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WOMEN'S INEQUALITY AND THEIR STATUS IN ZIMBABWE

by

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Submitted in fulfilment of the requirements for the degree

LLD

In the Faculty of Law,
University of Pretoria

2019 FEBRUARY

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ACKNOWLEDGEMENTS

I would like to, firstly, express special gratitude to my Supervisor, Professor Karin Van Marle who gave me the golden opportunity to do this wonderful research project on the topic *Women's inequality and their status in Zimbabwe*. Prof Van Marle has an attitude and the substance of a genius. She continuously conveyed guidance and direction throughout this research project. Without her constant supervision this thesis would not have been possible.

Secondly, I would like to thank my children Primal and Tanis for their patience and understanding when I missed important family events working on this research project. To my friends Radolf Mugwagwa, Arlington Mutazu and Ambassador Ishmail Mangwanya your support and assistance made the road smooth, thank you very much.

TABLE OF CONTENTS

CHAPTERS	PAGE NUMBER
LIST OF ABBREVIATION	v-vii
CHAPTER ONE	
INTRODUCTION	
1.1. Research problem	1-2
1.2. Background	3-8
1.3. Motivation	8-14
1.4. Assumptions	14
1.5. Research Questions	15
1.6. Theoretical approach and methods	15-19
1.7. Structure	20-22
CHAPTER TWO	
WOMEN’S STATUS IN PRE-COLONIAL, COLONIAL AND POST – INDEPENDENCE: ZIMBABWE	
2.1.Introduction	23
2.2.Status of women in the pre- colonial era	24-27
2.3.Women status during the colonial era	28-36
2.4.Theorizing gender inequality: the feminist perspective	36-37
2.5.Status of women under the 1980 constitution	37-57
2.6. Women status under Government of National Unity	57-58
2.7.Conclusion	58-61

CHAPTER THREE

EXAMINING EQUALITY OF WOMEN IN ZIMBABWE UNDER THE 2013 CONSTITUTION

3.1. Introduction	62-63
3.2. Women's equality: International and Regional instruments	63-76
3.3. Women's equality: 2013 Constitution of Zimbabwe	76-100
3.4. Implementation of equality provisions	100-112
3.5. Other factors	112-115
3.6. The role of Ministry of Women Affairs, Gender and Community Development	115-121
3.7. Conclusion	121-124

CHAPTER FOUR

DEMOCRACY, CITIZENSHIP AND EQUALITY

4.1. Introduction	125-128
4.2. Citizenship	128-153
4.3. Democracy	153-181
4.4. Linking democracy and citizenship	182-183
4.5. Linking citizenship and women political equality	183- 186
4.6. Linking democracy and equality	186-188
4.7. Linking democracy, citizenship and equality	188-196
4.8. Gender mainstreaming	196-200
4.9. Conclusion	200-201

CHAPTER FIVE

WOMEN'S EQUALITY, ACCESS TO CITIZENSHIP AND DEMOCRACY IN SOUTH AFRICA

5.1. Introduction	202-205
5.2. Women's status before 1996 Constitution	205-215
5.3. Women's equality under the 1996 Constitution	215-248
5.4. Women's access to democracy	

And citizenship under 1996 Constitution	249-258
4.5. Challenges in accessing democracy and citizenship	259-269
4.6. Conclusion	269-271

CHAPTER SIX

BEST PRACTICES FROM SOUTH AFRICA AND OTHER RECOMMENDATIONS

6.1. Introduction	272
6.2. Lessons for Zimbabwe	272-281
6.3. Other recommendations	281-287
6.4. Conclusion	287-291

BIBLIOGRAPHY	292-308
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LIST OF ABBREVIATIONS

ACDP	AFRICAN CHRISTIAN DEMOCRATIC PARTY
ACHPRRW	PROTOCOL OF THE AFRICAN CHARTER ON HUMAN AND PEOPLE'S RIGHTS ON THE RIGHTS OF WOMEN
AIDS	AQUIRED IMMUNO-DEFICIENCY SYNDROME
ANC	AFRICAN NATIONAL CONGRESS
ANCWL	AFRICAN NATIONAL CONGRESS WOMEN'S LEGUE
BOF	BILL OF RIGHTS
CALS	CENTER FOR APPLIED LEGAL STUDIES
CEDAW	CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION
CGE	COMMISSION FOR GENDER EQUALITY
COSATU	CONGRESS OF SOUTH AFRICAN TRADE UNION
CSVR	CENTRE FOR THE STUDY OF VIOLENCE AND RECONCILIATION
DR	DOCTOR
DSS	DEPARTMENT OF SOCIAL SERVICES
ECOSOC	ECONOMIC AND SOCIAL COUNCIL
ESAP	ECONOMIC STRUCTURAL ADJUSTMENT PROGRAM
FEDTRAW	FEDERATION OF TRANSVAAL WOMEN
GBV	GENDER BASED VIOLENCE
GNU	GOVERNMENT OF NATIONAL UNITY
GOZ	GOVERNMENT OF ZIMBABWE
GPA	GLOBAL POLITICAL AGREEMENT
HIV	HUMAN IMMUNODEFICIENCY VIRUS
HOD	HEAD OF DEPARTMENT
HRC	HUMAN RIGHTS COMMISSION
ICCPR	INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS
ICOSER	INTERNATIONAL COVENANT ON SOCIO-ECONOMIC RIGHTS
LAA	LAND APPORTIONMENT ACT
LAMA	LEGAL AGE OF MAJORITY ACT

LGBTI	LESBIAN GAY BISEXUAL TRANSGENDER INTERSEX
LTA	LAND TENURE ACT
MCDWA	MINISTRY OF COMMUNITY DEVELOPEMENT AND WOMEN AFFAIRS
MDC	MOVEMENT FOR DEMOCRATIC CHANGE
MEPF	MACRO-ECONOMIC FRAMEWORK
MERP	MILLENIUM ECONOMIC RECOVERY PROGRAMME
MFRC	MICRO- FINANCE REGULATORY COUNCIL
MP	MEMBER OF PARLIAMENT
MWAGCD	MINISTRY OF WOMEN AFFAIRS GENDER AND DEVELOPMENT
NCOP	NATIONAL COUNCIL OF PROVINCES
NGOS	NON-GOVERNMENTAL ORGANISATIONS
NOW	NATAL ORGANIZATION OF WOMEN
RAU	RESEARCH ADVOCACY UNIT
SADC	SOUTHERN AFRICAN DEVELOPMENT COMMITTEE
SADCPGD	SOUTHERN AFRICAN DEVELOPMENT COMMITTEE PROTOCOL ON GENDER AND DEVELOPMENT
SAT	SUSTAINABLE AGRICULTURE TRUST
SI	STATUTORY INSTRUMENT
TRC	TRUTH AND RECONCILIATION COMMISSION
UDHR	UNIVERSAL DECLARATION OF HUMAN RIGHTS
UN	UNITED NATIONS
UNDAW	UNITED NATIONS DIVISIONS FOR THE ADVANCEMENT OF WOMEN
UNESCO	UNITED NATIONS EDUCATIONAL SCIENTIFIC AND CULTURAL ORGANISATION
USA	UNITED STATES OF AMERICA
USAID	UNITED STATES AGENCY FOR INTERNATIONAL DEVELOPMENT
UWO	UNITED WOMEN’S ORGANIZATION
ZANU PF	ZIMBABWE AFRICAN NATIONAL UNION PATRIOTIC FRONT
ZAPU	ZIMBABWE AFRICAN PEOPLE’S UNION
ZEDS	ZIMBABWE ECONOMIC DEVELOPMENT STRATEGY

ZIMPREST ZIMBABWE PROGRAM FOR ECONOMIC AND SOCIAL
TRANSFORMATION
ZIPRA ZIMBABWE PEOPLE'S REVOLUTIONARY ARMY
ZNLA ZIMBABWE NATIONAL LIBERATION ARMY
ZRP ZIMBABWE REPUBLIC POLICE

CHAPTER ONE

INTRODUCTION

1.1. RESEARCH PROBLEM

The main research problem in this study is the extent to which, if at all, the legal and political status of women in Zimbabwe has changed after independence. Women constitute about 51% of the Zimbabwean population yet they are generally excluded from mainstream politics and are discriminated against in almost all spheres of socio-economic life and this has repercussions for their political rights. This exclusion, marginalisation and bigotry has largely been attributed to entrenched, traditional patriarchal norms, which are sustained by a plural legal system that has apparently remained insular to changes from around the globe.¹ Patriarchy denotes a system of social organisation that privileges males and regards them as custodians of society.² It validates the subordination of females to males.³ The unrelenting patriarchal system is simulated in almost all arenas of life and is embedded in customs, culture and social patterns. Hence, it has diminished the capacity of women to contribute meritoriously to the development of the society. Despite the fact that patriarchal society predates colonialism, its effects on gender relations is still pronounced in modern Zimbabwean society.⁴

The main concern of this study is women's political rights. Socioeconomic is referenced in as far as its contribution to political equality is concerned. Women's social status in a country is the major test of whether the country is committed to contributing towards equality between men and women or not jurisprudentially. Since independence the Zimbabwean Government has sanctioned legislation contributing towards the enhancement of women's rights and countering customs which underrate women. Such laws include the Domestic Violence Act which prohibits domestic

¹ Feminist Jurisprudence, Internet Encyclopaedia of Philosophy available at <https://www.iep.utm.edu/jurisfem/> Accessed on 30 July 2018.

² Feminist Jurisprudence (n 1 above).

³ Feminist Jurisprudence (n 1 above).

⁴ Women and Law in Southern Africa Research Trust *Inheritance in Zimbabwe Law Custom and Practices* (1996) 74.

violence against women.⁵ Another example is the Matrimonial Causes Act which recognizes the capability of women to own property in their own right.⁶

The Constitution of Zimbabwe Amendment No. 20 2013 (henceforth 2013 Constitution) in section 56 provides for equality between men and women and equal opportunities at the political level, in the economic sector and in their social activities.⁷ Section 80(1) also provides that:

Every woman has full and equal dignity of person with men and this includes equal opportunities in political, economic and social activities.

This section unequivocally promises women equality with men. Yet, despite Constitutional provisions and close to four decades of independence, women in Zimbabwe still do not enjoy equality in the political sphere at the same level with men.⁸ It can be observed that little has been done to address the equality of women in Zimbabwe pragmatically and their marginalization persists. This inexorable marginalization reflects lack of genuine commitment to gender equality on the part of the State and raises questions as to the nature of the independence achieved in 1980 with regards to women's emancipation. Thus, at the center of this study is the paradox between the promise of women's equality which is embraced by the 2013 Constitution of Zimbabwe and the implementation of such pledges. Gender equality is not just about treating all genders similarly on paper.⁹ It also involves an inclusive approach to distribution of opportunities and resources.¹⁰

⁵ Domestic Violence Act 14 of 2006.

⁶ Matrimonial Causes Act 33 of 1985.

⁷ Constitution of Zimbabwe Amendment (No. 20) Act 2013 (2013 Constitution).

⁸ Research Advocacy Unit, 'Zimbabwe Women and Their Participation in Elections' (2011) Available at www.researchandadvocacyunit.org (accessed on 21 October 2016).

⁹ I Currie & J De Waal *The Bill of Rights Handbook* (2017) 244.

¹⁰ Currie and De Waal (n 9 above) at 247.

1.2 BACKGROUND

Women are still deprived in the Zimbabwean society and their exclusion is apparent in every sector of society. The majority of women are illiterate, economically dependent, inclined to customary practices that operate against their personal rights, politically marginalized and lack the platforms to express themselves.¹¹ They are also excluded from agriculture, mining and a diversity of industries that constitute the Zimbabwean economy.¹² In these sectors only a few women have managed to prosper in their own right. This study traces the implication this has had for women's political participation in Zimbabwe.

