to Parliament effective measures to promote administrative justice.

11 LIMITATION OF THE RIGHT

- In terms of Section 86(2) of the Constitution, the right to administrative justice may be limited by a law of general application to the extent that the limitation is fair, necessary, reasonable and justifiable in an open and democratic society based on openness, justice, human dignity, equality and freedom.
- Section 8(1) of the Administrative Justice Act, which is a law of general application, allows the High Court to restrict the disclosure of the reasons for administrative conduct if such disclosure would be contrary to the public interest; or if the failure to supply reasons was reasonable and justifiable in the circumstances.
- Public interest is then broadly defined, in Section 8(3) of the Act, to include the security or defence of the State; the proper functioning of the Government; the maintenance of international relations; confidential sources of information pertaining to the enforcement or administration of the law; and the prevention or detection of offences or contraventions of the law.

12 CASE LAW

- a. In the case of *Mtizira v Epworth Local Board and Ors* HH 37/2011 the court held that: 'The rules of natural justice as embodied in the *audi alteram partem* rule require that a person be given reasonable notice to make representations where another takes action which adversely affects his/her interests or rights. ...administrative authority...with the responsibility to take an administrative action which may adversely affect the rights or interest of any person(must) give that person an opportunity to make adequate representations.'

13 ACTIVITIES

- a. In groups, identify and list 2 entities in your community that are Administrative Authorities in terms of the Administrative Justice Act. For each identified entity, list the administrative actions it performs which would fall within the ambit of the right to administrative justice and potential actions that can violate the right to administrative Justice.
- b. The government, in conjunction with a Chinese Company, decides to construct a dam that will lead to the relocation of thousands of families. It carries out both an Environmental Impact Assessment and a Human Rights Impact Assessment within two weeks, but does not involve the communities in the planning and decision-making processes. Three weeks after the completion of these assessments, the government, begins to forcibly relocate the affected families, leading to loss of access to livelihoods, education, health care services etc. The affected communities approach the Administrative Court challenging the legality of the actions based on violations of the right to just administrative action. Do you think the application will be successful? Give reasons.

14 KEY POINTS

- The right to administrative justice is protected in Section 68 of the Constitution.
- It encompasses fundamental principles of lawfulness, promptness, efficiency, reasonableness, proportionality, impartiality and both substantive and procedural fairness.
- The Administrative Justice Act Chapter 10:28 is the main piece of legislation that is in place to give effect to Section 68 of the Constitution. The Act gives an elaborate explanation of the right to administrative justice as well as the remedies that citizens are to be awarded in the instances that their rights are violated.
- The right to administrative justice can be limited by a law of general application for compelling reasons.
- The Zimbabwe Human Rights Commission is mandated to protect the public against abuse of power and maladministration by State and public institutions and by officers of those institutions.

15 CONCLUSION

- The right to administrative justice is an important right protected in the Declaration of Rights in the Zimbabwean Constitution. It is protected by section 68 of the Constitution and includes the right to just administration or action, the right to be provided with reasons for administrative conduct and the right to judicial review of administrative conduct.
- The right to administrative justice is an important one for purposes of promoting transparency and accountability in the exercise of public power and performance of public functions.

CHAPTER TWENTY TWO: SECTION 69: RIGHT TO A FAIR HEARING

1 OBJECTIVES

At the end of this Section, learners should be able to

- Explain the significance of the right to a fair hearing or trial;
- Discuss the scope and content of the right to a fair hearing;
- Apply their knowledge of fair trial rights to specific hypothetical problems presented before them; and
- Explain the significance of making a particular right illimitable and non-derogable; and
- Outline national laws, regional and international instruments protecting the right to a fair hearing

2 DEFINITION OF KEY TERMS

Fair hearing - A hearing that is conducted impartially and in accordance with due process.

Judicial independence -Is the principle which requires that judges and others adjudicating cases be independent and be protected from political influence or other pressures.

Fair Trial- Means the proper administration of justice conducted by an 'independent and impartial court, tribunal or other forum established by law.'

3 INTRODUCTION

- The Constitution guarantees the right to fair hearing. The right to a fair trial is absolute and cannot be limited under any circumstances.
- The right consists of a number of aspects including, but not limited to the right to a fair and public trial held within a reasonable time before an independent and impartial court, right to legal representation, and right of access to the courts.
- The right of access to the courts and tribunals entails access to effective remedies and reparations. In particular, it implies that tribunals and other decision-making authorities must refrain from any act that could influence the outcome of the proceedings to the detriment of any of the parties to court proceedings¹⁶.
- In general, fair trial guarantees are not only concerned with the outcome of judicial proceedings, but rather the process by which the outcome is achieved¹⁷.
- The right to a fair hearing is protected under regional and international law.

4 SCOPE AND CONTENT OF THE RIGHT TO A FAIR HEARING

4.1 Every person has the right to a public trial

- Generally speaking, the public has an interest in the prosecution of criminal cases and are entitled to be present during criminal trials.
- Since the public has a right of access to trials, the accused or the State would not in the ordinary course of events be able to insist on a trial behind closed doors. In any event, criminal offences are committed against the State which represents the broader interests of the general public and it would be a travesty of justice for court hearings to be conducted behind closed doors.
- The public nature of trials does not only make courts accountable to the people, but also emphasises the need for transparency in the judicial system. This fosters public confidence in

16. J Burchell *Principles of Criminal Law* 3rd ed. (2005) 19.

17. S Shah *International human rights law* 2nd ed. (2014) 270.

the courts.

- Members of the public are guaranteed free access to court proceedings as long as they do not disrupt the proceedings. The public character of hearings and of the pronouncement of judgements is therefore one of the core guarantees of the right to a fair trial and implies that the proceedings at first instance should be conducted orally and within a public setting.

4.2 The right to a fair hearing before an impartial court

- The right to a fair hearing is aimed at ensuring the proper administration of justice.
- The requirement of competence, independence and impartiality of a tribunal or court refers to the procedure and qualifications for the appointment of judges. Impartiality has several aspects, one being that judges must not allow their judgement to be influenced by personal bias nor act in ways that improperly promote the interests of one of the parties to the detriment of the other. Judges must apply the law without fear or favour.
- Impartiality refers to a State of mind or attitude of the tribunal in relation to the issues and the parties in a particular case and connotes absence of bias. As both independence and impartiality are fundamental to individual and public confidence in the administration of justice, it is also important to ask whether the tribunal may be reasonably perceived to be independent and impartial.
- In addition, the qualifications, training and experience of judges are important factors that work against bias and partiality on the bench.

4.3 Right to a fair, speedy and public hearing trial within a reasonable period of time

- Section 69 (1) of the Constitution provides for the protection of the law and the right to a fair hearing within a reasonable time for every person accused of a criminal offence.
- The right to a speedy hearing in civil proceedings is also enshrined in the Constitution. Section 69(2) thereof provides that: 'In the determination of civil rights and obligations, every person has a right to a fair, speedy and public hearing within a reasonable time before an independent and impartial court, tribunal or other forum established by law.'
- Decisions on whether the trial is speedy and carried out within a reasonable period of time depend on the circumstances of each and every case. The most important purpose of the right to a fair hearing within a reasonable time is to reduce as far as possible the anxiety and concern experienced by accused persons whilst awaiting trial or the hearing of an appeal.¹⁸
- Where there are delays, there is potential weakening of the quality of evidence, the possible death or disappearance or non-availability of witnesses, the loss of evidence, problems relating to the gathering of evidence and costs. However, there is an obligation to grant reasonable requests for adjournment especially where additional time for preparation of the defence is required.

4.4 The right of access to the courts or some other tribunal or forum

- Section 69 (3) States that every person has the right of access to the courts, or to some other tribunal or forum established by law for the resolution of any dispute.
- This right is not limited to Zimbabwean citizens only, but must also be available to all individuals regardless of their status.
- Courts are important since they enable people to claim and assert their rights. Courts provide a forum to resolve disputes and to test and enforce laws in a fair and rational manner.
- Both criminal and civil courts provide opportunities for aggrieved persons to have their cases heard by neutral judges. This process ensures that all cases are decided in a fair and consistent manner.
- This right is violated when certain persons are barred from bringing a suit against any other persons on the basis of their language, race, colour or other status.

■ 18. G Feltoe 'The effect of delays in trying criminal cases and the hearing of appeals in criminal cases,' *Legal Forum* 1996 Vol. 8, no. 1, p 36.

4.5 The right to choose and be represented by a Legal Practitioner before any court, tribunal or forum

- The right to a fair hearing allows one the opportunity to choose legal representation. Section 69 (4) of the Constitution States that every person has a right, at their own expense, to choose and be represented by a legal practitioner before any court, tribunal or forum. The extent to which these rights are realised, plays a vital part in ensuring the existence of a fair trial.
- It is important to note that the State, through the Legal Aid Directorate can provide legal representation in civil and criminal cases to indigent persons in order to ensure access to justice. In addition, every practising legal practitioner is compelled by law to handle at least one case per year on a pro bono basis.
- The right to legal representation of one's own choice is not absolute and does not require the State to halt criminal proceedings until an accused person is able to afford a legal representative of their choice.
- In essence, it means that a person is entitled not to have a particular legal practitioner imposed upon him or her.

5 LIMITATION OF THE RIGHT

- According to Section 86(3) (e) of the Constitution no law may limit the right to a fair trial and no person may violate this right. This means that the right to a fair and public hearing is absolute.

6 THE RIGHT TO A FAIR HEARING IN REGIONAL AND INTERNATIONAL INSTRUMENTS

- The right to a fair hearing is guaranteed in Article 10 of the UDHR, Article 14 of the ICCPR and Article 7 of ACHPR.
- Article 10 of the UDHR states that, "Everyone is entitled in full equality to a fair and open court by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him."
- Article 14 of the ICCPR states that, 'All persons shall be equal before the courts and tribunals... Everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.'
- Article 7 of the ACHPR provides that, 'Everyone has a right to have his cause heard and among the rights guaranteed are the right to defence including the right to be defended by a counsel of choice and right to be tried within a reasonable time by an impartial court or tribunal.'

7 CASE LAW

- In the case of *S v Manyara* (CCZ 3/2015) the Constitutional Court of Zimbabwe held that where an accused person alleges any infringement of his right to a fair trial within a reasonable time, the factors that are to be determined are: a) the length of the delay; b) the reason or explanation and responsibility for the delay; c) the assertion of his rights by the accused; and d) prejudice to the accused arising from the delay. In order to enable a proper evaluation of these factors it is essential that evidence be led, primarily by the accused person, as to what transpired from the date of the charge to the date when referral of the alleged violation of rights to the Constitutional Court is sought.
- In *Banana v Attorney-General* 1998 (1) ZLR 309 (S) it was held that in order to determine whether a court is impartial 'the real or substantial risk of partiality of the judge and assessors has to be weighed against the backdrop of the developed system of safeguards that have evolved to prevent just such a contingency. Only when these built in mechanisms are inadequate to guarantee impartiality will the test be satisfied and a fair trial rendered impossible of attainment.'