In social contexts, women are still being exposed to entrenched customary practices that infringe their personal rights. These customary practices include:

1. *kuzvarira* the practice of pledging a young woman to marriage with a partner not of her choosing;
2. *lobola* the customary obligation of a groom to pay a bride price to the parents of a would-be wife; and
3. *ngozi* the customary practice of offering a young girl as compensatory payment in interfamily disputes.¹³

For the Zimbabwean Marriage Guidance Society, *lobola* (bride prize) is the biggest obstacle to the attainment of equality between men and women.¹⁴ It is contended that the concept of bride prize implies that 'I paid for you so we cannot be equal.'¹⁵ Moreover the payment of bride prize has also morphed into a commercial venture whereby fathers demand stupendous sums of money for their daughters' hand in marriage. This inevitably commoditizes women symbolically, with a price tag on them put by the father for the husband to be.¹⁶ It is argued that the notion of *lobola* promotes the hegemony of men over women 'throughout their lifetime' by their fathers and then later by their husbands.¹⁷ This therefore becomes the foundation of all oppression that would ensue in the

¹¹ 16th Annual Human Rights Report Submitted to Congress by United States of America (1991). Available at <http://heinonline.org/HOL/License> (accessed on 15 March 2017).

¹² 16th Annual Human Rights Report (n 11 above).

¹³ 16th Annual Human Rights Report (n 11 above).

¹⁴ Zimbabwean Marriage Guidance Society available at https://www.africanadvice.com/Marriage_And_Family_Counselling/Zimbabwe/. Accessed on 25 June 2016.

¹⁵ 16th Annual Human Rights Report (n 11 above).

¹⁶ A Shenje-Peyton 'Balancing Gender, Equality and Cultural Identity: Marriage Payments in Post-Colonial Zimbabwe' (1996) 9 *Harvard Human Rights Journal* 109.

¹⁷ Shenje-Peyton (n 16 above) at 109.

marriage as the parties are not at par. The husband is presumed to have bought the services of the wife by paying *lobola* and this relegates women to the domestic sphere where they perform reproductive roles such as care duties. As a result, they are left with little time to pay attention to economic and political developmental issues.¹⁸ Such restrictive socioeconomic conditions constrict women's rights and overall, eliminate them from the political arena.

According to the Annual Human Rights Report, the customary practices like *ngozi* payment (paying reparations for murder using a woman) exploit women and regard them as objects or possessions that can be traded in as circumstances demand.¹⁹ This whole notion is eccentric because the woman is not the one who would have committed the crime and more so she is not consulted when a decision to use her to pay *ngozi* is being made. Also, her status in the family to which she is going to join is uncertain and it is up to the receiving family to decide how to treat her. In some cases, she is married off to any member of the receiving family.²⁰ This study is interested in how cultural practices like these would impact women's visibility in the public sphere

Patriarchy's hold on women's lives is notable even in the education sector. It is acknowledged that the nation's educational system has considerably increased the number of girls being educated.²¹ However there is a noticeable pattern of male domination in higher education.²² The implications this has for broad political participation is a cause for concern and need to be examined. Further, the status of women is greatly compromised at workplaces as well, severely restricting women economically and creating resource constraints to political activism. Notwithstanding the existence of the laws which proscribe workplace discrimination, women are concentrated in the lower levels of management and they are subjected to various forms of work place harassment which they cannot freely report or openly remonstrate against in fear of losing their jobs.²³ For instance, women in Zimbabwe are given at least ninety eight days of maternity leave yet men do not have access to any paternity leave for the purposes of sharing duties and responsibilities during the

¹⁸ Shenje-Peyton (n 16 above) at 109.

¹⁹ 16th Annual Report (n 11 above).

²⁰ 16th Annual Human Rights Report (n 11 above).

²¹ 16th Annual Human Rights Report (n 11 above).

²² 16th Annual Human Rights Report (n 11 above).

²³ 16th Annual Human Rights Report (n 11 above).

primary stages of child rearing.²⁴ This reinforces patriarchal ideals of the reproductive role of women in society, neglecting their civil rights and their political role.

At the political level women are underrepresented in decision making positions. Zimbabwean history tells the story of gender repression and segregation which has been witnessed through the manifestation of male dominated legislators both in the pre-colonial era and after independence. This is against the fact that woman is the majority in the Zimbabwean population. The political climate in Zimbabwe is marred by unresolved issues which were inherited from the post-independence era, which include non-adherence to national policies and lack of political will to implement the same.²⁵ According to Mujuru, the issues which were not dealt with from independence include political abuse and a culture of fear and intimidation has continued to dog the political sphere in contemporary Zimbabwe. Political violence and torture persist in modern, post-independent Zimbabwe reflecting continuities of features of the Smith regime whereby blacks were murdered under the auspices of national peace and stability.²⁶ Women have become the most affected casualties of Zimbabwean political violence as they are subjected to rape, torture and physical abuse.²⁷

The inequalities in the political sphere has all negatively impacted women's access to citizenship and democracy. There appears to be certain differential access to citizenship and democratic rights between men and women in Zimbabwe. The main dispute in this regard is that if women in Zimbabwe are not accessing citizenship rights at the same level with their male counterparts then it means they are being demoted to second class citizens and there is no democracy in Zimbabwe for them. To define citizenship is not an easy task as Lister points out, and because of its contextualized and contested nature, elements of citizenship are relative, depending on the society concerned.²⁸ Citizenship has two important elements, being status and practice. Citizenship as a

²⁴ Section 65(7) provides for maternity for a period of at least three months.

²⁵ Organisation for Social Science Research in Eastern and Southern Africa, Mujuru N. Report of the National Workshop on Zimbabwe's Current Socio-economic and Political Situation, Challenges and Prospects (2003) Available at <https://www.africaportal.org/c/space/articles/Zimbabwe-document-socio-economic-and-political-situation-challenges-and-prospects>. (accessed on 12 September 2016).

²⁶ Organisation for Social Science Research (n 25 above).

²⁷ Organisation for Social Science Research (n 25 above).

²⁸ R Lister *Citizenship: Feminist Perspectives* (2003) 13.

status recognizes the status (rights and obligations) of members of the community.²⁹ In this regard both men and women in a particular community must be treated equally, but this is not the situation on the ground in Zimbabwe.

Women's status is intrinsic to their access to citizenship and democracy. The connection among women's sustained inequality and citizenship and the lack of democracy in Zimbabwe is also discussed in this research with a focus on the effect of gender inequality on the citizenship of women in Zimbabwe and the lack of democracy in Zimbabwe. Generally being a citizen of a nation accords one constitutional rights which include socio-economic rights and civil-political rights. Citizenship bestows one's identity in the State. According to Lister, identity in relation to citizenship does not only involve legal rules regulating the State and individual's relationships.³⁰ Social relationships amongst individuals and between the State and individuals are equally important to the concept of citizenship. This position was buttressed by Gouws who quotes Jones in the following phase:³¹

For inclusion of women, the challenge is to transform the practice of citizenship from an isolated practice of judicially defined individuals with rights to the recognition of participation even on a local level.

Basically, citizenship is a status accorded to citizens with all the rights of a community which include civil and political rights. Citizenship as a practice allows citizens of a particular community to equally participate in the activities of that community. Consequently, as long as gender inequality persists in Zimbabwe then women are being treated as secondary citizens. Women in Zimbabwe can only be equal citizens with men if they attain equal political status with men at these levels.

Although most contemporary analysts assume that women as well as men will participate equally in new democracies, they remain silent on how gender dynamics play out in the framing of new democratic institutions. The relationship between citizens and the state is mostly viewed in universalistic terms, ignoring the particularistic ways in which women and men access democratic

²⁹ Lister (n 28 above) at 13.

³⁰ Lister (n 28 above) at 13.

³¹ A Gouws (*Un)thinking Citizenship: Feminist Debates in Contemporary South Africa* (2005) 3.

institutions. The link between democracy and equality is discussed in the context that unless equal access to the public arena is achieved then there is lack of democracy. Both men and women must have equal access to the public arena for there to be democracy in Zimbabwe.

According to Seidman, feminists argue that abstract theories about democracy downplay the ways citizens' lives are gendered and the implications this has for men and women's differential experience of political institutions.³² Rather than treating citizenship as a universal relationship between ungendered individuals and the State, they suggest that democratic theory must acknowledge the way gender dynamics affect both individual and political participation and the bearing of state policies on individuals. In Zimbabwe most women's participation in citizenship and democracy is stumbled by their need to keep up with domestic demands. As such the argument to be followed is that of most theorists who suggest that State policies should redefine and amend gendered domestic life in particularistic ways for women in diverse social stations and should highlight the ways gender interests are fabricated through particular institutions in diverse contexts.³³

Democracy is a true indicator of equality in a society. Generally, democracy can be defined as a system of government by the whole population or all the eligible members of the State, characteristically through elected representatives. Democracy allows its citizens to participate equally in the creation of laws and the State. Citizens may directly be involved in the creation of laws or they can participate through their representatives. Jones, following the feminist tradition has defined democracy as 'equal access to public arena of self-governance'.³⁴ She further explains that for there to be democracy there is a need to remove barriers to different person's access to self- rule.³⁵ In this regard another question which will be addressed in the study is the extent to which women in Zimbabwe are accessing citizenship and democracy.

³² GW Seidman 'Gendered Citizenship: South Africa's Democratic Transition and the Construction of a Gendered State' (1999) 13:3 *Gender and Society* 288.

³³ Seidman (n 32 above) at 289.

³⁴ KB Jones 'What is Authority's Gender?' in NJ Hirschmann & CD Stefano (eds) *Revisioning the Political Feminist Reconstructions of Traditional Concepts in Western Political Theory* 79.

³⁵ Jones (n 34 above) at 79.

South Africa's efforts to eradicate gender discrimination are to a great extent commendable especially when comparing it with Zimbabwe. Although Zimbabwe's efforts to enhance women status in Zimbabwe cannot be underrated, their effectiveness cannot be overestimated and there is no doubt that Zimbabwe has a lot to learn from South Africa in order to improve women's equality.³⁶ South Africa's Constitution (henceforth 1996 Constitution) provides for equality between men and women in section 9. This provision was backed by a series of legislations which deal with equal treatment between men and women which include Promotion of Equality and Prevention of Unfair Discrimination³⁷, Recognition of Customary Marriages Act³⁸, Commission on Gender Equality Act,³⁹ Charter Of Rights On AIDS And HIV⁴⁰ and Choice of Termination of Pregnancy Act.⁴¹ The South African judiciary system embraced this gesture and handed down favorable decisions in cases which dealt with equal treatment of men and women. Such cases include *Christian Lawyers Association of South Africa & Others v Minister of Health and others*⁴², *Amod v Multilateral Motor Vehicle Accidents Funds*⁴³ *Woolworths (Pty) Ltd v Whitehead*⁴⁴ and *Bhe*.⁴⁵

1.3 MOTIVATION

What motivates this study is the sharp contrast that exists between the equality clause and other constitutional equality provisions and the women's status and realistic attainment of equality are at the center of this study. Although discrimination against women is being addressed by different laws and at different forums there still exists some form of systematic discrimination against women which has received little attention, if any. There is an inaccurate conception of equal representation which merely consider the number of women, for example, at the workplace against

³⁶ T Dube 'Engendering Politics and Parliamentary Representation in Zimbabwe' (2013) 5 *Journal of African Studies and Development* 200.

³⁷ Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

³⁸ Recognition of Customary Marriages Act 120 of 1998.

³⁹ Commission on Gender Equality Act 39 of 1996.

⁴⁰ AIDS Law Project and AIDS Legal Network HIV/AIDS & the Law: A Resource Manual 3rd edition (2003).

⁴¹ Choice of Termination of Pregnancy Act 92 of 1996.

⁴² *Lawyers Association of South Africa & Others v Minister of Health and others* 1998 (4) SA 1113 (T).

⁴³ *Amod v Multilateral Motor Vehicle Accidents Funds* 1999 (4) SA 1319 (SCA).

⁴⁴ *Woolworths (Pty) Ltd v Whitehead* 2000 (21) ILJ 571 (LAC) H.

⁴⁵ *Bhe* 2005 (1) BCLR 1 CC.

the total number of employees needed at the organization yet disregarding the wider picture of the general population of women.

The research was also motivated by my experiences as a Zimbabwean woman and as a legal practitioner. I realized that despite being the majority in terms of numbers, women are still treated as a minority. This paradox is quite striking especially taking into consideration that as the majority, women have the capacity to lobby for social promotion and to influence the highest offices of the land. However, this has not happened. Women in Zimbabwe are for the most part politically passive. For instance, despite the fact that there are more women than men in the country, women representation in the country's legislative bodies is a paltry 13.80%. I was also intrigued by the differences in the legal status and political participation of Zimbabwean and South African women despite certain similarities in the colonial history and liberation and independence between the two countries.

Pre-colonial Zimbabwe was governed by customary law. Under these customary laws each family was controlled by the eldest male figure who would have a final say on major decisions of the family. As such he is the one who would decide on marriages of the members of the family. With regards to land tenureship, both males and females were treated equally because neither could own land.⁴⁶ The land, then, was held in trust by chiefs for the whole community. However customary inheritance law regarded the wife of the deceased husband as inheritable property which would be inherited by an heir and became the wife of that heir.⁴⁷

Once a woman got married, she would be under a compulsion to work for her husband and his family. Basically everything that would be acquired by the wife during the subsistence of the marriage would belong to the husband and even at dissolution of the marriage she would leave everything for the husband.⁴⁸ The children would belong to the husband as well and the husband was the sole guardian of the children.⁴⁹ This position did not only deny women an opportunity to

⁴⁶ Shenje-Peyton (n 16 above) at 130.

⁴⁷ Shenje-Peyton (n 16 above) at 130.

⁴⁸ Shenje-Peyton (n 16 above) at 130.

⁴⁹ A Chigwedere *Lobola: The Pros and Cons, Books for Africa* (1982) 4.

accomplish their economic independence but it also reduced them to slaves who would enrich their husbands and yet be denied an opportunity to enjoy the benefits of their labor.

Following Weiss's contention, the colonial era adversely contributed towards the status of women. In her own words she said:⁵⁰

The White man's perception of African women was even lower than the one he had of his own women: he saw them as unchaste chattel living in a backward society.

Considering this, it seems reasonable to conclude that while it is admitted that women were already under oppression in the pre-colonial era, gender divisions in the Zimbabwean society were intensified during colonialism.⁵¹ During the 90 years of colonialism the British chose to tolerate customary personal laws and did not foist their own family law regime. This position was codified in Section 56 of the Administrator's Proclamation of September 28, 1890. However, the application and interpretation of customary law during the colonial era was distorted to the demise of women.⁵²

Women were never accorded full legal status. Rather, they were consigned the position of a minor such that they could not hold any responsibility without the consent of their husbands.⁵³ The perpetual minority status given to women under the colonial era granted more power to men over women. In fact, the combination of customary law, which subjected women to male dominance, and colonial influences, which were characterized by racism, left women more burdened than they were before.⁵⁴ Even the international interventions like the United Nations' International Women's year on women rights in 1975 and the subsequent Declaration of the Decade for women did not yield any significant contribution towards improving women's status in Zimbabwe during the colonial era.⁵⁵

⁵⁰ R Weiss *The Women of Zimbabwe* (1986) 10.

⁵¹ Shenje-Peyton (n 16 above) at 111.

⁵² Weiss (n 50 above) at 10.

⁵³ Shenje-Peyton (n 16 above) at 112.

⁵⁴ Shenje-Peyton (n 16 above) at 112.

⁵⁵ K Standt 'Women on Gender' in P Burnell; P Randall & L Rakner (eds) *Politics in the Developing World* (2011) 154.

The continued dominance of customary law in the Zimbabwean society was disrupted by the liberation struggle which led to Zimbabwean Independence in 1980. During the liberation struggle, both men and women fought together and shared the same experiences and during this time it was difficult to observe customary laws.⁵⁶ At this juncture, women were given an opportunity to showcase their potential as human beings on the same platform with men. Shenje puts it in a more eloquent way and says, ‘women began to feel not only equal to men but the same as men’.⁵⁷

This stint of self-independence was short lived. After the liberation struggle, Zimbabwean women were reverted to customary law. The series of negotiations for independence also did not include women.⁵⁸ Pre-independence parleys and negotiations which were held between the former colonizers and the blacks only involved males and women were not represented.⁵⁹ Resultantly men were exposed to and familiarized with the public sphere of politics yet women were left confined to the private life of family and household. This might have emanated from the fact that the focus then was to reclaim political power from the whites and so issues of gender were totally ignored.

From another viewpoint this might have been instigated by patriarchal ideology which, then, was very much alive (and still, is to a moderate extent) in the Zimbabwean society.⁶⁰ Patriarchal systems uphold male privilege and female subordination.⁶¹ Under notions of patriarchal ideology, for instance, boys would be sent to school to take care of the family yet girls would be groomed to get married and to be respectable and respectful wives.⁶² In such a scenario, where it was inherently believed that man must represent women, the results of the independence negotiations were inevitably skewed in favor of men.

Moreover, women were not educated enough to be able to appreciate and participate in the political order. Women’s participation was on the grounds of the nationalist agenda and not to further

⁵⁶ Shenje-Peyton (n 16 above) at 115.

⁵⁷ Shenje-Peyton (n 16 above) at 116.

⁵⁸ M Preston *Ending Civil War: Rhodesia and Lebanon in Perspective* (2004) 25.

⁵⁹ Preston (n 58 above) at 24.

⁶⁰ United Nations Development Program for the Government of Zimbabwe (UNDP/GOZ) Millennium Development Goals Status Report (2010) Available at <http://www.undp.org> (accessed on 21 October 2016).

⁶¹ Standt (n 55 above) at 165.

⁶² Standt (n 55 above) at 170.

women's interests.⁶³ And when the new Zimbabwe was born in 1980, very few women were in politics. The new Parliament had only 3(three) out of 40 (forty) Parliamentarians. However, women were awarded the right to vote right from the inception of independence and their voter turnout has been increasing since then.⁶⁴ A research done by the Research Advocacy Unit in December 2011 shows that in 1980, the total percentage of women who voted stood at 20% and in 2008 it had increased to 80% of those who had registered to vote.⁶⁵

The Government of Zimbabwe at independence perpetuated women's invisibility and discrimination by officially acknowledging customary law in the Zimbabwean Constitution Amendment No 1 of 1980 (1980 Constitution). Customary law, which could not be challenged in courts, governed property, status and even political participation of women and inadvertently sponsored a discrepancy in power distribution between men and women.⁶⁶ This has in consequence led to a failure to eradicate gender inequality and adversely affected the country's potential to realize full development.⁶⁷

The 1980 Constitution at independence was an ignominy to women and it reflected the consequences of the exclusion of women in national dialogues. Section 89 of the Zimbabwean Constitution of 1980 maintained the provisions of the Colonial's Administrator's Proclamation which allowed the application of customary law in personal law. Further the 1980 Constitution of Zimbabwe excluded gender as a ground for discrimination from its section 23(2) equality clause.

Basically, Zimbabwean independence was the independence of men. Women were placed back under the subordination and domination of men after independence. What made it all prejudiced for women is that they were equally involved in the liberation struggle and yet they were in actual fact fighting for men to enjoy the fruits of their sweat. The same *status quo* which existed during the pre-colonial era whereby women work and build the empire for their husbands and gain nothing for their own was reflected at national level after the Zimbabwean independence. The 1980

⁶³ Standt (n 55 above) at 171.

⁶⁴ Research Advocacy Unit (n 8 above).

⁶⁵ Standt (n 55 above) at 171.

⁶⁶ Women and Law In Southern Africa Research Trust (n 4 above) at 74.

⁶⁷ Women and Law In Southern Africa Research Trust (n 4 above) at 75.

Constitution buttressed this position, excluding gender and sex as a prohibitive ground for discrimination.

After independence Zimbabwe partook in the Women's United Nations Global Conferences of 1985 (Nairobi) and 1995 (Beijing). This increased awareness of women's rights and led to the establishment of the Ministry of Women Affairs (the Ministry) in 1995, whose mission is:

To spearhead women empowerment, gender, equality and equity for community development.⁶⁸

The Ministry's endeavors to empower women is couched in its mission statement. However, lack of resources and lack of prioritization by Government of women issues limit its effort to significantly improve women's status.

Zimbabwe's commitment to improve the status of women was compromised during the existence of the Unity Government in Zimbabwe during 2008-2013. On the 15th of September 2008, the three major political parties⁶⁹ signed a Global Political Agreement (GPA) under which they agreed to work together for the betterment of Zimbabwe.⁷⁰ Article VII of the GPA which was the equality article was condemned for its vagueness, ambiguity and lack of detail in its address of equality rights.⁷¹ It has to be pointed out that its implementation did not so much focus on women's status but it was a power struggle amongst the political parties involved. Moreover, those political parties were male-led and gender considerations became ancillary while the primary agenda was for each party to get recognition and to discredit the other. What happened during the independence negotiations recurred, and again women were excluded from the negotiations for power sharing during the unity government of 2008.

⁶⁸ Ministry of Women Affairs, Gender and Community Development. Available at <http://www.women.gov.zw/>. (accessed on 21 October 2016).

⁶⁹ ZANU (Pf), Movement for Democratic Change under the leadership of Mr Morgan Tsvangirayi (MDC-T) and the Movement for Democratic Change which was then led by Prof Aurther Mutambara (MDC-M).

⁷⁰ Zimbabwe Global Political Agreement 2008.

⁷¹ N Shvedova . Obstacles to Women's participation in Parliament 2002 available at <http://www.idea.int>. Accessed on 21 October 2016.

Embracing the international euphoria on gender equality, Zimbabwe has ratified various Regional Protocols and International Conventions on gender.⁷² These include the Convention on Elimination of All Forms of Discrimination Against Women (CEDAW) which lays a footing for addressing women's status.⁷³ In 2008 it ratified the Protocol of the African Charter which, in its Article 9, enjoins member states to take necessary measures to stimulate equal representation of females with their male counterparts in the electoral process.⁷⁴ This obligation for Zimbabwe to enhance women's status became more pronounced when she ratified the Southern African Development Community (SADC) Protocol on Gender and Development in November 2009.⁷⁵

In 2013 Zimbabwe made a robust adjustment in the constitutionalism and equality jurisprudence by enacting the 2013 Constitution. During the drafting process, although women themselves were underrepresented, women pressure groups and the Ministry of Women's Affairs played a pivotal role in warranting that the Constitution included a gender responsive equality provision, Section 56 (Equality Clause).

1.4 RESEARCH ASSUMPTIONS

- 1.4.1 Women and men enjoy differential access to legal and political rights and stemming from different socio-economic statuses.
- 1.4.2 Women's equality rights are constitutionally guaranteed and protected.
- 1.4.3 Women's participation in citizenship and democracy has implications on their political equality.
- 1.3.4 South Africa has substantially improved women's equality and Zimbabwe can therefore draw some lessons from South Africa.

⁷² Southern African Development Community (SADC) Protocol on Gender and Development 2008, Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa 2009 (PACHPR) and Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) 1965.

⁷³ Articles 2,3 and 4 of the CEDAW obligates its member states to fight and alleviates discrimination against women through, among other means, affirmative action measure.

⁷⁴ Article 9 of the PACHPR clearly states that member states are to adopt affirmative action, enabling legislation and other measures to ensure that women participate without discrimination in all elections and are represented equally at all level in all electoral processes.

⁷⁵ Article 13 (1) of the SADC Protocol on Gender and Development provides that:

States Parties shall adopt specific legislative measures and other strategies to enable women to have equal opportunities with men to participate in all electoral process including the administration of elections and voting.