- c. In *S v Paweni and Another* 1994 ZLR 16 (H), Ebrahim J, at 22, held as follows:
 'The mere fact that an accused person is not able to secure the services of a specific legal practitioner is not in itself justification for a postponement of his trial.'

8. ACTIVITIES

- a. Discuss the assertion that, 'Justice delayed is justice denied'.
- b. Please read the following conversation between a fleeing antelope and an elephant in the picture:



J Hutchinson 'How Fast Can an Elephant Run?' available at <https://www.google.com/search?> (accessed 01 July 2018)

An antelope was running very fast and met an elephant on the way.

Elephant Why are you running?

Antelope They are arresting all goats.

Elephant But you are not a goat.

Antelope It will take you five years to prove that you are not a goat in court.

The elephant started running too.

Analyse the conversation between the Antelope and the Elephant in light of the right to a fair hearing.

9 KEY POINTS

- The guarantee of a fair hearing is fundamental to the criminal trial process of every modern society.
- The phrase 'right to a fair trial' consists of a number of component rights including, but not limited to the right to a speedy hearing, legal representation, cross-examination, the presumption of innocence and pre-trial disclosure.
- Section 69(1) of the Constitution captures the key components of the right to a fair hearing in criminal trials and section 69(2) broadly describes the right to a fair hearing in civil proceedings.
- To ensure the enjoyment of fair trial rights, the trial must take place in an independent court and before an impartial judicial officer.
- The right to a fair and public trial is absolute and cannot be limited under any circumstances, even during a public emergency.

10 CONCLUSION

- The right to a fair hearing or trial is one of the enforceable fundamental rights protected in the Constitution. It requires the adjudication of legal disputes by independent courts and impartial tribunals.

- The right to a fair hearing is one of the few Constitutional rights that are illimitable and non-derogable rights. This underlines the importance of due process in the determination of legal disputes.

CHAPTER TWENTY THREE: SECTION 71: PROPERTY RIGHTS

1. OBJECTIVES

At the end of this Section, learners should be able to:

- Explain the scope and content of property rights;
- Identify and explain the duties of the State and private persons in the realisation of property rights;
- Determine under what circumstances property rights are limited; and
- Discuss applicable national, regional and international laws protecting property rights.

2. DEFINITION OF TERMS

Hold	Any real or personal property to which one has title.
Occupy	To hold property in possession; to hold or keep property for use and with intent to control the property
Transfer	Passage of title to a property from one person to another
Hypothecate	A generic term for using property to secure payment of a loan, which includes mortgages, pledges and putting up collateral, while the borrower retains possession.
Lease	A contractual agreement by which one party conveys an estate in property to another party for a limited period, subject to various conditions, in exchange for something of value but still retains ownership
Dispose	The act of transferring or relinquishing of a property to another's care or possession usually by deed or will.
Deprivation	Is an act of interference with the use, enjoyment and exploitation of property that is significant enough to have a legally relevant impact on the rights of the affected party.
Arbitrary	Action based on random choice or personal considerations rather than any reason or system.
Acquisition	The act by which a person acquires or gains rights to a property. Compulsory- means 'compelled by law.'
Public safety	The welfare and protection of the general public.
Public order	Refers to the normal standards for peaceful operation of society.
Public morality	The ethics or principles which the society enforces or upholds in public places.
Real Rights	Refers to rights that are attached to a thing (usually a piece of land) rather than a person. Examples include ownership, use, pledge and habitation.

3. INTRODUCTION

- The Constitution gives a broad definition of property rights which include the protection of real rights, privileges and the use of a resource or material things which can be possessed by individuals or companies.
- Property rights can be enjoyed by an individual or group of people. In terms of the Constitution, this right is not absolute. It may be limited by the State, provided the limitation is done in a non-arbitrary manner, and in accordance with the law and the principle of proportionality.

4. SCOPE AND CONTENT OF PROPERTY RIGHTS

4.1 Definition of Property and Property Rights

- Section 71 of the Constitution provides for property rights and defines property as 'property of any description and any right or interest in property' in Section 71(1). This definition implies that the meaning of property is wide and all encompassing.
- Reference to 'any right or interest in the property' as constituting property is significant because it includes property rights other than ownership.
- In terms of Section 71(1) pension benefits are regarded as property rights and include pension, annuity, gratuity or similar allowances.
- Section 71(2) provides for every person's right to acquire, hold, occupy, use, transfer, hypothecate, lease or dispose of all forms of property. This applies to property which is located in any part of Zimbabwe and property which is owned individually or in association with others.
- Section 71(3) of the Constitution provides the procedures to be followed where both deprivations and acquisitions of property are concerned.
- As a general rule, no person may be compulsorily deprived of their property. Where a deprivation occurs, it must be substantively and procedurally fair. Procedural fairness means the State and acquiring authority must exercise its power in terms of clear rules and principles that are predictable/set out in advance.

4.2 Freedom from arbitrary deprivation of property

- Section 71(3) (a), (b) and (e) of the Constitution deal with the compulsory deprivation of property. In terms of Section 71(3) (a) of the Constitution, a person may only be compulsorily deprived of their property if the deprivation is in terms of a law of general application or if the deprivation is necessary.
- The rationale behind the requirement for deprivations to be in terms of a law of general application is to ensure that executive power is not used to deprive someone of their property without having a clear basis to do so.
- The deprivation will only be considered necessary if it is in the interests of defense, public safety, public order, public morality, public health or town and country planning; or in order to develop or use that or any other property for a purpose beneficial to the community. These requirements are outlined in Section 71(3) (b) of the Constitution.
- A deprivation of property is arbitrary when the law does not provide sufficient reason for the deprivation in question, or if it is procedurally unfair.
- In order to be substantively and procedurally fair, deprivations must be justified and proportionate, in addition to being made for a legitimate public purpose.
- In addition, the deprivation must not impose an unacceptably heavy burden upon one individual for the sake of the public at large.

4.3 Procedure to be followed by an acquiring authority before acquisition of property

- Section 71(3) (c) and (d) of the Constitution deals with the acquisition of property.
- Firstly, the acquiring authority is required to give reasonable notice of the intention to acquire the property to everyone whose interest or right in the property would be affected by the acquisition (Section 71(3) (c) (i) of the Constitution).
- Secondly, the acquiring authority has an obligation to pay fair and adequate compensation before acquiring property or within a reasonable time after the acquisition (Section 71(3) (c) (ii) of the Constitution).
- The reasonableness of the period between the compulsory acquisition of property and the payment of compensation should be decided on a case by case basis.
- If the compulsory acquisition of property is contested, the acquiring authority is to apply to a competent court for an order to confirm the acquisition before acquiring the property or within 30 days after the acquisition (Section 71(3) (c) (iii) of the Constitution).

- Compulsory acquisitions that do not comply with these requirements are procedurally unfair, invalid and unconstitutional.

4.4 Rights of persons whose property is designated for compulsory acquisition

- A person who has an interest or right in a property has the right to be given reasonable notice of the acquiring authority's intention to acquire the property in terms of Section 71(3) (c) (i) of the Constitution.
- Such a person has the right to contest the acquiring authority's notice of intention of acquisition in a competent court in terms of section 71(3) (c) (iii) of the Constitution.
- If the acquisition of the property is not confirmed by the court, such a person has the right to apply to a competent court for the prompt return of the property in terms of Section 71(3) (d) of the Constitution.
- Section 71(3)(e) of the Constitution confers on any person who has been deprived of their property and is claiming compensation for the deprivation, the right to apply to a competent court for it to determine:
 - a. Whether they have an interest in the property;
 - b. If they have an interest in property, to determine the nature and value of the interest;
 - c. Whether the deprivation is legal; and
 - d. The amount of compensation that they are entitled to be paid.
- Such a person also has a right to apply to the court for an order directing the prompt payment of any compensation. The Constitution, however, does not define what is meant by 'prompt' payment of compensation and matters should be decided on a case by case basis.
- In the event of a law that provides for extinction or diminution of the right to the payment of a pension, such a law will be regarded as compulsory acquisition of property and the same principles on compulsory acquisition should apply.

5 PROPERTY RIGHTS IN REGIONAL AND INTERNATIONAL INSTRUMENTS

- Property rights are recognised in regional and international human rights instruments such as Article 17 of the UDHR, Article 16 of the CEDAW, Article 14 of the ACHPR, and Article 26 of the ICCPR.
- Article 17 of the UDHR states that everyone has the right to own property alone as well as in association with others and no one shall be arbitrarily deprived of his property.
- Article 16 (1) (h) of CEDAW States that the State Parties must ensure "...same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration."
- Article 14 of ACHPR states that: "The right to property shall be guaranteed, it may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws".

6 LIMITATION OF THE RIGHT

- In terms of Section 71(3) (a) of the Constitution, a person may only be compulsorily deprived of their property if the deprivation is in terms of a law of general application or if the deprivation is necessary.
- The deprivation will only be considered necessary if it is in the interests of defense, public safety, public order, public morality, public health or town and country planning; or in order to develop or use that property for a purpose beneficial to the community. These requirements are outlined in Section 71(3) (b) of the Constitution.
- Section 86(2) of the Constitution also regulates the limitation of property rights. The limitation is

permissible only 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.

- When assessing whether a limitation is fair, reasonable, necessary and justifiable, factors such as the purpose of the limitation, are taken into consideration.

7 CASE LAW

- In the case of *Zavaza and another v Tendere and others* (HH740/15/HC8382/14), the Applicant (Zavaza) owned a piece of land in Ruwa but did not eventually develop it upon buying it. The third respondent who was an Estate Agent unknown to the applicant sold the piece of land to the first and second Respondents. The first and second Applicants discovered the sale of their piece of land to the first and second Respondents when they wanted to develop the land. First and second Applicants sued the Respondents. In finding in favour of the Applicants, the Court held that 'an owner whose property has been sold and delivered without his consent remains the owner as the seller cannot pass ownership that was not his...Roman Dutch Law protects the right of an owner to vindicate his property, and as a matter of policy favours him against an innocent purchaser...'

8 ACTIVITY

- Shumba Rural District Council (RDC) intends to establish a growth point in a certain communal area where some people are settled. The RDC has already begun selling and allocating the new owners their stands. The community has approached the RDC to enquire about this new development which they have not been informed about. The RDC informs the community that in terms of the Communal Lands Act, the community has no rights of ownership to the land since it is vested in the President. The RDC justifies its actions by indicating that it is the regulating authority in terms of the Communal Lands Act.
 - Discuss the actions of the RDC in light of property rights
 - What are the remedies available to the affected community?
- Hazvinei is a retired school teacher who took out a pension plan with an insurance company whilst she was still in employment. She recently approached the insurance company to access her pension and was informed that her pension had been recalculated from the value of \$10 million to \$10 thousand. She now wants to sue the insurance company for compulsory acquisition of property. Discuss her chances of success. Discuss the human rights issues that emanate from this case.