1.5 RESEARCH QUESTIONS

In this study the following research questions are raised:

- 1.5.1 What was the status of women in Zimbabwe before 1980 and to what extent did Zimbabwe address the socio-political status of women after independence?
- 1.5.2 How is equality between men and women currently being protected in Zimbabwe and how does women inequality persist?
- 1.5.3 What is the connection between women's continued inequality and citizenship and the lack of democracy in Zimbabwe?
- 1.5.4 How has South Africa embraced women's equality citizenship and democracy from Precolonial Era, during Apartheid and after independence? And What can Zimbabwe learn from it.

1.6 THEORETICAL APPROACH AND METHODS

In this study I apply the feminist theory. While acknowledging that there are various waves and branches of feminism that have been developed, this project will apply a broad conceptualization of the theory of feminism but will borrow mainly from themes which emerged during the first wave of feminism which concerned itself largely with gaining equal political rights. Feminism itself is however interested in improving the social status of women across all spheres of socio-economic and political life. Thus, it exposes the fundamental, socially constructed differences between men and women which this research argues are the basis for women's inadequate access to their civil and political rights. My argument in this study is that men and women have the same reasoning capacity therefore their rights and obligations must be the same. This approach counters the legal subordination of one sex to the other. In Zimbabwe men and women must be given equal rights through, at this stage, putting in place laws that give women advantage to be at par with men and abolishing practices, through legislation that takes away women's rights. Once this is done both women and men would enjoy civil liberties equally.

The method of research that I follow is the doctrinal approach whereby much of the information is gathered through desk research. According to Prof. S. N. Jain:⁷⁶

Doctrinal research involves analysis of case law, arranging, ordering and systematizing legal propositions and study of legal institutions through legal reasoning or rational deduction.

There is a thorough analysis and examination of various legislations, case laws and international and regional instruments. South African Constitution and Zimbabwean Constitution take center stage in most of the discussion on equality followed by their respective equality jurisprudential case laws and legislations.

According to Kharel availability of the reliable data is the biggest challenge in conducting doctrinal research.⁷⁷ Researcher must be competent enough to identify the reliable data and make sure the data is of some kind of authority, either primary or secondary. To make up for this, the researcher referred extensively to the 2013 Constitution provisions on gender and gender equality and researches that have been done on the implementation of these provision by recognized bodies such as the Research Advocacy Unit and United Nations.

The comparative approach is also applied in applying lessons learnt from South African jurisprudence to the Zimbabwean context. According to Bhat this approach is relevant for legal research because it ‘consists in comparative evaluation of human experience occurring in legal domains of different situations and jurisdictions’.⁷⁸ Comparisons of laws, legal systems, governance, and policies have the potential to enrich the realms of knowledge and enable the improvement of various legal systems thereby benefitting from their experiences and avoiding errors.⁷⁹ Bhat argues that:⁸⁰

⁷⁶ SN. Jain, (2006). ‘Doctrinal and Non-Doctrinal Legal Research, in Legal Research and Methodology’ (2006) 68 Indian Law Institute, India, 68 (S.K. Verma & M. Afzal Wani eds.).

⁷⁷ A Kharel Doctrinal Legal Research available at <https://ssrn.com/abstract=313525>. Accessed on 17 January 2019 at 12.

⁷⁸ I Bhat ‘Comparative Method of Legal Research: Nature, Process and Potentiality’ (2015) 57:2 *Journal Of The Indian Law Institute* 147.

⁷⁹ Bhat (n 78 above) at 148.

⁸⁰ Bhat (n 78 above) at 149.

Comparative legal research is a systematic exposition of the rules, institutions and procedures or their application prevalent in one or more legal systems or their sub-systems with a comparative evaluation after objective estimation of their similarities and differences and their implications

Bhat citing Wigmore, establishes that the comparative method operates in one of three forms:⁸¹

comparative *nomo scopy*-description of other systems of law;

comparative *nomo ethics*-assessment of relative merit;

comparative *nomo genetics*-study of development of the system of law in relation to one another.

This research utilizes the comparative *nomo ethics* approach because the objective of the comparison is to come up with best practices which Zimbabwe can emulate.

This approach was selected because it augments knowledge by aiding the discovery of different methods of seeing society.⁸² It widens the dimensions of critical legal research by comparing, contrasting, and exposing to larger social experiences about law and legal system. It enables better understanding of legal data

South Africa has been picked because, apart from being a neighbor of Zimbabwe, it is one of the most prominent democratic state in Africa. Its Constitution has also been lauded as containing extensive provisions guaranteeing gender equality.⁸³ Further, there are some obvious similarities between the two countries' in terms of culture and customs when it comes to women. Both are considered patriarchal societies. Zimbabwe has also borrowed from South African Roman-Dutch law, and both countries went through liberation struggles in which women became prominent social actors. Further, according to Bhat for conducting such study, broad historical grounding in the socio-cultural contexts of the legal systems is vital. Thus, an examination of South Africa's socio-cultural context is contained.⁸⁴ To better conceptualize the gender difference between South African and Zimbabwean jurisprudence, the concept of legal culture is applied. The following

⁸¹ Bhat (78 above) at 151.

⁸² E Gande *Development of Comparative Law in Italy* (2006) M Reimann & R Zimmerman, *The Oxford Handbook of Comparative law* (Oxford University Press, Oxford, 2006) at 118.

⁸³ Constitution of The Republic Of South Africa, 1996.

⁸⁴ Bhat (n 78 above) at 151.

section examines the concept of legal culture and how it can be used to juxtapose the legal systems of the two countries in question.

This study also attempts to employ the idea of legal culture in comparative exercises geared to exploring the similarities and differences amongst the legal practices and legal worlds of South Africa and Zimbabwe as far as gender equality is concerned. Klare defines legal culture as ‘professional sensibilities, habits of mind and intellectual reflexes.’⁸⁵

It queries the characteristics of rhetorical strategies utilized by participants in a legal setting, along with intellectual sensibilities that are taken as normal by its participants. Nelken defines legal culture as follows:⁸⁶

Relatively stable patterns of legally oriented social behaviour and attitudes. The identifying elements of legal culture range from facts about institutions such as the number and role of lawyers or the ways judges are appointed and controlled, to various forms of behaviour such as litigation or prison rates, and, at the other extreme, more nebulous aspects of ideas, values, aspirations and mentalities. Like culture itself, legal culture is about who we are not just what we do.

Whatever the definition may be, what is undeniable is that legal culture is relative to a social context and has the capability of shaping legal thought and perceptions in a particular society. Klare argues that legal culture colors even the impressions legal practitioners have of the convincingness or unconvincingness of certain arguments. He insists that a legal practitioner’s reasoning and justifications are residues of that practitioner’s legal culture who may not even realize that such ways of thinking are contextually bound to his or her society’s legal culture. Klare notes that it is not easy for participants in a particular legal culture to note its particularistic nature and its contingency or to bring alternative conceptions of legal thinking to bear in solving a legal problem.⁸⁷ Legal practitioners may only have partial awareness of how their legal culture shapes their professional beliefs and practices or may lack such awareness altogether and they may remain

⁸⁵ KE Klare ‘Legal Culture and Transformative Constitutionalism’ (1998) 14 *South African Journal for Human Rights* 166.

⁸⁶ D Nelken (2004). ‘The Meaning of Legal Culture’ (2004) 2 *Australian Journal of Legal Philosophy* 2.

⁸⁷ Klare (n 85 above) at 167.

that way unless they are immersed in a legal culture distinctive to their own or their legal culture undergoes transformation result from conflict.⁸⁸

Klare reasons that.⁸⁹

If cultural coding sets limits (however implicit or unconscious) on the types of questions lawyers ask and the types of evidence and argument they deem persuasive, surely this sets limits on the types of answers the legal culture can generate.

Culturally available intellectual tools and instincts handed down from earlier times, such as from the era of customary law dominated, generally limit democratic achievements. In this study, an assumption is made that the legal culture of Zimbabwe has been heavily infiltrated by patriarchy. This has made for a patently discriminatory legal system in Zimbabwe, which presides over a limited interpretation of women's rights politically and legally.

According to Nelken, the sort of investigations in which the idea of legal culture finds its place are those which set out to explore empirical variations in the way law is conceived and lived rather than to establish universal truths about the nature of law and those who seek to map the existence of different concepts of law rather than establish the concept of law.⁹⁰ This framework dovetails with the task of this study, which seeks to unearth differential access to the law and politics experientially, based on gender, while also attempting to ground the perceptions of gender in the context of the South African legal and political system. The study also endeavors to determine how Zimbabwe's patriarchal legal culture has influenced gendered perceptions of democracy and citizenship.

⁸⁸ Klare (n 85 above) at 168.

⁸⁹ Klare (n 85 above) at 168.

⁹⁰ Nelken (n 86 above) at 2.

1.7 STRUCTURE

This thesis has the following structure:

Chapter One:	Introduction
Chapter Two:	Women's Status in Pre-Colonial, Colonial and Post - Independence Zimbabwe
Chapter Three:	Examining the Equality Of women In Zimbabwe Under the 2013 Constitution
Chapter Four:	Citizenship, Democracy and Women's Equality
Chapter Five:	Women's Equality, Citizenship and Democracy in South Africa
Chapter Six:	Best Practices from South Africa and Other Recommendations

Chapter One contains the introduction wherein the research problem and the background, the research assumptions, research questions and structure of the study. The chapter introduces the key issues which the study is concerned with and basically describes how the research was born. Chapter one therefore acts as a map to the study.

Chapter two of this study focuses on the status of women in Zimbabwe during the colonial era especially their involvement in political activities. There will be an analysis of the legal frameworks of the pre-colonial era, colonial era and post-independence era focusing in part on continuities and discontinuities of legislation on gender equality.

Chapter three is an analysis of the laws and strategies which are currently in place for the advancement of gender equality. The analysis will also focus on women's equality in Zimbabwe in reference to the 2013 Constitution that has been applauded for being a women's rights friendly Constitution.⁹¹ Its far-reaching protections for women's rights are to be discussed and an analysis of how in actual fact women benefit from the implementation of these rights is also presented. Discrimination against women has been receiving international attention through advocacy at

⁹¹ T Mutangi 'The Impact of the African Charter and the Maputo Protocol in Zimbabwe' in VO Ajoni (ed) *The Impact of the African Charter and the Maputo Protocol in Selected African States* (2016) 281.

various platforms.⁹² Therefore a plethora of international Conventions and Declarations were put in place to enhance equal treatment between men and women.⁹³

In Chapter four it is argued that there is a correlation between political equality and the practice of citizenship and democracy. The connection among women's sustained inequality and citizenship and the lack of democracy in Zimbabwe is also discussed in chapter three with a focus on the effect of gender inequality on the citizenship of women in Zimbabwe and the lack of democracy in Zimbabwe. The link between equality and democracy is also critically assessed in Chapter four's discussion. The interconnectedness of democracy, citizenship and equality is also going to be articulated.

A gaze into a foreign country, South Africa, and its treatment of women's equality and status comes in Chapter Five. The discussion will trace the historical progression of the country from the colonial (apartheid) era, transitional stage and democratic South Africa. The chapter describes women's status during the South African apartheid era in terms of access to employment, education, housing, churches, hospitals, business and politics. It also describes attempts by South Africa at her independence to put women on an equal footing with men through its Constitution,⁹⁴ various domestic legislation and ratification of International Conventions⁹⁵ and Declarations and Regional Protocols.

In chapter six some best practices from South Africa and other recommendations are suggested for Zimbabwe. The chapter examines how Zimbabwe can resourcefully capacitate human rights institutions and state machinery on women's rights and embark on a Constitutional reform that tackles issues like paternity leave, the election of Cabinet Ministers and the composition of democratic commissions. The chapter also offers recommendation on how Zimbabwe can embark on the alignment of legislation with the Constitution especially of those laws that adversely affect

⁹² International Human Rights Advocacy available at <https://www.theadvocatesforhumanrights.org/mechanisms>. (accessed on 16 November 2018).