9 KEY POINTS

- The Constitution gives a wide definition of property to mean property of any description and any right or interest in property. This includes pension benefits.
- Every person has a right to acquire, hold, occupy, use, transfer, hypothecate, lease or dispose of all forms of property.
- Section 71(3) of the Constitution deals with the procedures to be followed where both deprivations and acquisitions of property are concerned.
- A person may only be compulsorily deprived of their property if the deprivation is in terms of a law of general application and if the deprivation is necessary.
- A person who has been deprived of their property has the right to apply to the court to determine the legality of the deprivation and the amount of compensation they are entitled to.
- In the case of an acquisition, the acquiring authority must give reasonable notice before acquiring the property and pay fair and adequate compensation before the property is acquired or within

30 days of the acquisition.

- A person who receives notice of the acquiring authority's intention to acquire the property has the right to contest the acquiring authority's notice and to apply to court for the prompt return of the property if the acquisition is not confirmed.

10 CONCLUSION

- The Constitution protects property rights and clearly articulates the circumstances under which holders thereof may be deprived of these rights.
- In compulsorily depriving property owners of their rights, whether through acquisitions or deprivations, the government should ensure that the deprivation is substantively and procedurally fair.

CHAPTER TWENTY FOUR: SECTION 72: RIGHTS TO AGRICULTURAL LAND

1 OBJECTIVES

At the end of this Section, learners should be able to:

- Explain the scope and content of the right to agricultural land;
- Discuss the duties of the State in realising this right;
- Assess whether the right can be limited and, if so, under what circumstances; and
- Explain how the ACHPR protects the right to agricultural land.

2 DEFINITION OF KEY TERMS

Agricultural land

means land used or suitable for agriculture, that is to say for horticulture, viticulture, forestry or aquaculture or for any purpose of husbandry, including the keeping or breeding of livestock, game, poultry, animals or bees; or the grazing of livestock or game.

Land

includes anything permanently attached to or growing on land.

Piece of agricultural land

means a piece of agricultural land registered as a separate piece of land in a Deeds Registry.

3 INTRODUCTION



Figure 29: Right to agricultural land are enshrined in Section 72 of the Constitution. A Ashton 'Land Rights and Development in Zimbabwe' <https://www.google.com/search?> (accessed on the 30 June 2018).

- Section 72 of the Constitution, the land rights clause, opens with a definitions sub-section, which seeks to define commonly used words and phrases in the Section, such as land, piece of agricultural land and agricultural land.
- The definitions remove any doubt as to what is meant when such words are used in this section, or when the need arises for their interpretation.
- Section 72 of the Constitution establishes a framework not only for the recognition, protection and regulation of rights to agricultural land in the legal system, but also for the compulsory acquisition and deprivation of the same rights by the State.

4 SCOPE OF THE RIGHT

- Section 72 of the Constitution provides for agricultural land rights. Agricultural land does not include Communal Land or land within the boundaries of an urban local authority or within a township established under a law relating to town and country planning or as defined in a law relating to land surveying.
- Section 72(2) of the Constitution makes provision for the compulsory acquisition of land or rights or interests therein. No compensation is payable in respect of acquisition except for improvements effected on it before its acquisition.
- Section 72(3)(b) of the Constitution provides that 'no person may apply to court for the determination of any question relating to compensation, except for compensation for improvements effected on the land before its acquisition, and no court may entertain any such application'.

4.1 Compulsory acquisition

- Section 72(2) of the Constitution provides that: 'Where agricultural land, or any right or interest in such land, is required for a public purpose, including settlement for agricultural or other purposes... (it) may be compulsorily acquired by the State by notice published in the Gazette.'
- Thus, in order to initiate the compulsory acquisition of agricultural land, the State first identifies the agricultural land in question and publishes a notice in the Gazette, indicating the State's intention to compulsorily acquire the land for the stated purposes.
- The purpose of the notice is to identify the land and alert interested parties. Once this has been done, the land in question automatically vests in the State with full title with effect from the date of publication of the notice.
- Section 72(3)(c) provides that the acquisition may not be challenged on the grounds that it was discriminatory in contravention of section 56 of the Constitution.
- Most pertinently, the notice triggers three acts which are acquisition, loss of rights by the landowner and automatic transfer of those rights from the previous land owner to the State.
- Under Section 293 of the Constitution on alienation of agricultural land by the State, the State has the right to deal with agricultural land acquired through compulsory acquisition in three ways. Firstly, the State can transfer ownership to any person through the sale of that land to third parties. Secondly, the State can lease the land to interested persons. Finally, the State can grant persons a right of use or occupation over acquired agricultural land.
- Hence, this provision clearly recognises that as the new owner, the State enjoys all the common law rights that come with private property, such as alienation or disposal.

4.2 Compensation for compulsory acquisition.

- Section 72(3)(a) of the Constitution provides that where agricultural land has been compulsorily acquired, no compensation is payable except for improvements effected on it before its acquisition.
- However, Section 295 on compensation for previously acquired agricultural land creates a distinct compensation regime for agricultural land compulsorily acquired by the State depending on whether one is an indigenous Zimbabwean or not.
- An indigenous Zimbabwean whose agricultural land was compulsorily acquired by the State before the 2013 Constitution came into effect is entitled to compensation from the State for the land and any improvements that were on the land when it was acquired.
- In order to emphasise the legal position in Section 72, Section 295 reiterates that any person (other than an indigenous person) whose agricultural land was subject to compulsory acquisition by the State can only claim compensation for improvements that were on the land at the date of acquisition.
- The term indigenous person is defined in the Indigenisation and Economic Empowerment Act to mean any person who, before 18th April 1980, was disadvantaged by unfair discrimination on the grounds of his or her race, and any descendant of such person, and includes any company, association, syndicate or partnership of which indigenous Zimbabweans form the majority of

members holding the controlling interest therein.

4.3 Removal of the jurisdiction of the courts

- According to Section 72(3) (b), with regards to compulsory acquisition of land, the affected landowners are denied the right to approach the courts to seek compensation and the courts are specifically barred from exercising their jurisdiction in such matters.
- It should be noted that the concept of the rule of law embraces at least two fundamental rights, namely, the right of access to the courts and the right to a fair hearing before a person is deprived of a right, interest or legitimate expectation.
- Section 72(3) (b) of the Constitution therefore, violates the right and principle of fair hearing in a court of law.

5 THE RIGHT TO AGRICULTURAL LAND IN REGIONAL AND INTERNATIONAL INSTRUMENTS

- It should be noted that the right to agricultural land is not protected under international law. Instead, international law protects the right to property and it is possible to argue that this includes agricultural land.
- Article 21 of ACHPR provides for the right to use national resources giving peoples the right to freely dispose of their wealth and natural resources. Where groups have been deprived of their wealth and natural resources, they have a right to recover them by lawful means, and to be given compensation for their losses.

6 LIMITATION OF THE RIGHT

- The limitation of rights and freedoms clause, Section 86 of the Constitution is applicable with regard to the right to agricultural land and the right to property rights protected under Sections 71 and 72 of the Constitution.
- Most importantly, the right to agricultural land in Section 72 of the Constitution can be limited 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.
- The State can compulsorily acquire agricultural land through a notice published in the Gazette identifying the land, right or interest, whereupon the land, right or interest vests in the State with full title with effect from the date of publication of the notice.
- When the State compulsorily acquires land, no compensation is given to non-indigenous people except for improvements effected on the land. The Constitution provides that such action should not be regarded as discriminatory. The different treatment of indigenous and non-indigenous owners of agricultural land has been justified on the grounds that it is necessary to remedy the colonial deprivation of indigenous people of their land.

7 CASE LAW

- a. In the case of *Ntuliki v White & Others* (HC 217/15), the applicant claimed to be entitled to occupy a portion of the farm formerly owned by the first respondent and that he had an offer letter from the Ministry of Lands to that effect. The first respondent, who for years had occupied the portion of the farm and was growing crops there, resisted the application on various grounds, including an averment that he was already entitled to occupy the land. He had a letter to that effect from the chief lands officer. The court held that: "Whilst the Lands Ministry, as the acquiring authority, is vested with all rights in relation to State land, such authority should be exercised with due

consideration of the rules of natural justice. They had written to the first respondent and made him believe that he could remain in occupation of the land. The Ministry cannot allow a party to occupy land, then offer the land to another party without following the requirements of the rules of natural justice that demand that the party who understands that he has a right to remain in occupation should be duly notified of the intention to take that right away, make representations, if any, and a decision be taken subsequently after all concerned have been heard”.

8 ACTIVITIES

- a. In 2001, a group of people in Chiromo communal lands temporarily occupied a piece of land for easy access to their workplace as farm workers. The land they occupied belonged to the State. Over the years, these people constructed homes on the State land. In 2013, the State sold the land to Derbyshire Pvt Ltd. When Derbyshire Pvt Ltd attempted to evict the occupants, the majority of them refused to vacate the land claiming the land belonged to them. The State compensated a few who complied then forcibly removed occupants who resisted eviction.
 - i. Did the actions of the State constitute violation of the right to agricultural land of the occupants?
 - ii. Are there any remedies available for those who were forcibly removed from the land?

9 KEY POINTS

- Section 72 of the Constitution is the land rights clause which opens with a definitions section, which seeks to define commonly used words and phrases in the Section, such as land, piece of agricultural land and agricultural land. The definitions remove any doubt as to what is meant when such words are used.
- In order to initiate the compulsory acquisition of land, the State identifies the agricultural land in question and then publishes a notice of acquisition in the Gazette.
- The purpose of the notice is to identify the land and alert all interested parties. Once this has been done, the land in question automatically vests in the State with full title with effect from the date of publication of the notice.
- In terms of Section 72 of the Constitution, the right to agricultural land can be limited by the State through compulsory acquisition. In such cases, the landowner is not entitled to compensation for the loss of land except for improvements made on the land unless they are an indigenous person.

10 CONCLUSION

- The agricultural land rights regime established by the Zimbabwean Constitution attempts to strike a compromise between the inherent tensions created by the government's commitment to land reform and the recognition of vested private property rights.
- Nonetheless, the prevailing legal regime for land acquisition and ownership leans heavily in favour of the State as it allows compulsory acquisition of the land without the payment of compensation (except for improvements) for the land in the case of non-indigenous people.