⁹³ International Human Rights Advocacy (n 92 above).

⁹⁴ The Constitution of The Republic of South Africa 1994.

⁹⁵ South Africa ratified the Convention on the Elimination of all forms of Discrimination against Women (CEDAW) http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en (accessed on 24 August 2016).

the status of women and to enact laws which enhance women's equality. Such laws may include affirmative action laws in education, employment and politics.

CHAPTER TWO

WOMEN'S STATUS IN PRE-COLONIAL, COLONIAL AND POST- INDEPENDENCE: ZIMBABWE

2.1. INTRODUCTION

This chapter addresses the first research question concerning the status of women and gender inequalities in Zimbabwe before colonisation, during the colonial era as well as after independence. The main focus is on women's involvement in politics and in positions of authority, their social and legal status and their contribution to the country's development. Aspects of the gendered power relations between men and women in Zimbabwe are examined under the spotlight of the Zimbabwean Constitution No 1 of 1980 (1980 Constitution). The chapter's focus here is on the complexity that the 1980 Constitution has created by exempting customary law from the constitutional prohibition against discrimination. Its contribution towards the persisting gender inequalities needs to be unpacked.

It is argued in this chapter that even after Zimbabwe had ratified International Conventions on women's rights which prohibit discrimination on any basis, culture in Zimbabwe retains a superior grip on other rights affecting women, to the demise of women's social status. In examining these issues, the chapter recognises efforts made to improve the situation through policies and judicial reforms, yet it suggests a need for further improvement. An in-depth illustration of why the legal reforms at independence did not produce any major changes to the status of women is proffered in the penultimate section. Thereafter, the chapter concludes by considering the extent to which the status of women was affected by the colonial and post administration and goes on to question whether there was any meaningful improvement after 1980 as far as women's rights are concerned.

2.2. THE STATUS OF WOMEN IN THE PRE-COLONIAL ERA

In the history of pre-colonial Zimbabwe, women were excluded from access to land in their own right.¹ The social status of women was strongly influenced by African customary practices which promoted male domination, as they still do in present day Zimbabwean society arguably. This pattern of male domination has inevitably affected women's economic as well as political participation. Historically, women have been deprived of control over the means and the forces of production for instance in key economic sectors such as agriculture and mining. This is despite the fact that they make up a labour force crucial for the success of these activities.²

Many scholars attribute women's privation of direct control of the means of production and the family property to the practice of payment of bride wealth (*lobola/ roora*).³ Among both the Shona and Ndebele speaking people in Zimbabwe, it is customary that men pay lobola to their bride's parents before marriage.⁴ Traditionally, the entire clan often helped young men acquire cattle to pay prospective fathers – in – law and lobola payment marked unification of different kinship groups. The new husband's family also considered marriage as the acquisition of a domestic labourer and child bearer. Bride price transferred rights to a woman's labour and reproductive capacity from her own family to that of her husband and compensated her family for this loss.

According to the Zimbabwean Marriage Guidance Society, *lobola* (bride prize) is the biggest obstacle to the attainment of equality between men and women.⁵ It is contended that the concept of bride prize implies that 'I paid for you so we cannot be equal.'⁶ Moreover the payment of bride prize has also morphed into a profit – making venture whereby fathers demand huge sums of

¹ AP Cheater 'The role and position of women in pre-colonial and colonial Zimbabwe', Paper presented at the workshop on the Role of Women in National Rehabilitation and Development, sponsored and organized by UNESCO and the Zimbabwean Ministry of Community Development and Women's Affairs. Harare, November (1985). Available at <https://opendocs.ids.ac.uk/opendocs/handle/123456789/9977>. (accessed on 24 August 2018) 66.

² Cheater (n 1 above) at 66.

³ Cheater (n 1 above) at 66

Shenje-Peyton A. 'Balancing Gender, equality and Cultural Identity: Marriage Payments in Post-Colonial Zimbabwe' (1996) 9 *Harvard Human Rights Journal* 116.

⁴ GW Seidman 'Women in Zimbabwe: Post Independence Struggles (1984) 10 *Feminist Studies* 421.

⁵ Zimbabwean Marriage Guidance Society Available at www.africanadvice.com (accessed on 2 May 2017).

⁶ 16th Annual Human Rights Report Submitted to Congress of the United States of America (16th Annual human Rights Report) (1991) available at <http://heinonline.org/HOL/License> (accessed on 15 March 2017).

money for their daughters' hand in marriage.⁷ This inevitably objectifies women and reduces them to mere commodities, with a price tag set by the father for the prospective husband. It is argued that the notion of *lobola* promotes the domination of women 'throughout their lifetime' by their fathers and then later by their husbands.⁸ Bride prize becomes the foundation of all oppression that would ensue in the marriage as the parties are not at par in status when the marriage begins. A husband is perceived as having bought the services of the wife by paying *lobola*. In the context of a marriage, women are relegated to reproductive and expressive roles traditionally set apart as female roles such that they are left with little time to pay attention to economic and political livelihoods.⁹

Pre-colonial society had a strong impact on the culture and customs of present-day Zimbabwean society, particularly as far as family structure and personal relationships are concerned.¹⁰ There were also numerous restrictions over female sexuality in traditional society. Men could fine other men for seducing their wives or daughters and the damage payment would go to the wife's father or husband, not to the woman herself.¹¹ Polygamous marriages were common and they were perceived as a symbol of a high status of a man.¹² Having numerous wives was considered as a sign of economic prosperity as well as a guarantee of a larger, more prosperous family. Even in these polygamous unions, *lobola* payment gave husbands legal control over wives, their children and their wives and children's labour.¹³

Additionally, in the pre-colonial era there existed other demeaning customary practices such as the use of women to appease avenging spirits (*ngozi*). This would normally happen when a member of a family committed murder and then in a bid to recompense the crime, the family of the perpetrator would have to give a woman to the family of the victim to pacify the victim's avenging spirit. In the Annual Human Rights Report the customary practice of using women in appeasement rituals is considered to be one that exploits women and regards them as objects that can be traded

⁷ 16th Annual Human Rights Report (n 6 above).

⁸ Shenje-Peyton (n 3 above) at 109.

⁹ Shenje-Peyton (n 3 above) at 109.

¹⁰ Seidman (n 4 above) at 419.

¹¹ Seidman (n 4 above) at 421.

¹² Seidman (n 4 above) at 421.

¹³ Seidman (n 4 above) at 422.

as circumstances demand.¹⁴ Interesting to note is that although women were normally not responsible for such kinds of heinous and violent crimes, they are the ones who ended up paying for them. Such kinds of crimes were committed by men normally. More so, a woman would not be consulted when a decision to use her in an appeasement ritual was being made. Her status in the new family of the victim, which she would be forced to join, was as that of a slave and it was up to the new family to decide how to receive her and treat her. In some cases, any member of the receiving family would marry her so that she bears children to replace the deceased.¹⁵

The pre-colonial era systematically excluded women from formal, politico- judicial authority roles which, as one of its functions, controlled the allocation of land.¹⁶ Women had some family roles which were less powerful and non-influential compared to those of men. For example, aunts were responsible for educating their brothers' daughters in their reproductive and caregiver roles and in any other special skills to be used in the household. Women's role within the family was limited to that of mothers to their children and wives to their husbands. Because they were deprived of property ownership and therefore economically disempowered, women experienced more difficulty than men in improving their stature through accumulating property.¹⁷

Arguably the most interesting and yet ambiguous role of political authority traditionally occupied by women in the pre-colonial period was that of spirit mediumship. A famous example in this respect is that of Charwe, the medium of Nehanda who was executed by the colonial administration in 1898 for her role in the death of a Native Commissioner during the First Chimurenga.¹⁸ Spirit mediums lived a life separate and dissimilar from regular people. From the moment a woman was selected to be a spirit medium she had to terminate sexual contact with her spouse. The medium and her spouse would move into separate quarters in order for the medium to meet the demands of the spirit possessing her.¹⁹ Consequently the medium's reproductive roles would cease and all other ordinary domestic chores such as child care would be carried out by aides.²⁰ The medium's

¹⁴ 16th Annual Human Rights Report (n 6 above).

¹⁵ 16th Annual Human Rights Report (n 6 above).

¹⁶ Cheater (n 1 above) at 67.

¹⁷ Cheater (n 1 above) at 67.

¹⁸ Cheater (n 1 above) at 67.

¹⁹ Cheater (n 1 above) at 68.

²⁰ Cheater (n 1 above) at 68.

spiritual authority, for which she was given due reverence and respect, overrode the previous social status of the woman.²¹ This is so because the spirits which possessed these women were considered as gravely sacred and were revered.²²

Women, when possessed especially by a male ancestral spirit, would escape the regular and mundane subordinated status of the rest of their gender and could demand from their husband's material goods and special treatment which they were normally not entitled to.²³ Spirit mediums could also control and determine the secular political power normally wielded by men. In Shona societies it was the spirit medium who chose and validated a deceased chief's successor and the medium would continue to exercise ultimate influence over the chief by virtue of her position as a spirit medium.²⁴ It can also be noted that female spirit mediums also derived political authority by virtue of their position as rainmakers.²⁵ Where female spirit mediums were believed to control rain, they challenged general norms of the powerless social position of an ordinary woman and provided an alternative perception of women.²⁶

In a few areas, however, women also wielded political authority without necessarily being spirit mediums. For example, in the Mutasa area there were headwomen who yielded so much political power in their jurisdictions.²⁷ Their leadership prowess and capacity to govern was applauded by many scholars as exceptional.²⁸ However these headwomen were not allowed to marry although they could have sexual relations with any man they chose and they were not committed to one man. For this reason, they were regarded as women of loose morals. These incidences of headwomen in power as observed in Mutasa and other areas in Umtali were however just an exception to the rule, otherwise women were generally excluded from areas of political decision-making which were reserved for men.

²¹ Cheater (n 1 above) at 68.

²² Cheater (n 1 above) at 68.

²³ Cheater (n 1 above) at 69.

²⁴ Cheater (n 1 above) at 69.

²⁵ Cheater (n 1 above) at 70.

²⁶ Cheater (n 1 above) at 70.

²⁷ Cheater (n 1 above) at 70.

²⁸ Cheater (n 1 above) at 70.

2.3. WOMEN'S STATUS DURING THE COLONIAL ERA

The status of African women in Zimbabwe entered into another dimension during the colonial era. Zimbabwe was colonized from 1890 -1980. During this period many factors influenced the status of indigenous African women. In the family set up, there was no major change to their status from that observed in the pre-colonial era. However, while it is admitted that women were under oppression in the pre-colonial era, gender divisions in the Zimbabwean society were intensified during colonialism.²⁹ During the 90 years of colonialism the British chose to tolerate customary family laws and did not impose their own family law regime. This position was codified in Section 56 of the Administrator's Proclamation of September 28, 1890. African customary law in many respects served to perpetuate racial differences emphasised by the colonial administration while at the same time it intensified the subordination of women to men.³⁰ Further the colonial regime restricted women's ability to control productive resources.³¹ Women's lack of access to the means of production, legitimated by laws governing their property relations had a strong bearing on women's status. As a result of this limited access to fundamental resources women were rendered economically dependent upon men.

Customary law is the indigenous law of a country and its sources are the practices and the customs of the people.³² These laws are largely ethnic in origin and they may differ from one ethnic group to the other but the broad principles in various ethnic groups' customary laws are generally the same.³³ Customary law in Zimbabwe has a great impact on personal law and its application, during the colonial era, differentiated between men and women in the areas of bride price, guardianship, inheritance, and appointment to traditional offices, exercise of traditional authority and age of majority.³⁴ Certain customs undermined women's dignity, reinforcing the treatment of women as second class citizens.³⁵

²⁹ Shenje-Peyton (n 3 above) at 111.

³⁰ Cheater (n 1 above) at 71.

³¹ Cheater (n 1 above) at 71.