CHAPTER TWENTY FIVE: SECTION 73: ENVIRONMENTAL RIGHTS

1 OBJECTIVES

At the end of this Section learners should be able to:

- Explain the scope and content of environmental rights;
- Discuss the State's duties and citizens' responsibilities towards the realisation of this right;
- Analyse circumstances in which environmental rights can be reasonably, fairly and justifiably limited; and
- Outline national, regional and international laws that protect the environmental rights

2 DEFINITION OF KEY TERMS

Environment	The natural surrounding which includes air, water and land in or on which people, animals or plants live or operate.
Health	'A State of complete physical, mental and social wellbeing and not merely the absence of disease, illness or injury...' ¹⁹
Wellbeing	The State of being comfortable, healthy and happy.
Sustainable Development	This is development that meets the needs of present generations without compromising on the needs of future generations to meet their own needs ²⁰ . It is economic development that is conducted without depletion of natural resources.
Progressive realisation of rights	A State's compliance with the obligation to take appropriate measures to fulfil rights is assessed in light of the financial and other resources that are available to it.

3 INTRODUCTION

- Environmental rights are a new set of rights that have been introduced in the Constitution. Within the traditional classification of rights, environmental rights are classified as third generation or group rights. This means that the rights in this category cannot be enjoyed individually, but only in groups or collectively. Environmental rights are also referred to as green rights.
- The obligation to conserve the environment is placed on both natural and juristic persons and applies to vertical and horizontal relationships.
- Environmental rights are also dependent on other rights such as political, social and economic rights.
- A clean and safe environment provides the foundation upon which the quality of life needed by any person can be attained together with other basic services such as safe and clean water. However, the right to a clean environment can be infringed by action or inaction by both natural and juristic persons.
- The realisation of environmental rights is largely affected by two main categories of human activities i.e. unsustainable use of natural resources and contamination of the environment through pollution and poor waste disposal.

4 SCOPE OF THE RIGHT

¹⁹. Adopted from the World Health Organisation (WHO)

²⁰. Brundtland Report, 1987

- Section 73(1) (a) of the Constitution provides that:“Every person has the right to an environment that is not harmful to their health or well-being”.
- Section 73 (1) (b) States that every person has the right to a sustainable environment through measures taken to prevent pollution and ecological degradation, promote conservation and sustainable utilisation of natural resources.
- The State must take reasonable legislative and other measures to achieve progressive realisation of environmental rights. A key piece of environmental legislation in Zimbabwe is the Environmental Management Act (Chapter 20:27).

4.1 Right to an environment that is not harmful to health and well-being

- Environmental rights are divided into two separate sub-sections. Section 73(1) recognises the right to a clean environment as a fundamental human right that is accorded to everyone on the mere basis that one is a human being.
- A key observation included in this text is the identification of major actions that impact on the realisation of this right namely, pollution and ecological degradation that occurs through various activities that people undertake for either livelihood or economic gain.
- The Constitution advocates for the improvement of all aspects of environmental protection which include occupational hygiene, adequate supply of safe and potable water, basic sanitation, and prevention and reduction of exposure to harmful substances.
- The full enjoyment of the right to life is partly dependent upon rights holders living in a clean environment which does not pose a threat to their health.
- As such, the right to life creates a positive obligation on the State and other citizens not to expose rights holders to an environment which is potentially harmful to its enjoyment.

4.2 The right to have the environment protected for future generations

- At their core, environmental rights entrench the public trust doctrine that recognises that the present generation holds the environment in trust for future generations and as such action has to be undertaken to ensure that future generations are given something worthwhile to inherit.
- Institutions and agencies of the government such as the Ministry of Environment, Tourism and Hospitality Industry, the Ministry of Agriculture, Water, Climate and Rural Resettlement, the Environmental Management Agency (EMA) and Urban and Rural Local Authorities as well as the media play key roles in the adoption of ‘other measures’ to ensure the enjoyment of environmental rights. Such measures include, among others, public awareness programmes, legislative enforcement and reduction of acts that harm the environment.



Figure 30: Everyone has a responsibility to prevent land degradation
See D Mavhinga ‘Villagers in Zimbabwe Marange Diamond Fields in Mass Protests’
available at <https://www.google.com/search?>

- The Environmental Management Act is the principal legislation that gives effect to the environmental

- rights and hence natural and juristic persons would be expected to initially utilise such legislation.
- The Environmental Management Agency (EMA) is a statutory body responsible for ensuring the sustainable management of natural resources and protection of the environment, the prevention of pollution and environmental degradation, the preparation of Environmental Plans for the management and protection of the environment. It was established under the Environmental Management Act [Chapter 20:27] that was enacted in 2002.
 - The need to conserve the environment should be emphasised in all development projects and programmes. Before development projects are initiated, Environmental Impact Assessments should be undertaken. An Environmental Impact Assessment (EIA) is a process which identifies the environmental impacts of a development project and clearly outlines measures to mitigate the negative impacts caused during project construction, implementation and decommissioning.
 - Furthermore, legislative measures are not the only means through which the Constitution calls upon the State to ensure the realisation of environmental rights. Various other measures that the State can undertake to fulfil this mandate include development of policies, strategic plans and plans of action. Various measures in place include the National Environment Policy, National Waste Management Strategy and the Environmental Impact Assessments as discussed and Ecosystems Protection Regulations.
 - Importantly, the existence of legislation and other measures is inadequate. The existence of legislative and other measures is the first stage in a process that must be followed up by action. While the State as the duty bearer has the greatest responsibility in terms of fulfilment of environmental rights, responsibilities extend to juristic and non-juristic persons. For example, toxic materials must be produced, used and disposed of by industry and individuals in an environmentally safe manner.



Figure 31: Toxic waste disposal harmful to the environment
 See M Denchak 'Water Pollution: Everything You Need to Know'
<https://www.google.com/search?> (accessed on the 3 of July 2018)

- 'Participation of all citizens, at different levels is necessary for the realisation of environmental rights. At the national level, each individual should have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available.'²¹
- The State must take action that would result in the achievement of the goals for which the measures for protecting the environment were adopted. This would ensure effective implementation of the rights relating to key sustainable development issues.

21. Principle 10 of the Rio Declaration

5 ENVIRONMENTAL RIGHTS IN REGIONAL AND INTERNATIONAL INSTRUMENTS

- Environmental rights are protected under international and regional law in Article 24 of the ACHPR, the Declaration of the United Nations Conference on the Human Environment (Stockholm Conference 1972) Principles 1-26, United Nations Conference on Environment and Development in Rio de Janeiro (Earth Summit 1992), Principles 1-27 and the United Nations Framework Convention on Climate Change (Kyoto Protocol 1997), the Bamako Convention on the Ban of Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes in Africa (Bamako Convention 1991), the United Nations Climate Change Conference (COP 17/CMP7) 2011.
- Article 24 of ACHPR states that: 'All people shall have the right to a general satisfactory environment favourable to their development.'
- Principles 1 of the Stockholm Declaration espouses mostly broad environmental policy goals and objectives. It states that: "The protection and improvement of the human environment is a major issue which affects the well-being of peoples and economic development throughout the world; it is the urgent desire of the peoples of the whole world and the duty of all Governments".
- Principle 2 of the Stockholm Declaration States that 'The natural resources of the earth, including the air, water, land, flora and fauna and especially representative samples of natural ecosystems, must be safeguarded for the benefit of present and future generations through careful planning or management, as appropriate'
- The focus of the Earth Summit was the state of the global environment and the relationship between economics, science and the environment in a political context. Principle 2 of the Earth Summit states that 'the natural resources of the earth, including the air, water, land, flora and fauna and especially representative samples of natural ecosystems, must be safeguarded for the benefit of present and future generations through careful planning or management, as appropriate.'
- Article 4 Bamako Convention provides that: "All State parties shall take appropriate legal, administrative and other measures within the area under their jurisdiction to prohibit the import of all hazardous wastes, for any reason, into Africa from non-contracting parties".

6 LIMITATIONS

- The enjoyment of environmental rights is limited if it affects developmental or other compelling interests of the State. For instance, the generation of electricity from coal powered power stations leads to massive levels of air pollution and negatively affects the environmental and health rights of employees and local communities. However, because energy is an important resource for the country as a whole, it is necessary to continue generating it by burning coal.
- The principle of progressive realisation shows that fulfilment of environmental rights is dependent upon the availability of resources and this right can be limited by reason of lack of resources.

7 CASE LAW

- a. In the case of Augar Investments OU v Minister of Environment & Anor (HH278/15), the issue for determination was whether the Minister of Environment was empowered to declare that a piece of land is a wetland, or whether his or her powers are confined to declaring an existing wetland to be an ecologically sensitive area. The court held that not all wetlands are ecologically sensitive and declaring a wetland to be ecologically sensitive must be based on scientific study and determination of such ecological sensitivity. A wetland will not become sensitive just because it has been declared to be so.
- b. In Communications 25/89, 47/90, 56/91, and 100/93 against Zaire (now known as the Democratic

Republic of Congo DRC)), the African Commission on Human and Peoples Rights held that failure by Government to provide basic services such as safe drinking water constituted a violation of the right to health.

- c. In the ZHRC Investigative Report in the matter between: Mazvihwa Community as Complainants and Murowa Diamonds (Pvt) Ltd (2016)²² as the respondent the complaint involved allegations of violation of environmental rights and right to health by Murowa Diamonds (Pvt) Ltd (hereinafter referred to as the Respondent). An investigation was conducted from the 28th to the 30th of June 2017. Complainants were community members residing near Murowa Diamond Mine under Chief Mazvihwa in Zvishavane.

They alleged that as a result of mining activities, Murowa Diamond Mine had been polluting the environment in Mazvihwa community due to mine blasts which produced excessive dust. They further alleged that in 2012, a number of children at Baradzanwa Primary School near Murowa Diamond Mine were taken sick due to excessive dust emissions from the mine. It was further alleged by complainants that the blasting at Murowa Diamond Mine had resulted in some of their houses cracking. At the time of reporting to and investigation by the ZHRC more than 200 households had been affected. To rectify the situation, the respondent constructed about 9 houses for some of the affected complainants. Complainants, however feared that their houses would no longer be safe for human habitation if the blasting continued. The ZHRC found out that the link between the cracking of houses and the harmful effects of the dust emissions needed to be further investigated by experts.

The ZHRC recommended that there was need to engage Independent Consultants to assess, monitor and verify claims by the complainants on the effect of blasting on their houses and the effect of the dust emissions on the complainants' health.

8 ACTIVITIES

- a. Study the picture below and answer the questions that follow:



Figure 32: This picture shows a man disposing solid waste in Harare. See I Ruwende 'Prioritise garbage collection, Harare urged' 28 March 2017, Zimbabwe Daily, available at <https://www.thezimbabwedaily.com/news/> (accessed 21 July 2018)

- Explain the rights that are violated by conditions shown in the picture.
- Discuss the roles of different stakeholders in addressing the conditions?

²². FILE REF ZHRC/CI/0149/16.

b. Study the picture shown below and do the activity that follows:



Figure 33: See GemKonnnect News Service 'Artisanal Miners Invade Zimbabwe Diamond Fields; 50 Held' 25 February 2016, available at <https://www.gemkonnnect.com/news/> (accessed 10 June 2018)

The picture above was taken in a diamond mining area in Chiadzwa in Marange, Zimbabwe. Discuss the laws that protect the environment from harm or degradation and analyse whether these have been respected with regard to mining activities in Zimbabwe.

9 KEY POINTS

- A clean environment is a precondition to the enjoyment of human rights. Life, health and human dignity are only possible where people have access to a clean environment. Environmental degradation, including pollution of air, water and land can affect the realisation of particular rights, such as the rights to life, food, safe and clean water and health.
- Economic, human and social development should be encouraged only if it is to be done in a sustainable manner. In this light, both natural and juristic persons should aid the State in ensuring that the right to a clean environment is attained.
- Regardless of the requirement that the State must ensure the realisation of the right to a clean environment within the resources available to it, the State cannot hide behind resource constraints to avoid taking action for the protection of environmental rights.
- The State has to adopt and implement legislative, policy and other measures targeted at ensuring ecologically sustainable development.

10 CONCLUSION

- Environmental rights are protected under national, regional and international law as well as through the judiciary. The environment is a source of livelihood for all humans and all natural resources key to economic development.
- As such, it is important that people realise the need to protect or conserve the environment for the benefit of present and future generations.

CHAPTER TWENTY SIX: SECTION 74: FREEDOM FROM ARBITRARY EVICTION

1 OBJECTIVES

At the end of this section, learners should be able to:

- Explain the scope and content of the right to freedom from arbitrary eviction;
- Discuss the duties of the State and private persons in the realisation of this right;
- Discuss the national, regional and international legal position with regards to evictions; and
- Explain the circumstances in which the right to freedom from arbitrary eviction may be limited.

2 DEFINITION OF KEY TERMS

Eviction	The permanent or temporary removal of individuals, families and or communities against their will from the homes and or land which they occupy.
Arbitrary eviction	The permanent or temporary forceful removal of individuals, families and or communities from their homes or land which they are occupying without following proper legal procedures.
Home	This is shelter that provides some form of comfort of life with some degree of permanence against weather elements. This definition is sufficient to include illegal occupation in the form of either shacks or informal settlements.
Security of tenure	an expectation that you can use land for a period of time free from unreasonable interference from outsiders.

3 INTRODUCTION

- Under common law, ownership is described as the real right that confers the most complete control over a thing. According to this perception, it is argued that ownership has an individualistic nature and, as such, is an absolute right that can be enforced against anyone.
- The Constitution does not recognise the right to housing as a justiciable right, especially in respect of adults. However, it entrenches safeguards that protect citizens against the arbitrary deprivation of ownership rights through Section 74 of the Constitution.

4 SCOPE OF THE RIGHT

- Section 74 of the Constitution prohibits the eviction of any person from their home or its demolition by either the State and or private citizens without an order of the court.
- The entrenchment of this provision within the Constitution is a positive development for Zimbabweans given the history of evictions and demolitions of homes with no court orders and without provision of alternative accommodation.
- The legality or otherwise of occupation does not justify arbitrary eviction from one's home. Only a court can make an order on the legality or illegality of the occupation based on facts presented before it.
- This is key in order to prevent property owners from taking the law into their own hands and to allow for an objective entity to adjudicate on the submissions that would be presented before them.
- It is key to note that Section 74 of the Constitution does not put a total bar against evictions, but seeks to balance the interests of the property owners, the State and the occupiers of property.

4.1 Freedom from arbitrary eviction under domestic law

- Section 74 of the Constitution provides for substantive and procedural rights in circumstances where a property owner needs to take occupancy or use of his or her property. This provision can also be interpreted as a limitation of the property rights provided for in section 71 of the Constitution.
- Demolition of properties is covered in Section 32 of the Regional, Town and Country Planning Act Chapter 29:12. This law requires the authorities to issue an enforcement order giving all persons likely to be affected by such demolitions at least one-month notice of the intended demolitions.
- Furthermore, to comply with the Constitution it is imperative for relevant authorities to obtain court orders and to make provision for alternative accommodation prior to demolitions.

5 FREEDOM FROM ARBITRARY EVICTION IN REGIONAL AND INTERNATIONAL INSTRUMENTS

- Freedom from arbitrary eviction is provided for in Article 17 of the ICCPR and Article 3(1) (a) of the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa.
- Article 17(1) of the ICCPR places a duty on the State to guarantee the legal protection of every person against arbitrary or unlawful interference of one's home, family, privacy which would in most cases occur when one is unlawfully evicted or is about to have their home demolished.
- Article 3(1) (a) of the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa provides that 'State parties must refrain from, prohibit and prevent arbitrary displacement of populations.'

6 LIMITATION OF THE RIGHT

- Freedom from arbitrary eviction is not an absolute right. It is limitable where a Court Order is made after considering all the relevant circumstances.
- The general limitation provided in Section 86(2) of the Constitution also applies to freedom from arbitrary eviction. The limitation is permissible only 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.

7 CASE LAW

The *Maganga Estate Residents v Ministry of Lands and Rural Resettlement* case FILE REF: ZHRC/CHI/2037/17 concerned a complaint on the arbitrary eviction and alleged violation of the complainants' freedom from arbitrary eviction, right to dignity, the right to privacy and other interrelated rights of residents of Maganga Estate in Marondera-Mashonaland East Province. The ZHRC concluded that although the complainants were illegal settlers and could not hold or have right of title to the farms (through possession of Offer Letters), their eviction from farms without any alternative land being offered was a violation of their right to adequate shelter and their freedom from arbitrary eviction without considering all the relevant circumstances.

8 ACTIVITIES



Figure 34: Woman watches as a house is demolished. See All Africa News 'Zimbabwe government demolishes houses' available at <https://allafrica.com/view/group/main/main/id/00041034.html> (accessed 29 June 2018)

- a. The picture above shows demolition of a house allegedly built on undesignated land. The demolitions did not meet the requirements of Section 74 of the Constitution.
 - i. Discuss the issues arising with regards to protection of the settlers versus the actions of the authorities.
 - ii. Would the issues arising be different had provisions of the Regional Town Planning Act been followed?

9 KEY POINTS

- Section 74 of the Constitution provides that no person may be evicted from their home or have their home demolished, without an order of court made after considering all the relevant circumstances.
- The right to freedom from arbitrary eviction can be limited only in terms of a law of general application in terms of Section 86(2).

10 CONCLUSION

- It is clear that for any home demolition to comply with Section 74 there should be a court order sanctioning the demolition of the house. The court order should be made after the court has considered all 'relevant circumstances.' This provision mandates that substantive requirements should be met through a court order sanctioning the demolition before a person's home is demolished.

CHAPTER TWENTY SEVEN: SECTION 75: RIGHT TO EDUCATION

1 OBJECTIVES

At the end of this section learners should be able to:

- Explain the scope and content of the right to education;
- Outline the duties of the State and private persons in realising this right;
- Identify national laws, regional and international instruments protecting the right to education; and
- Discuss the limitations to the right to education.

2 DEFINITION OF KEY TERMS

- **Basic Education**- First few years of formal education, basic, elementary, primary and fundamental learning needs. It also covers a wide variety of non-formal and informal activities designed to meet the basic learning needs of people of all ages.
- **Adult Basic Education**- Means any educational training which the Minister considers suitable for persons beyond the age of sixteen years to develop them into useful members of society (Section 2 of the Education Act [Chapter 25:04]).

3 INTRODUCTION

- It should be noted that education is both a human right in itself and means of realising other human rights. Its objectives include the full development and dignity of each person, the ability to participate effectively in society, and the strengthening of respect for human rights.
- Education is important in itself and is often also called a 'multiplier' human right, as the degree of access to education largely impacts the level of enjoyment of other human rights.
- A key piece of legislation that protects the right to education is the Education Act (Chapter 25:04)²³.

3 SCOPE AND CONTENT OF THE RIGHT

- Section 75(1) - (4) of the Constitution provides for the right to education. There are several other provisions which are relevant to the right to education, hence these ought to be read in conjunction with Section 75 of the Constitution.
- Education has a vital role in empowering women, safeguarding children from exploitative and hazardous labour and sexual exploitation, protecting the environment, promoting human rights and democracy.
- The right to education is fully realised when functioning educational institutions and programmes are in sufficient quantity within a country.
- There are four key elements of the right to education. These include availability, accessibility, acceptability and adaptability.
- Availability means that the State should establish sufficient schools with adequate infrastructure and trained teachers, as well as grant permission to non-State actors to establish schools.
- Accessibility implies that educational institutions have to be physically and economically accessible to everyone without discrimination. This calls for reasonable accommodation of Persons with Disabilities in schools and institutions of higher learning.

■ 23. The Act is being considered for amendment at the time of compiling this Manual.

- In terms of acceptability, education is acceptable when the form and substance of education, including curriculum and teaching methods are relevant, culturally appropriate and of good quality to students and flexible so it can meet the needs of changing societies and respond to the needs of students within their diverse social and cultural settings.
- Adaptability means that education should be flexible so that it adapts to the needs of changing societies, communities and different learners.

4.4 The right to basic education



Figure 35: Education should adapt to new technologies.

T Monda's Zimbabwe ready for education system digitisation? A glimpse into the future' available at <https://www.google.com/search?> (accessed on the 3 of July 2018)

- In terms of Section 75(1) (a) of the Constitution, the State has an obligation to provide every citizen and permanent resident of Zimbabwe with basic State funded education, including adult basic education.
- However, the Constitution neither defines 'basic education' nor outlines what 'State funded education' entails, but it is arguable that 'basic education' means primary school education.
- To be 'State funded', basic education should be free of charge. Section 75(1) of the Constitution provides a normative basis for free and compulsory primary education as well as continuing education and learning for everyone. This provision underlines the fact that fees constitute disincentives to the enjoyment of the right and may jeopardise its realisation.
- Compulsory primary education means that neither parents, guardians, nor the State are entitled to treat as optional the decision as to whether the child should have access to primary education.
- The fact that the Constitution provides for a right to 'basic State-funded education' also suggests that primary education should be free of charge and compulsory, especially for all children.
- The right to 'basic State-funded education' is also extended to adults, but it is perhaps difficult to make it compulsory because of the autonomy-related claims that come with adulthood.

4.5 The right to further education



Figure 36: The right to education must be supported by well-equipped facilities.

W Zhangazha 'Local education system in doldrums' available at <https://www.google.com/search?> (accessed on the 15 of July 2018).