³² M Ndulo 'African Customary Law, Customs and Women's Rights' (2011) 18:1 *Indiana Journal of Global Legal Studies* 88.

³³ Ndulo (n 32 above) at 88.

³⁴ Ndulo (n 32 above) at 89.

³⁵ Ndulo (n 32 above) at 89.

Under these customary laws each family was headed by the eldest male figure who, in consultation with other male family member, had a final say in major decisions of the family.³⁶ For instance, he is the one who would preside over the marriage ceremonies of members of the family. Women would thus have no say in family issues and even on the matters that would affect their lives.

Among Africans, marriage is essentially regarded as a contract between two families. As such even the dissolution of a marriage also involves the whole family group.³⁷ Once a woman gets married she would be under a social obligation to work for her husband and his family. Basically any property or possessions that would be acquired by the wife during the subsistence of the marriage would belong to the husband and even at dissolution of the marriage she would leave her possessions with the husband.³⁸ The children would belong to the husband as well and the husband was the sole guardian of the children.³⁹ This position did not only deny women an opportunity to attain economic independence, but it also reduced them to the level of slaves who would enrich their husbands by providing labour while being denied the right to enjoy fully the benefits derived.

Customarily, in the event of death of a woman's spouse during the early stages of a marriage, the family of the deceased must provide an acceptable replacement or negotiate for the dissolution of the contract. The wife is expected to respect and serve her husband's family. The young widow has to carry the burden of performing unpleasant chores around the homestead. She holds a subordinate position to everyone in the family.⁴⁰ The inequalities in the family manifest also in the form of subordination of the family of the wife to the family of the husband.

Another dimension of inequality is amongst the wives in a polygamous family whereby the youngest wife is placed in a subordinate position within the family.⁴¹ Within the husband's family, there is a hierarchy which is supposed to be observed with the father-in-law being the most

³⁶ Ndulo (n 32 above) at 89.

³⁷ MFC Bourdillar *The Shona Peoples: an Ethnography of the Contemporary Shona with Special Reference to their Religion* (1976) 52.

³⁸ Shenje-Peyton (n 3 above) at 130.

³⁹ Shenje-Peyton (n 3 above) at 130.

⁴⁰ Bourdillar (n 37 above) at 53.

⁴¹ Bourdillar (n 37 above) at 54.

respected among the males and the mother in law being at the top of the hierarchy among the females. However, within the family the father in law is the one in charge of the household and has the final say on family matters.⁴² Marriages among the Shona are primarily a contract between two kinship groups rather than two emotionally attached individuals.

Some authors however caution that assuming that women had little or no status in the traditional or African societies may be a misconception.⁴³ In this perspective, it is argued on the contrary that a woman acquires status rather than losing it through the payment of the bride price.⁴⁴ Within her own family group, a woman's marriage brings wealth and prestige to her family group. However, the status acquired by a woman through marriage does not do much to transform the status of the woman in the wider society but rather she merely attains status as a married woman in her own family. Few marriages in fact would give significant status to a woman within her husband's family. In a traditional marriage, the new wife lives as a newcomer to her husband's extended family and is under the control and direction of her husband's mother and sisters who can demand that she carries the burden of doing the chores around the home.⁴⁵

At the death of the husband, a widow is normally inherited by one her dead husband's kinsmen. In the event that she chose to be inherited, traditionally the widow was usually asked to choose whom she preferred to take her husband's place and any kinsman chosen was forbidden from rejecting her.⁴⁶ With regards to the distribution of the deceased's estates, legally it was administered under the Native Wills Act⁴⁷. According to the Native Wills Act African women were also permitted to divide their property by a will. However, it did not change the customary inheritance of male primogeniture. In the absence of a will, property and the guardianship of children would be determined by customary law which regarded women as minors. A case in point is *Dokotera v The Master of the High Court and others*.⁴⁸ This case portrays how the colonial government perpetuated the subordination of woman even in the presence of other compelling

⁴² Bourdillar (n 37 above) at 54.

⁴³ Bourdillar (n 37 above) at 68.

⁴⁴ Bourdillar (n 37 above) at 68.

⁴⁵ Bourdillar (n 37 above) at 68

⁴⁶ Bourdillar (n 37 above) at 68.

⁴⁷ Native Wills Act Of 1933

⁴⁸ *Dokotera vs The Master of the High Court & others* 1957 R & N 697.

grounds to do otherwise. In the *Dokotera* case a husband and a wife acquired a farm where both had contributed in pecuniary for its purchase. Mr Dokotela was formally employed while his wife was managing the farm. At the death of the husband, the wife was given some gratuity and movable property and the farm was given to the husband's brother who in turn passed it on to his son since he had another farm.

Legally, women were unable to present a case in court on their own but they had to be represented by a husband or by a male relative.⁴⁹ Women could not represent themselves in courts because legally they were regarded as minors and they had to be represented by a senior male relative if they were not married and if married by their husbands. In turn women had limited responsibilities for offences. A husband could also punish his wife in private by any means which included wife battering.⁵⁰ Interestingly, husbands had the right to beat their wives within limits.⁵¹ The husband was the one who was in charge of the family and all the family property would belong to him. His wife could claim nothing in the event of divorce or of the death of the husband. Sometimes even the clothes a husband had gifted to his wife could be reclaimed by the husband if the marriage was broken down.⁵² Considering this status of women socially during this period, some scholars have concluded that the traditional position of women in Zimbabwe was little better than the position of a slave.⁵³

Interesting to note also is that at the local courts themselves where the customary laws were mainly enforced by men and predominantly staffed by men and not women and these men were chosen for their knowledge and familiarity with traditional customs and norms.⁵⁴ In such a scenario, men were inclined to defend traditional patriarchal customs which favoured them at the expense of women. Thus issues that discriminated against women, such as polygamy, bride price and discriminatory inheritance practices had low chances of being given due attention and of being dealt with effectively.⁵⁵

⁴⁹ Bourdillar (n 37 above) at 68.

⁵⁰ Bourdillar (n 37 above) at 68.

⁵¹ Bourdillar (n 37 above) at 68.

⁵² Bourdillar (n 37 above) at 68.

⁵³ Bourdillar (n 37 above) at 68.

⁵⁴ Ndulo (n 32 above) at 96.

⁵⁵ Ndulo (n 32 above) at 96.

Other factors apart from tradition and customs which affected the status of women during the colonial era included access to education, limited migration to towns, urbanization and religious conversions.⁵⁶ For instance, even those girls who could find placements at schools were channelled towards fields and careers traditionally reserved for women in the West such as nursing and teaching.⁵⁷ Girls who would become pregnant during their enrolment at school would be forced to leave school, which position was retained by the Zimbabwean Government even after independence.⁵⁸ The African population of Rhodesia in the mid-1960s was subjected to severe discrimination in terms of access to education, employment, and wages as well as quality health services.⁵⁹ This caused most girls to drop out of school at a rate six or seven times higher than the rate at which boys were leaving school. Women were also harassed by settlers and policemen and suffered systematic oppression.⁶⁰

Another form of injustice which was suffered by the rural population and which affected women was that of land alienation. During the colonial era land was forcibly taken from blacks by white settlers. Chief's and headmen's traditional role of allocating land was usurped by the colonial government. Nearly 50% of all land, including most of the best land was confiscated by the State. Additionally, the State subsidized white settler's large-scale commercial farms to make Africans' produce less competitive.⁶¹ Land was then later on regulated under the Land Apportionment Act (LAA)⁶² and the Land Tenure Act (LTA).⁶³ Under these laws, whites seized the best and biggest portions of the land while blacks were given the worst land in areas that were overpopulated.⁶⁴

With regards to land rights amongst blacks, both males and females suffered the same fate because neither owned land.⁶⁵ The land was held in trust by the chiefs for the whole community. It would

⁵⁶ Cheater (n 1 above) at 71.

⁵⁷ Seidman (n 4 above) at 423.

⁵⁸ Seidman (n 4 above) at 423.

⁵⁹ RE Mazur 'Social class differential in the impact of Repression and Guerrilla War on Rural Population and Development in Zimbabwe' (1991) 25 *The Journal Developing Areas* 511.

⁶⁰ Mazur (n 59 above) at 511.

⁶¹ Mazur (n 59 above) at 511.

⁶² Land Apportionment Act of 1930.

⁶³ Land Tenure Act of 1969.

⁶⁴ L Mazingi & R Kamidza 'Inequality in Zimbabwe' in H Jauch & D Machena (ed) *Tearing us Apart: Inequalities in Southern Africa* (2011) 324.

⁶⁵ Shenje-Peyton (n 3 above) at 105.

be registered in the name of the husband in terms of the Native Land Husbandry Act.⁶⁶ The Native Land Husbandry Act curtailed the land rights of widows and divorcees. The rural population was transformed from formerly self-sufficient agricultural households into low-paid male migrant workers and unpaid female subsistence producers in the reserves.⁶⁷ Even the livestock of the whole household was registered using dipping cards which were in the name of the husband. The economy which was mainly agro-based was under the control of the colonisers who were supported by Multinational Corporations such as the London-Rhodesia (Lonrho), Anglo – American Corporation and British American Tobacco. Black men would be allowed to work in white farms and industry while women were left to do household chores.

Women were not accepted as independent farmers in their own right except when they represented an absent male relative.⁶⁸ By 1980, African women comprised only 6.8% of the total non-agricultural wage labour force. Those women who were in waged employment, were concentrated in domestic service.⁶⁹ Prostitution was a normal livelihood strategy for urban women but it marginalized the women who chose that lifestyle both in the cultural context and in the colonial administration.⁷⁰ This led to the creation of the stereotype that urban women are prostitutes unless they could prove that they are gainfully employed and this attitude persisted even after independence.⁷¹

The gendered division of labour is even apparent in the different roles played by boys and girls and men and women during the War of Liberation in Zimbabwe. Guerrillas organized all night public meetings for the purposes of political education. During these meetings blacks would also have an opportunity to elect their leaders. There was division of roles between teenage boys and teenage girls during the Second Chimurenga and this division was gendered. Whereas teenage boys lived in the bush and collected contributions of food, clothing, medicines and money for the guerrillas and guarded the guerrilla camps while the freedom fighters slept, teenage girls were

⁶⁶ Native Land Husbandry Act 52 of 1951.

⁶⁷ Mazur (n 59 above) at 511.

⁶⁸ Seidman (n 4 above) at 424.

⁶⁹ Seidman (n 4 above) at 424.

⁷⁰ Seidman (n 4 above) at 425.

⁷¹ Seidman (n 4 above) at 425.

assigned domestic duties such as cooking, washing and serving the guerrillas.⁷² These youths were also responsible for providing information to the guerrillas about the movement of the Rhodesian military and on people who could be trusted in the village and those who were sell-outs. During this period, especially around 1972-1975, these youths took up guerrilla training to join the fight against the colonial government.⁷³

With regards to the treatment of women during the war, both Zimbabwe African National Union (ZANU) and Zimbabwe African People's Union (ZAPU) recognised the Geneva Conventions and the 1977 Protocols regarding the protection of civilians during war and the treatment of prisoners of war.⁷⁴ Most women were civilians and they benefited under this protocol. This however does not mean that their status improved socially. Until the 1980s, most approaches had a negative effect on Southern African women by bringing men into the development process to the virtual exclusion of women. If women were acknowledged at all, it was in their roles as reproducers and not as producers.⁷⁵ Gender equity involves redistribution of critical productive resources of decision-making power, which in turn may affect the way decisions are reached and of authority to act on decision at all levels.⁷⁶

Of note however, is that in those areas where women were given positions of traditional authority like the Manyika headwomen, the status quo from the pre-colonial era continued.⁷⁷ These women were exceptional cases in that, as highlighted in the preceding section, no bride price was paid for them in marriage and they were not expected to remain faithful to their husbands. As such they were at liberty to acquire property in their own rights.⁷⁸ More over a woman could, and still can, obtain an important position in the government of a chiefdom by becoming a medium to a senior ancestral spirit. Except for these instances, it was unusual for a woman to hold a position of authority in Zimbabwe during colonisation. Through civilization however, it was expected that women would free themselves from subordination to their menfolk through economic

⁷² Mazur (n 59 above) at 511.

⁷³ Mazur (n 59 above) at 512.

⁷⁴ The Geneva Conventions and Additional Protocol 1949.

⁷⁵ J Dansan *Gender Lineage & Ethnicity in Southern Africa* (1997) 8.

⁷⁶ Dansan (n 75 above).

⁷⁷ Bourdillar (n 37 above) at 68.

⁷⁸ Bourdillar (n 37 above) at 68.

independence.⁷⁹ However some would be forced into demeaning professions like prostitution for them to gain economic independence.⁸⁰

During the colonial era the white settlers introduced and applied an administration system which differentiated between the Europeans and Africans. As such colonialism was premised on human rights violations and it perpetuated inequality.⁸¹ Two conditions were set for the application of customary law. The first was that it was applied if it was not repugnant to justice, equity, or good morality and the second was that it could be applied only if it was not in conflict with the written law.⁸² What is worrisome is not only the fact that customary law was placed at an inferior position to that of common law but also that those customs which were upheld were regarded to be parallel to justice, equity and good moral, despite their adverse effects of women status.

Weiss's contents that the colonial era adversely contributed in worsening the inferior social status of women in Zimbabwe. In her own words she says:⁸³

The White man's perception of African women was even lower than the one he had of his own women: he saw them as unchaste chattel living in a backward society.

The application and interpretation of customary law under the colonial era was distorted to the disadvantage of women. The colonialists would at times, and when it was convenient for them uphold traditional gender related norms. For example, they upheld the Shona custom of rewarding loyal soldiers with women when they officially distributed the wives of the rebellious Chief Maondera to African soldiers who helped whites in the rebellion.⁸⁴ Women's access to economic resources was reduced and they could only access most resources through their husbands or fathers.⁸⁵ In the employment sector men were allowed to work in towns or on white farms, while black women remained in the overcrowded, eroded Tribal Trust Lands where they were

⁷⁹ Bourdillar (n 37 above) at 68

⁸⁰ Bourdillar (n 37 above) at 68.

⁸¹ Ndulo (n 32 above) at 94.

⁸² Ndulo (n 32 above) at 94.

⁸³ R Weiss *The Women of Zimbabwe* (1986) 115.

⁸⁴ Seidman (n 4 above) at 423.

⁸⁵ Seidman (n 4 above) at 423.

responsible for taking care of children, the elderly and the farm from where they could make out a living.⁸⁶

2.4. THEORISING GENDER INEQUALITY: THE FEMINIST PERSPECTIVE

Feminism sheds light on these historic inequalities alluded to here. There are many different strands of feminism including liberal feminism, radical feminism, Marxist-socialist feminism and black feminism.⁸⁷ However a description of the tenets of each feminist school of thought is beyond the scope of this thesis. My interest is how feminists as a broad category conceptualise the different politico-legal status of women and how this explains women's historic disenfranchisement in the political landscape of Zimbabwe along with legal restrictions on their freedom. Of particular interest is feminist legal theory, which comes close to explaining the different politico-legal status of men and women in society.⁸⁸

Feminists like liberal feminism maintain that women's unequal access to legal and political institutions, along with economic and social institutions, causes women's oppression. They argue for women's equal legal rights and participation in the public spheres of education, politics, and employment.⁸⁹ Feminists distinguish between gender and sex. Sex is understood to refer to the biological differences between men and women. The two sexes are differentiated from each other by reference to sexual and reproductive organs. Gender on the other hand is understood to refer to the social status of men and women. The genders are differentiated by their social roles of masculinity and femininity.⁹⁰ Feminists subscribe to the view that differences between men and women are sponsored by socially produced ideas about what it means to be a male or what it means to be a female. It is these different, socially constructed gender expectations which have led to the differential treatment of men and women legally and politically in countries like Zimbabwe.

⁸⁶ Seidman (n 4 above) at 423.

⁸⁷ KC Jones & M J Budig 'Feminist Theory' in Vincent N. Parrillo (ed.) *Encyclopedia of Social Problems* (2008) 1.

⁸⁸ Ruth Fletcher, (2002). Feminist Legal Theory. At 1 <https://www.researchgate.net/publication/277248454>. Accessed 18 January 2019

⁸⁹ Jones & Budig (n 87 above) at 1.

⁹⁰ R Fletcher (2002) at 7

According to Fletcher, feminist work has pointed out the need to question the norms and values of law and to enter debates over the meaning of values such as equality, justice and freedom which requires a substantive engagement with the discipline of politics among other disciplines.⁹¹ This gender/ sex dichotomy is used to justify the naturalness of women's responsibility for domestic tasks and men's responsibility for public tasks.⁹²

Feminists have also criticized the public/private divide for its justification of non-intervention into the domestic, familial realm of interpersonal relationships, leaving women vulnerable. This idea that people are entitled to make their own personal choices without legal interference has contributed to the characterization of personal relations as a site of legal non-intervention and so legally and politically states have for long ignored the plight of women within the family. Through the feminist slogan 'the personal is political' feminists have called attention to the private sphere as a site of oppression, which warrants a political response.⁹³ Fletcher points to the disinclination to interfere in the marital relationship, in the private sphere as evidence that politically and legally, the state has at times actively or passively supported the subjugation of women.⁹⁴

It can be argued that the prevailing status quo was sponsored by norms and customary laws which determined appropriate behaviour for women. The existing jurisprudence during this period was masculine,

2.5. STATUS OF WOMEN UNDER THE 1980 CONSTITUTION

2.5.1. POLITICAL INEQUALITIES AND VIOLENCE

Zimbabwe won its independence in 1980 after a long struggle against white settlers. In the last decade of war, the white regime used all repressive apparatuses which were available to the State to retain their hold on power. Such measures included the enactment of increasingly repressive

⁹¹ R Fletcher (n 90 above) at 3.

⁹² R Fletcher (n 90 above) at 8.

⁹³ R Fletcher (n 90 above) at 13.

⁹⁴ R Fletcher (n 90 above) at 14

security legislation, strict control over access to food and land, censorship, propaganda, the assassination of guerilla leaders and the use of biological warfare.⁹⁵ After independence, military and security personnel, even those who were responsible for human rights violations, were retained. The major political challenge which Zimbabwe faced after independence, which had implications on women's human rights, was intraparty conflict within ZANU PF, which resulted in armed conflict. It culminated into a clash between two rival ethnic groups, the Shona and the Ndebele.⁹⁶ This internal armed conflict was very violent and fierce and its impact on human rights was extremely devastating.

Bochenek is of the view that the armed conflict of the independence aftermath was not strictly and accurately an ethnic issue.⁹⁷ It was considered to have its roots in the fact that two separate liberation armies the Zimbabwean National Liberation Army (ZANLA) and the Zimbabwean People's Revolutionary Army (ZIPRA) fought against the Smith regime in the struggle for majority rule. Formulation of the two liberation armies was not solely based on ethnic factors; there were also some fundamental ideological differences between the two groups and strategic differences over how to confront the Smith regime.⁹⁸ Nevertheless the composition of the two armies reflected a sharp division within the country along regional, ethnic and linguistic lines. Eventually ZANLA and its corresponding political party, ZANU led by Robert Mugabe, came to be seen as representing the Shona, ZIPRA and its political party, ZAPU led by Joshua Nkomo, was perceived as the Ndebele party.' The Lawyers Committee, in describing the activities of the dissidents in the armed conflict that came to be known as Gukurahundi said:⁹⁹

[T]he rebels...move under cover of darkness in groups of rarely more than half a dozen, periodically emerging from the bush to the ambush a bus or attack a village, blow up an important transport or fuel line ,or sabotage a fledgling government development project. Their tactics are much like those used by the black nationalists who fought in the liberation struggle, including more than a few instances of brutal intimidation and thuggery: beatings of presumed 'sell-outs', rape, looting, arson, and in a number of well-documented cases, mutilation by cutting of ears and lips.

⁹⁵ MG Bochenek 'Compensation For Human Rights Abuses In Zimbabwe' 26 *Columbia Human Rights Law Review* 485.

⁹⁶ Bochenek (n 95 above) at 485.

⁹⁷ Bochenek (n 95 above) at 485.

⁹⁸ Bochenek (n 95 above) at 485.

⁹⁹ Bochenek (n 95 above) at 490.

Dissident activity was often shockingly brutal and attracted international condemnation.¹⁰⁰ Perpetrators of the armed conflict/dissidents were not easily identifiable. However, the Lawyers Committee reported that the victims felt that they were being victimized by government soldiers disguised as dissidents.¹⁰¹ It was believed that the army would then accuse people of assisting dissidents or failing to report their presence in the area. By 1983 the number of civilians killed was approximately 450 to 1500 and up to 400 local ZAPU officials and supporters, disappeared.¹⁰² In 1984, from February to April the government imposed a curfew in Matebeleland.¹⁰³ This crisis in Matebeleland ended in late 1987 with the Unity Accord signed by Mugabe and Nkomo, agreeing to merge their political parties (ZANU and ZAPU). This agreement was accompanied by an amnesty for the dissidents. ZAPU leader, Joshua Nkomo, who had refused to join Mugabe's government in 1980, accepted the post of vice president.

A government-initiated investigation on human rights abuses perpetrated in Matebeleland was conducted. However, the report was never made public. In 1990, through an amnesty, the government pardoned government forces for criminal liability and human rights abuses they committed. This amnesty was regarded by many as an act of self-absolution. Within the first decade of independence, the ruling government focused on securing its position by eliminating internal threats using any and all means necessary. This involved use of heavy-handed tactics which violated human rights values and principles. The ruling party had to deal with the pressures caused by a growing disaffection among demobilized army members and by the uneasy coalition of two parties formed from the leadership of two separate armies of liberation.¹⁰⁴ These violent conflicts affected women because women were defenseless and most of them were left as widows as their husbands were killed. It would appear the government's efforts and attention after independence were not focused on the plight of women or on basic human rights for that matter. Their agenda was securing power and positions of influence. The Executive also seemed reluctant to incorporate women in governance and most positions of power in the government were reserved for men.

¹⁰⁰ Bochenek (n 95 above) at 485.

¹⁰¹ Bochenek (n 95 above) at 492.

¹⁰² Bochenek (n 95 above) at 495.

¹⁰³ Bochenek (n 95 above) at 495.

¹⁰⁴ Bochenek (n 95 above) at 485.

Prior to independence ZANU had, through its leadership, promised and emphasized the need of the improvement of the social position of women in the independent Zimbabwe. Black Zimbabwean women needed emancipation not only from racial and economic oppression but also from gender inequalities.¹⁰⁵ Contrary to this commitment, in 1983 some women were detained in temporary police camps during a clean-up operation which was launched by government to tackle prostitution in Zimbabwe.¹⁰⁶ During this period, women suspected of solicitation were picked from streets, hotels and cinemas and from their homes and would be released upon production of either marriage certificates or proof of employment. Failure to produce these documents would result in them being sent to rural resettlement areas. This operation unfortunately also affected innocent women. An example given by Seidman is that of two hundred women in Mutare who were arrested on their way to work at a factory and were held at a football stadium until their employer facilitated their release.¹⁰⁷ Operation Clean-up was perceived as a strategy to strengthen family values in the country. The assumption was that if prostitutes were removed from the streets men or husbands would go home with a full pay.¹⁰⁸ Little consideration was paid to women's rights during this campaign.