- Every citizen and permanent resident has a right to further education. 'Further education' is not defined in the Constitution, but it is arguable that it includes secondary and higher education.
- The right to 'further education' requires States to make secondary and higher education available and accessible to all citizens and permanent residents.
- The enjoyment of this right is subject to progressive realisation within available resources.

4.3 The right of non-State actors to establish educational facilities

- Section 75(2) provides for the establishment and maintenance of independent educational institutions by non-State actors at their own expense.
- Such schools must meet reasonable standards and should not discriminate on any grounds prohibited by the Constitution.
- Section 75(3) provides for a law for the registration and closing of educational institutions. Such law should enable the maintenance of appropriate educational standards that are not prejudicial to learners and do not present hindrance to the enjoyment of the right.
- The State should therefore fulfil this right by ensuring that the procedures for registration and permits for private actors are not unnecessarily cumbersome.
- In addition, the State should carry out regular inspections of private institutions to monitor compliance with set educational standards.

4.3 States Parties obligations

- Section 75(4) of the Constitution obliges the State to take reasonable legislative and other measures within the limits of resources available to achieve the progressive realisation of the rights set out in Section 75(1), which are the right to basic State-funded education, adult basic education and further education.
- While the Constitution provides for progressive realisation of these rights and acknowledges the constraints due to the limits of available resources, it imposes on the State obligations which are of immediate effect, such as guaranteeing the right and its exercise without discrimination of any kind.
- Progressive realisation means that the State has a specific and continuing obligation to move as expeditiously and effectively as possible towards the full realisation of the right. There is an implicit duty for the State to ensure that standards and conditions of education are equivalent in

all public educational institutions of the same level.

- The duty to respect requires State Parties to avoid measures that hinder or prevent the enjoyment of the right to education. Where citizens are already enjoying access to education, the State may not take measures that interfere with this right.
- The duty to protect, binds the State to take measures that prevent third parties from interfering with the enjoyment of the right to education.
- The duty to fulfil requires the government to take positive measures that enable and assist individuals and communities to enjoy the right to education. It obliges the government to fulfil the right to education when an individual or group is unable, for reasons beyond their control, to realise the right themselves by the means at their disposal.

5. THE RIGHT TO EDUCATION IN REGIONAL AND INTERNATIONAL INSTRUMENTS

- The right to education is provided for in several regional and international human rights instruments such as Article 26 of the UDHR, Article 24 of the CRPD, Article 12 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, Articles 13 & 14 of the ICESCR, Article 10 of the CEDAW, Article 28 of the CRC, Article 11 of the ACRWC and Article 17 of the ACHPR. Article 24 of the CRPD states that: 'States parties recognise the rights of Persons with Disabilities to education...'
- Article 13 of the ICESCR States that: 'State parties to the Covenant recognise the right of everyone to education.' Subsection 2 of the same article states that: 'State parties to the present covenant recognise that, with a view to achieving the full realisation of this right, primary education shall be compulsory and available free to all...'
- Article 17 of the ACHPR States that 'every individual shall have the right to education...'

6. LIMITATION OF THE RIGHT

- In terms of Section 75(1) (a) and (b) of the Constitution, the right to basic State funded education including adult basic education and the right to further education is limited to citizens and permanent residents of Zimbabwe.
- There is an internal limitation which States that the realisation of the right to education is 'progressively realised' within available resources subject to reasonable legislative measures.
- The general limitation provided in Section 86(2) of the Constitution also applies to the right to education. The limitation is permissible only 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.

7 CASE LAW

In the Gubula Primary School²⁴ case (Bulawayo High Court Justice Bere judgment), two parents brought an application before the Bulawayo High Court challenging a decision by the school authorities that barred their children from sitting for mid-year examinations over non-payment of school fees. The court held that the Government policy is that no pupils should be sent home for non-payment of fees but school authorities should take legal action against defaulting parents or guardians.

24. For a detailed discussion of the case, see M Netsianda 'Court blocks school from barring pupils from writing exams' Chronicle Newspaper, 2 August 2017.

8 ACTIVITIES

- a. Amos, a 16 year old boy, is a student at Mucheke High school in Masvingo. The school has expelled him for non-payment of levy for four terms. The headmaster has insisted that the parents have breached a payment plan. Amos is at risk of missing his Ordinary Level final examinations. He is currently missing classes. His parents sue the Ministry of Primary and Secondary Education, the school and the School Development Association.
 - i. Discuss the chances of Amos's parents winning this case.

8 KEY POINTS

- Section 75 of the Constitution provides for the right to education. In terms of Section 75(1) (a) of the Constitution, the State has an obligation to provide every citizen and permanent resident of Zimbabwe with a basic State funded education, including adult basic education.
- While the Constitution provides for progressive realisation of this right and acknowledges the constraints due to the limits of available resources, it imposes on the State obligations which are of immediate effect, such as guaranteeing the right and its exercise without discrimination of any kind
- Progressive realisation means that the State has a specific and continuing obligation to move as expeditiously and effectively as possible towards the full realisation of the right.

10 CONCLUSION

- The realisation of the right to education facilitates the realisation of other human rights in the Constitution. Zimbabwe is party to a number of international human rights instruments and Declarations that guarantee the right to education.
- The right to a basic education in the Constitution may be limited only in terms of a law of general application which is reasonable, necessary or justifiable in a democratic society.

CHAPTER TWENTY EIGHT: SECTION 76: RIGHT TO HEALTH CARE SERVICES

1 OBJECTIVES

At the end of this Section, learners should be able to:

- Explain the scope and content of the right to health care services;
- Discuss the obligations of State and non-State actors in the realisation of this right;
- Outline national laws, regional and international instruments protecting the right to health care; and
- Discuss whether certain practices in the health sector limit the right to health care services.

2 DEFINITION OF KEY TERMS

- Health care - Is the maintenance or improvement of health via the prevention, diagnosis, and treatment of disease, illness, injury, and other physical and mental impairments in human beings. Healthcare is delivered by health professionals (providers or practitioners) in allied health fields.
- Health care system - Is the organisation of people, institutions and resources that deliver health care services to meet the health needs of target populations.
- Reproductive health care - Deals with the reproductive processes, functions and systems at all stages of life and includes family planning services, counselling and information, pre-natal and post-natal care.
- Chronic illness - It is a condition or disease that persists for a long time and normally cannot be prevented by vaccines or cured by medication, for example; diabetes, heart disease, arthritis, kidney disease and HIV/AIDS.
- Emergency medical treatment – Provision of life saving measures in life threatening situations.

3. INTRODUCTION

- The Constitution guarantees access to basic health care services including reproductive health care services to every citizen and permanent resident.
- The Constitution also guarantees access to basic health care services for chronic illnesses and emergency medical treatment to every person.
- Accessibility of health care services facilities and services include the four dimensions which are non-discrimination, physical accessibility, economic accessibility (affordability), and information accessibility.
- Availability means that the State has sufficient facilities and services for the population given the country's State of development.
- The State must take reasonable legislative and other measures to achieve progressive realisation of the right to health care.
- A key piece of legislation that protects the right to health care is the Public Health Act (Chapter 15:09).
- The right to health care services is recognised in regional and international human rights law such as Article 25 UDHR, Article 12 of ICESCR.

4 SCOPE OF THE RIGHT

- The right to health care services can be categorised into three parts;
 - a) The first part extends to citizens and permanent residents the right to basic health care

- services, including reproductive health care services;
- b) The second part confers on everyone, including non-nationals, the right to basic health care services for chronic illnesses;
- c) The third part relates to the provision of emergency health care services by private and public institutions.
- The human right to health care services means that hospitals, clinics, medicines, and doctors' services must be accessible, available, acceptable, and of good quality for everyone, on an equitable basis where and when needed.

4 THE RIGHT TO BASIC HEALTH CARE SERVICES



Figure 37: The State has an obligation to provide health care services to its citizens. Basic healthcare available <https://www.google.com/search?> (accessed on 15th July 2018)

- Section 76 (1) of the Constitution provides that: 'Every citizen and permanent resident of Zimbabwe has the right to have access to basic health-care services, including reproductive health-care services.'
- The State is bound to provide basic health care services, including reproductive health care, only to citizens and permanent residents. This is intended to ensure that nationals of other countries who temporarily reside in Zimbabwe meet their own health care costs. The ultimate aim is to ensure that the public health care system is not burdened by the health care needs of nationals of other countries who are temporarily resident in Zimbabwe.
- However, when it comes to basic health care services for chronic illnesses, the Constitution binds the State to provide public health care services to non-nationals and nationals alike.
- In that regard, Section 76 (2) of the Constitution provides that 'Every person living with a chronic illness has the right to basic health care services for the illness'.
- Thus, when it comes to the provision of basic health care services for chronic illnesses, non-nationals are not discriminated against. Generally, health care services must be accessible and provided without discrimination based on health status, race, ethnicity, age, sex, sexuality, disability, language, religion, national origin, income, social status or any other ground for discrimination.

5 ACCESS TO EMERGENCY MEDICAL TREATMENT



Figure 38: Every health care institution should provide emergency medical treatment. Available at <https://www.google.com/search?> (accessed 15 July 2018).

- Section 76(3) of the Constitution makes it clear that, 'No person may be refused emergency medical treatment in any health-care institution.' The right to emergency medical treatment is both vertically and horizontally applicable because it requires that both public and private health institutions desist from refusing patients emergency medical treatment.
- This is evident from the use of the phrase 'any health-care institution' to suggest that all health care providers are bound to cater for emergencies.
- The right to emergency medical treatment is enforceable against both the State and private or non-State actors.
- The principle of non-discrimination is crucial to the enjoyment of the right to the highest attainable standard of health, especially in the context of the provision of emergency medical treatment.

6 STATES PARTIES OBLIGATIONS

- Section 76(4) of the Constitution provides that: 'The State must take reasonable legislative and other measures, within the limits of the resources available to it, to achieve the progressive realisation of the rights set out in this section.' Taking steps to realise the right to health care requires a variety of measures.
- Government must take steps to ensure that health services are accessible to the entire population. The concept of accessibility has four separate, but overlapping dimensions which are non-discrimination, physical accessibility, affordability and information accessibility as already noted.
- Affordability implies that the development of health care facilities is not enough to realise the right to health care if people cannot afford the medication that will improve their life or cure sicknesses.
- Connected to the access to health care services is access to medicines which improve the quality of life of the patients, treat sickness and cure diseases. A close analysis of accessibility shows that it means both physically available and financially accessible.
- The Public Health Act [Chapter 15:09] provides for the protection of public health, including prevention and suppression of infectious and sexually transmitted diseases, as well as regulation of the provision of safe water and food supplies and improved sanitation, among other things. The Act also provides for the immunisation of children against disabling diseases such as polio.
- The State has a free user fee policy, mainly the Assisted Medical Treatment Order which supports the indigent, children under the age of five, pregnant women and older persons over the age of

65.

- The obligation to protect requires the State to take measures that prevent third parties from interfering with the right to health care. The obligation to fulfil requires the State to adopt appropriate legislative, administrative, budgetary, judicial, policy, promotional and other measures towards the full realisation of the right to health care.
- Access rights in the context of health care are limited to access to health facilities, goods and services, but health rights proper cover the underlying conditions of health including sanitation, adequate housing, clean water, food, a healthy working climate and a healthy environment.

7 THE RIGHT TO HEALTH CARE SERVICES IN REGIONAL AND INTERNATIONAL INSTRUMENTS

- The right to health care services is recognised in regional and international human rights law such as Article 25 of the UDHR, Article 12 of the ICESCR, Article 24 of the CRC, Article 5 of the Convention on the Elimination of All Forms of Racial Discrimination (CERD), Articles 12 & 14 of the CEDAW, Article 18 of the ACHPR, and Article 5 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol).
- Article 12 of the ICESCR provides for State Parties to recognize 'the right of everyone to the enjoyment of the highest attainable standard of physical and mental health'. This goes beyond the provision of health care services – it includes ensuring conditions and an environment that are conducive to physical and mental health.
- Article 14 of the CEDAW provides for protection for rural women and their special problems, ensuring the right of women to participate in development programs, "to have access to adequate health care facilities," "to participate in all community activities," "to have access to agricultural credit" and "to enjoy adequate living conditions.'
- Article 5 of the Maputo Protocol provides for State Parties to "prohibit and condemn all forms of harmful practices which negatively affect the human rights of women and which are contrary to recognised international standards."
- Article 16 of the ACHPR states that: 'Every individual shall have the right to enjoy the best attainable State of physical and mental health. State Parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.'
- Article 24 of the CRC states that: "State Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. State Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.'
- Under the Abuja Declaration of 2001 Heads of States of the African Union countries met and pledged to set a target of allocating at least 15 percent of their annual budget to improve the health sector.

8 LIMITATION OF THE RIGHT

- Section 76(4) of the Constitution provides that: 'The State must take reasonable legislative and other measures, within the limits of the resources available to it, to achieve the progressive realisation of the rights set out in this section.' This provision shows that the right to health care services is dependent upon the availability of resources and this right can be limited by reason of lack of resources.
- Although the right to health care services is limited by the availability of resources, the existence of this right is not determined by the availability of resources.
- The availability of resources only determines the extent to which the right is realised. It should be noted that even under conditions of impossibility of fulfilment, citizens retain their right to have

their core health needs met once conditions change.

- Recognising resource constraints as a legitimate defence for State failure to realise socio-economic rights is consistent with the concept of 'progressive realisation.' The State is bound to fulfil this right over a period of time and not with immediate effect or on demand.
- Exercise of other rights by service providers, for example, the right to strike can also limit the right to health care services to patients.
- It is submitted that the fact that most medications are not affordable shows that the right to health care services can be limited by non-affordability of medical treatment.

9 CASE LAW

- a. In the case of *Soobramoney v Minister of Health* 1998 (1) SA 765; the right to health care services was interpreted to mean that the State is under an obligation not to deny a person remedial treatment that is necessary and available to forestall harm in the case of a sudden catastrophe or emergency.

10 ACTIVITIES

- a. After a fatal accident, people are taken to a private hospital in Harare. Patients are left stranded after being turned away by staff authorities who insist that they needed a fee before admitting patients into the hospital.
 - i. Discuss whether this constitutes a violation of the right to health care services as provided in the Constitution.
- b. Are parents constitutionally entitled to refuse life-saving medical interventions for their children on the basis of their religion?

11 KEY POINTS

- The Constitution guarantees to citizens and permanent residents access to health care services, including reproductive health care for citizens and permanent residents. This is intended to ensure that nationals of other countries who temporarily reside in Zimbabwe meet their own health care costs.
- However, when it comes to basic health care services for chronic illnesses, the Constitution binds the State to provide public health care services to non-nationals and nationals alike.
- The right to emergency medical treatment is both vertically and horizontally applicable because it requires that both public and private health institutions desist from refusing patients emergency medical treatment.
- The State has an obligation within the limits of available resources to take immediate steps to progressively ensure that health services, and facilities are available, accessible, affordable, acceptable and of good quality.
- It is however noted that the right to health care services can be limited by lack of resources, non-affordability and enjoyment of other rights like right to strike by health care providers.

12 CONCLUSION

- The right to health care is protected under national, regional and international laws and the State must develop legislative and other measures, within the limits of its resources in order to realise this right.
- The right comprises access to health care services, including reproductive health care services for every citizen and permanent resident in Zimbabwe. It also entails access to basic health care

for every person living with a chronic illness. Furthermore, no person may be refused emergency medical treatment in any health care institution.

CHAPTER TWENTY NINE: SECTION 77: THE RIGHT TO FOOD AND WATER

1 OBJECTIVES

At the end of this Section, learners should be able to:

- Explain the scope and content of the rights to food and water;
- Discuss the duties of the State and private persons in realising these rights;
- Discuss the limitations of these rights; and
- Outline the protection of these rights under national, regional and international law.

2 DEFINITION OF KEY TERMS

Food security the extent to which a country can satisfy its food needs from its own domestic production.

Potable water water that is safe to drink or to use for food preparation.

Safe water water that is free from hazardous substances (microorganisms, chemical substances and radiological hazards) that could endanger human health, and whose colour, odour and taste are acceptable to users.

3 INTRODUCTION

- Water is a limited natural resource and a fundamental rights that sustains life and health. The right to water is indispensable for purposes of leading a dignified life and it is a prerequisite for the realisation of other human rights.
- Similarly, the right to adequate food is indivisibly linked to the inherent dignity of the human person and is indispensable for the fulfilment of other human rights such as the rights to life, health and education.

4 SCOPE AND CONTENT OF THE RIGHTS

- Section 77 of the Constitution provides that: 'Every person has the right to clean, safe and potable water; and sufficient food.'
- The Constitution further obliges the State to take reasonable legislative and other measures, within the limits of resources available to it, to achieve the progressive realisation of this right.
- The rights to food and water are universally acknowledged at national, regional and international levels and apply to every person or group of persons.



Figure 39: Access to adequate potable water is key for survival and realisation of other rights. See 'Unsafe water cause for dental fluorosis to Binga villagers' Available at <https://www.google.com/search?> (accessed on the 15th of July 2018).

4.1 The right to safe, clean and potable water

- Section 77(a) of the Constitution provides that every person has the right to clean, safe and potable water.
- In terms of availability, the water supply for each person must be sufficient for personal and domestic uses which ordinarily include drinking, personal sanitation, food preparation and washing.
- With reference to quality, the water required for each person's personal or domestic use must be safe from hazardous substances that constitute a threat to a person's health. Water should be of an acceptable colour, odour and taste.
- Accessibility entails both physical and economic accessibility. This means that water facilities and services must be accessible within safe physical reach and must be affordable for all.
- The right to water contains both freedoms and entitlements. The freedoms include the right to maintain access to existing water supplies necessary for the right to water and the right to be free from interference such as the right to be free from arbitrary disconnections or contamination of water supplies.
- The right to clean water is violated when some Local Authorities provide dirty water thereby threatening other rights such as the right to health and life.

4.2 The right to sufficient food

- Section 77(b) provides for the right to sufficient food. The right is realised when every person, alone or in community with others, has physical and economic access at all times to adequate food or means for its procurement.
- In terms of accessibility, all people should have access, both economically and physically, to sufficient amounts of adequate food. This implies that the costs associated with the acquisition of food for an adequate diet should be at such a level that the attainment and satisfaction of other basic needs are not compromised.
- General accessibility should be progressively facilitated; legal, administrative, operational and financial hurdles should be examined and lowered over time.
- Special measures and programmes should be put in place to ensure that socially vulnerable groups such as the elderly, women and children access adequate food. This is an immediate

obligation that is not subject to progressive realisation because food is necessary for the sustenance of life.

- Availability refers to the possibilities either for feeding oneself directly from productive land or other natural resources, or for well-functioning distribution, processing and market systems that can move food from the site of production to where it is needed in response to demand.

4.3 The State obligations on the rights to food and water

- Therefore, the State is obliged to take reasonable legislative and other measures within the limits of resources available to it to achieve the progressive realisation of the rights to food and water.
- The right to food cannot be realized if people lack access to safe drinking water for personal and domestic uses.
- The right to adequate food does not mean that the right holders have a general entitlement to be provided food by the State. It is primarily interpreted as the right to feed oneself in dignity, through economic and other activities. In other words, individuals and groups are responsible for undertaking activities that enable them to have access to food. However, vulnerable persons must be assisted by the state.
- However, the State has an important role to play in supporting these efforts. Under the Constitution, the State must take reasonable legislative and other measures, within the limits of the resources available to it, to achieve the progressive realisation of these rights. In other words, the key obligation of the State is to take steps towards the progressive realisation of the rights to food and water.
- A close analysis of Section 77 of the Constitution shows that the State should take the necessary action to guarantee the right of everyone to be free from hunger and to mitigate and alleviate hunger even in times of natural or other disasters.
- The State and its agencies should also refrain from discrimination and denial of access to food to particular individuals or groups such as political opponents.
- The State should also ensure access to the minimum essential amount of water that is sufficient and safe for personal and domestic use, including for ensuring disease prevention and access to adequate sanitation.
- Section 44 of the Constitution imposes a duty on the State and all its institutions and agencies of government to respect, protect and fulfil fundamental human rights and freedoms. It states that: 'The State and every person, including juristic persons, and every institution and agency of the government at every level must respect, protect and fulfil the rights and freedoms set out in this Chapter.' It follows that public bodies or government institutions at all levels cannot deny citizens food and/or water without just cause.
- It is particularly important to recognise the need to guarantee equality between men and women in the exercise of their right to food and water.

5 THE RIGHTS TO FOOD AND WATER IN INTERNATIONAL AND REGIONAL INSTRUMENTS

- The rights to food and water are explicitly and implicitly provided for in both international and regional human rights instruments. The rights to food and water are protected in the following provisions: Article 25 of the UDHR; Article 28 (1), (2) (a) of the CRPD; Article 15 of the Maputo Protocol; Article 11 of the ICESCR; Article 14 (h) of the CEDAW; Article 24 (2) (c) of the CRC and Article 14 of the ACRWC.
- Article 15 of the Maputo Protocol states that: 'State parties shall ensure that women have the right to nutritious and adequate food. In this regard, they shall take appropriate measures to provide women with access to clean drinking water...'
- Article 11 of the ICESCR states that: 'The State Parties to the present Covenant recognise the

right of everyone to an adequate standard of living for himself and his family, including adequate food...'

6 LIMITATION OF THE RIGHT

- Section 77 of the Constitution has an internal limitation that the rights to food and water are 'progressively realised' within available resources subject to reasonable legislative measures. However, progressive realisation must be understood to mean that the State has a specific and continuing obligation to move as expeditiously and effectively as possible towards the full realisation of the right and has an immediate obligation to assist the vulnerable.
- The general limitation provided in Section 86(2) of the Constitution also applies to the rights to food and water. The limitation is permissible only 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.

7 CASE LAW

- a. In the case of *Mushoriwa v City of Harare* (HH195/14), the applicant approached the High Court seeking an interim interdict barring the respondent from cutting water supplies from flats owned by the applicant. The Court granted the interdict. However, the respondent went ahead to disconnect the water supplies. The applicant filed an urgent chamber application alleging contempt of Court by the respondent. The Court ruled that the applicant's papers were properly before the Court and made reference to Section 77 and 44 of the Constitution in reaching its decision. The Court held that the respondent, being a public body and institution of local government, it cannot deny a citizen water without a just cause.

8 ACTIVITIES

- a. The village of Kokanzara is a beneficiary of a government led food aid programme. The aim of the food aid programme is to provide food to all drought stricken households. Councillor Tongai Musanhi is in charge of the food distribution. The Councillor discovers that a group of villagers has been holding political meetings ahead of the upcoming elections, and that they are considering sponsoring a candidate to contest as a Councillor for the ward. Councillor Tongai Musanhi immediately issues an order to remove the group of villagers from the village's list of beneficiaries of the food aid programme.
Discuss the human rights issues that emanate from this story.
- b. The City of Maine intends to roll out pre-paid water metres. Pressure groups argue that Maine is not yet ready to roll out prepaid water metres on the basis that it does not provide a constant supply of water supply to residents. They also argue that the introduction of prepaid water metres amounts to privatisation of water which could in the long run undermine public health. Discuss the human rights issues arising from this development.

9 KEY POINTS

- Section 77 of the Constitution protects the rights to clean, safe and potable water and to sufficient food. The rights to food and water are closely linked to other rights such as the right to life and the right to health.
- The rights to food and water are realised when food/water is accessible, available, affordable, of acceptable quality and acceptable for the culture of the group to which each person belongs.
- The State must take reasonable legislative and other measures aimed at achieving the full and

progressive realisation of the rights to food and water.

- The State is obliged to take immediate measures to ensure access to food and water for the vulnerable.
- The rights to food and water are not an absolute right and are limited by an internal clawback clause and section 86(2) of the Constitution.

10 CONCLUSION

- The rights to food and water are indispensable for leading a life with dignity and they are a prerequisite for the realisation of other rights such as the right to life, health and education.
- It is important to recognise the need to guarantee equality between men and women in the exercise of their rights to food and water.

CHAPTER THIRTY: SECTION 78: MARRIAGE RIGHTS

1 OBJECTIVES

At the end of this Section, learners should be able to:

- Explain the scope and content of marriage rights;
- Discuss the duties of the State and private persons in realising marriage rights;
- Assess whether these rights can be limited and, if so, under what circumstances; and
- Outline national laws, regional and international instruments protecting marriage rights.

2 DEFINITION OF KEY TERMS

- Child marriage** A formal or informal union where one or both of the parties are under eighteen years of age.
- Marriage** The legally and formally recognised union of two people, man and woman, as partners in a personal relationship.
- Child Betrothal** Is one form of child marriage which allows parents to decide on their daughter's husband when she is under eighteen years of age.

3 INTRODUCTION

- Marriage rights are largely based on the right of persons to found a family and to choose a 'lifetime' partner. There are overlaps with freedom of association.
- This chapter analyses marriage rights as provided for in the Constitution as well as regional and international human rights instruments.
- Like many other rights in the Constitution, the right to marry and found a family may be limited by a law of general application in certain contexts.

4 SCOPE OF THE RIGHT

- Marriage rights are protected in Section 78 of the Constitution which revolves around three component parts of the right. These aspects, explained in turn below, include; (a) the prohibition of child marriages, (b) the right to consent to marriage and (c) the prohibition of same sex marriages.

4.1 The prohibition of child marriages

- Section 78 (1) of the Constitution provides that: 'Every person who has attained the age of eighteen years has the right to found a family.' This provision should be read together with section 81(1) which defines a child as 'every boy or girl under the age of eighteen years.' In *Mudzuru and Another v Minister of Justice and Others*,²⁵ the Constitutional Court relied on these provisions to reach the conclusion that child marriages are unconstitutional.

■ 25. CCZ 12-15.



Figure 40: Child marriages are prohibited by the Constitution. See Girls Not Brides, 'Not ripe for marriage: Roots Zimbabwe' 21 January 2016, available at <https://www.girlsnotbrides.org/zimbabwe- 5 June 2016>).

- Persons below the age of 18 years are presumed to be incapable of giving free and valid consent to a marriage or similar union. This presumption is meant to protect the majority of children who are incapable of fully understanding the harmful effects of child marriage on physical, intellectual and moral development.
- To this end, the prohibition of child marriages falls squarely within the broad area of child protection and is meant to ensure that children enjoy all their rights without being subjected to harm by adults seeking to prey on them.
- The prohibition of child marriages has implications for such customary practices as early marriages or child betrothals. It requires the State to ensure that the betrothal and marriage of persons under the age of 18 is prohibited, without exceptions based on culture or religion.
- Apart from violating the prohibition of child marriages, child betrothal also infringes upon the individual's freedom to choose their spouse freely and without undue influence from anyone or the State.
- Birth registration is an essential component of the effort to end child marriages. Making birth registration compulsory, accessible and free is important in the fight against child marriage. This is because without a birth certificate, it is difficult to prove that victims of child marriages are under the minimum age of marriage.

4.2 The right not to be compelled to enter into marriage.

- An individual's right to choose a spouse and enter freely into marriage is central to their life, dignity and equality as a human being. No marriage shall be entered into without the free and full consent of the intending spouses.
- The Constitution protects adult men and women's right to choose when, if, and whom they will marry. Courts and administrative bodies have the duty to protect this right. This means that legislation governing marriages must require both parties to a marriage to give full and free consent for all forms of marriage.
- The personal, full and free consent of both parties to a marriage cannot be replaced by the consent of a parent, legal guardian or any other person. By stipulating that 'no person may be compelled to enter into marriage against their will', the Constitution imposes a legal obligation on marriage officers to verify whether or not both parties have given their consent to marriage voluntarily.
- If one or both parties get married under some form of coercion, whether from their spouse, parent or guardian, then the marriage must be declared null and void.
- In some cultural and religious traditions, the marriage of a girl child is almost always arranged

by her parents or guardian, whose desires take precedence over the wishes of the child. The rights to choose a spouse and to consent to a marriage imply the prohibition of marriages that are arranged in the name of culture or religion.

4.3 The prohibition of same sex marriages

- The Constitution does not specify the type or nature of marriage. Zimbabwe recognizes three types of marriages namely, civil marriage (Marriage Act, Chapter 5:11), registered customary marriage (Customary Marriages Act, Chapter 5:07), and unregistered customary law unions.
- Section 78 (3) of the Constitution prohibits same sex marriages.
- The explicit prohibition of same-sex marriages implies that gays and lesbians cannot rely on the non-discrimination clause and seek legal recognition of such a union in Zimbabwe.

5. MARRIAGE RIGHTS IN REGIONAL AND INTERNATIONAL INSTRUMENTS

- Marriage rights are protected under regional and international law. For example, Article 16 of the UDHR, Article 23 of the ICCPR, Articles 1 and 3 of the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, Articles 9 and 16 of the CEDAW, Article 21 of the ACRWC, Articles 6 and 7 of the Maputo Protocol and Article 7(b) of the SADC Protocol on Gender and Development (2008).
- Article 1 of the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages states that: 'No marriage shall be legally entered into without the full and free consent of both parties, such consent to be expressed by them in person after due publicity and in the presence of the authority competent to solemnize the marriage and of witnesses, as prescribed by law.'
- Article 21(2) of the ACRWC states that: 'Child marriage and the betrothal of girls and boys shall be prohibited and effective action, including legislation, shall be taken to specify the minimum age of marriage to be 18 years and make registration of all marriages in an official registry compulsory.'
- Articles 6 and 7 of the Maputo Protocol provides for State Parties to 'ensure that women and men enjoy equal rights and are regarded as equal partners in marriage and to enact appropriate legislation to ensure that women and men enjoy the same rights in case of separation, divorce or annulment of marriage.'
- Article 7(b) of the SADC Protocol on Gender and Development (2008) provides that: 'State Parties shall put in place legislative and other measures which promote and ensure the practical realisation of equality for women, equal legal status and capacity in civil and customary law.'

6 LIMITATIONS OF THE RIGHT

- According to Section 78(3) of the Constitution 'persons of the same sex are prohibited from marrying each other.'
- Sexual intercourse within prohibited degrees of relationships as defined in Section 75 of the Criminal Law Codification and Reform Act (Penal Code) is also prohibited.
- Section 75 of the Penal Code deals with the offence of having sexual intercourse within a prohibited degree of relationship. Incest is sexual deviation from the usual or accepted sexual behavior or standards. It is regarded as sexual perversion because it is a departure from what is right, natural or acceptable.
- Incest, which is sexual behaviour between a man and a woman who are related to each other within a prohibited degree of relationship is morally unacceptable and is prohibited by law.

7 CASE LAW

- The Constitutional Court delivered a landmark ruling which outlawed child marriages in the case of *Mudzuru and Another v Minister of Justice, Legal and Parliamentary and Others* (CCZ12/16). The Court held that Section 78 (1)²⁶ of the Constitution rendered Section 22(1) of the Marriage Act or any other law which allows a girl who is below the age of 18 years to marry invalid.
- It should be noted that Government is now taking measures to amend the marriage law so that it conforms to Section 78 (1) of the Constitution.

8 ACTIVITIES

- a. Does the customary practice of lobola violate the individual's right to consent to a marriage and to choose a spouse?
- b. Discuss the effects of child marriages on the girl child.

9 KEY POINTS

- Marriage rights are constitutionally guaranteed in Section 78 of the Constitution. These rights include the freedom to choose a spouse and to consent to a marriage. No one may be compelled to marry.
- Apart from the Constitution, several regional and international human rights instruments also protect the rights to marry and to found a family.
- However, the freedom to marry is subject to certain limitations such as the prohibition of same-sex or incestuous marriages in the case of Zimbabwe.

10 CONCLUSION

- The Constitution prohibits child marriages, same-sex marriages and those entered into by persons who are related within prohibited degrees of relationships. In addition, those marrying should consent.
- Marriage rights are protected under national, regional and international law, but are not absolute.

26. Every person who has attained the age of 18 has the right to found a family