A glimpse into the Constitution adopted by the country after independence reveals a general disdain for women status and their political freedoms. Their constitutional disenfranchisement speaks to the restrictive politico-legal space which this thesis is interested in. Through the enactment of the Zimbabwean Constitution Amendment No 1 of 1980 (hereinafter referred to as the 1980 Constitution) a new era of constitutionalism was ushered in the administration of the country. However, this Constitution was weak and largely perceived as conservative, especially with regards to women's plight. Zimbabwe, unlike other African countries at their independence, failed to embrace a well-balanced constitution.¹⁰⁹ For example Kenya's 2010 Constitution and South Africa's 1996 Constitution offer the best test of constitutionalism with elaborate fundamental rights for women guaranteed.

¹⁰⁵ Seidman (n 4 above) 430.

¹⁰⁶ Seidman (n 4 above) 430.

¹⁰⁷ Seidman (n 4 above) 430.

¹⁰⁸ Seidman (n 4 above) 434.

¹⁰⁹ L Juma 'Chieftainship Succession and Gender Equality in Lesotho: Negotiation the right to equality in a jungle of pluralism' (2013) 22 *Texas Journal of Women and the Law* 169.

Once a Constitution is weak in rights protection, rights enforcement cannot be guaranteed. The 1980 Constitution was a delicate text, which in its framing, sought to balance two ‘conflicting’ value systems; traditionalism and democracy.¹¹⁰ Traditionalism paradoxically has a strong attachment to patriarchy which promotes and supports male dominance yet democracy is strongly supportive of values such as equality, freedom and justice. Negotiations of 1980 were done purely on a political platform.¹¹¹ Major political parties were mainly concerned with winning elections and positioning themselves to benefit from the perceived new democratic dispensation. In the process they overlooked a re-examination of the gender-blind character of colonial jurisprudence. Little attention was paid to the future role of customary law, much less women’s position in it. It seems that the main political actors hoped that human rights concerns, in particular those affecting women, would resolve themselves once democracy was restored.¹¹²

Resultantly, some of the institutions, policies and customs, which were not necessarily supportive of women’s democracy, were left intact. The Constituent Assembly, tasked with reviewing the Constitution, merely resurrected the 1966 version of the Constitution.¹¹³ There was no collation of views from women’s groups, neither was there any substantial consultation done on constitutional issues.¹¹⁴ The assembly had no expertise to undertake a constitutional review. For instance, they lacked the sophistication to balance competing human rights and other issues of social interest. Therefore the 1980 constitution failed to put Zimbabwe on a solid democratic path thereby failing to create robust framework for protection of women rights.¹¹⁵ It simply re-enacted the old-order of gender oppression and suppression.

The 1980 Constitution compromised women’s human rights and dignity in favour of customary law. Customary law and human rights, though seemingly divorced concepts, could have been balanced in appreciation of the pervasive influence they have on gender power relations.¹¹⁶ However, the 1980 Zimbabwean Constitution neglected to marry these concepts.¹¹⁷ Its provisions

¹¹⁰ Juma (n 109 above) at 162.

¹¹¹ Juma (n 109 above) at 167.

¹¹² Juma (n 109 above) at 167.

¹¹³ Juma (n 109 above) at 167

¹¹⁴ Juma (n 109 above) at 167.

¹¹⁵ Juma (n 109 above) at 167.

¹¹⁶ Juma (n 109 above) at 171.

¹¹⁷ Juma (n 109 above) at 169.

upheld customary law as *sui generis* in relation to the status of women. It basically made infringement of women's rights constitutional. I aver that this had direct and indirect ramifications for women's socio-economic and politico-legal status.

The Zimbabwean Constitution of 1980 allowed for the application of customary law in section 23 (3) which provides as follows:

(3) Nothing contained in any law shall be held to be [discriminatory] to the extent that the law in question relates to any of the following matters:

(a) matters of personal law.

(b) The application of African customary law in any case involving Africans or an African and one or more persons who are not Africans where such persons have consented to the application of customary law in that case.¹¹⁸

Leaving women to the fate of customary law in this manner meant they were not constitutionally protected from discrimination. The 1980 Zimbabwean Constitution in other words legalised women oppression under the auspice of traditional customs and denied them any legal recourse. The exclusion of matters of personal law from the equality provision was a major flaw in the Constitution which also had deleterious upshots for women's freedom. Basically, Zimbabwean independence attained in 1980 was independence of men rather than women. Women remained under the subordination and oppression of men. Ironically, women had been just as involved in the liberation struggle oblivious of the fact that they were in actual fact fighting for the freedom of men and not their own.

Women's constitutional and political exclusion emanated from their disenfranchisement during independence parleys.¹¹⁹ Pre-independence conferences and negotiations which were held between the former colonisers and the blacks mainly involved males.¹²⁰ Resultantly, men were exposed and familiarised to the public sphere of politics while women were confined to the private

¹¹⁸ Zimbabwean Constitution Act No. 1 of 1980 (1980 Constitution) (Chapter III).

¹¹⁹ M Preston *Ending Civil War: Rhodesia and Lebanon in Perspective* (2004) 25.

¹²⁰ Preston (n 119 above) at 24.

life of family. The preoccupation then was political independence and the gender equality agenda was sidelined.

Women exclusion might also have been fuelled by patriarchal ideology which, then, enjoyed great preponderance in Zimbabwean society (and still does, to a moderate extent).¹²¹ Patriarchal social systems uphold male domination and female subordination.¹²² Patriarchal ideology justified discriminatory practices such as sending boys to formal schools while girls would be groomed for domestic roles.¹²³

Moreover, women's meagre educational attainment restrained any meaningful participation in politics in the pre-colonial era. Women obtained entry into the political arena then on grounds of them being nationalists rather than for gender activism.¹²⁴ When the new Zimbabwe came into being in 1980, very few women were politically active. The first Parliament had only three female Parliamentarians out of forty.¹²⁵ This skewed proportion of men to women in Parliament was a reflection of the picture on the ground in relation to access to influential political positions.¹²⁶ However women were given their right to vote, right from the inception of independence and women's voter turnout has been increasing since then.¹²⁷ A research done by the Research Advocacy Unit in December 2011 shows that in 1980, the total percentage of women who voted stood at 20% as compared to those women who registered to vote and in 2008 it had increased to 80% of those who registered to vote.¹²⁸

The 1980 Constitution was a disgrace to women. Section 89 of the Zimbabwean Constitution of 1980 maintained the provisions of the Colonial's Administrator's Proclamation which required the application of customary law in personal law. Further this Constitution excluded gender, sex and pregnancy as a ground for discrimination. Section 23(2) provides that:

¹²¹ United Nations Development Program (UNDP) 'Millennium Development Goals Status Report' (2010) Available at <http://www.undp.org> (accessed on 21 October 2016).

¹²² K Standt 'Women on Gender' in RP Burnell & L Rakner (eds) *Politics In the Developing World* (2011) 165.

¹²³ Standt (n 122 above) at 170.

¹²⁴ Standt (n 122 above) at 171.

¹²⁵ Mazingi & Kamidza (n 64 above) 325.

¹²⁶ Mazingi & Kamidza (n 64 above) 326.

¹²⁷ Research Advocacy Unit, 'Zimbabwe women and their participation in elections' (2011) Available at www.researchandadvocacyunit.org accessed on 21 October 2016.

¹²⁸ Standt (n 122 above) at 165.

(2) A law shall be regarded as making a provision that is discriminatory and a person shall be regarded as having been treated in a discriminatory manner as a result of that law or treatment, persons of a particular description by race, tribe, place of origin, political opinions, colour or creed are prejudiced.

The same situation which existed during the pre-colonial era whereby women built an empire for men while gaining nothing for themselves continued into the new Zimbabwe. The Constitution buttressed this status quo by excluding gender and sex as a prohibitive ground for discrimination. Bourbon explains that while Section 23 of the Constitution accords protection from discrimination that emanates from the law its application, it merely prohibits discrimination in general terms.¹²⁹

Section 20 of the 1980 Constitution provides for the right to freedom of expression.¹³⁰ Freedom of expression is quite fundamental in as far as the struggle for gender equality is concerned. In *Retrofit (Pvt) Ltd v PTC & Another*¹³¹, the court expounded on the importance of the right to freedom of expression. The court listed the quadruplet purposes of the right to freedom of expression being:

- It helps an individual to attain self-fulfilment.
- It assists in the discovery of the truth.
- It strengthens the capacity of an individual to participate in decision making.
- It provides a mechanism by which it would be possible to establish a reasonable balance between stability and social change.

¹²⁹ A Bourbon 'Human Rights Litigation In Zimbabwe: Past, Present and Future African' (2003) *Human Rights Law Journal* 215.

¹³⁰ Section 20 of the 1980 Constitution provides as follows:

20 Protection of freedom of expression

(1) Except with his own consent or by way of parental discipline, no person shall be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions and to receive and impart ideas and information without interference, and freedom from interference with his correspondence.

(2) Nothing contained in or done under the authority of any law shall be held to be in contravention of subsection (1) to the extent that the law in question makes provision—

(a) in the interests of defence, public safety, public order, the economic interests of the State, public morality or public health;

(b) for the purpose of—

(i) protecting the reputations, rights and freedoms of other persons or the private lives of persons concerned in legal proceedings;

(ii) preventing the disclosure of information received in confidence;

(iii) maintaining the authority and independence of the courts or tribunals or Parliament;

¹³¹ *Retrofit (Pvt) Ltd v PTC & Another* 1995 2 ZLR 199 (SC) 212-213.

In *Re Munhumeso & Others* the court states that the freedom of expression:¹³²

lies at the foundation of a democratic society and is one of the basic conditions for its progress and for the development of every man.

Freedom of expression is quite fundamental and if people are denied this freedom in a society, democracy and equality would be compromised. The application of customary law had tremendous unwanted consequences on women's freedom of expression. As explained above the nature of the customary law was such that women were taken as minors, legally represented their husbands.¹³³ The implications for women's right to freedom of expression were disastrous. It followed that in the context of the customary law, women could not stand in public and express their views. They could only express themselves through their husbands.

2.5.2. WOMEN'S SOCIO-ECONOMIC STATUS POST INDEPENDENCE

Meaningful strides were however made towards gender equality after independence. In early 1981, the Government of Zimbabwe created a new Ministry for women affairs called the Ministry of Community Development and Women Affairs (MCDWA).¹³⁴ The MCDWA was formed pursuant to a global commitment to protect women's rights. The United Nations (UN) had convened a World Conference on Women in Mexico City in 1975. There, recommendations were made that governments were to establish mechanisms at the national level to promote the status of women.¹³⁵ MCDWA was Zimbabwe's version of a national vehicle for women's rights in the country. Key responsibilities of this Ministry included spearheading the enactment of gender sensitive laws and policies and ensuring that women's rights were upheld. In the first few years after Independence there was considerable enthusiasm regarding the improvement of the status of women. In 1984 the then Minister of Community Development and Women Affairs, Teurai Ropa Nhongo (now Dr Joyce Mujuru) made the following statement:¹³⁶

¹³² *In re Munhumeso & Others* 1994 1 ZLR 49 (SC); 1995 1 SA 551 (ZS) 557.

¹³³ Ndulo (n 32 above) at 88.

¹³⁴ Seidman (n 4 above) at 430.

¹³⁵ United Nations Divisions for The Advancement of Women (UNDAW) Report 'National Mechanisms For Gender Equality' (1998).

¹³⁶ Statement by Teurai Ropa Nhongo at the Colloquium on Women's rights in Zimbabwe (1984).

Zimbabwean women are better placed than most to demand, not to ask or beg, to be given their full rights as equal citizens in their own country. This is the heritage left behind by their sister comrades who gallantly gave their lives in the war. I believe every man in Zimbabwe has no cause to quarrel, no cause to fear and no cause to procrastinate. Justice delayed is justice denied. We have delayed for far too many years. We must move vigorously forward.

However, the Minister's statement was predicated on the euphoria of women's participation and involvement in the liberation struggle. She had not yet realised that after the war was won, the landscape had 'returned to normal'.¹³⁷ Patriarchy was once again firmly in control and the social environment had become even more hostile to women's concerns.¹³⁸

Apart from ideological constraints, the MCDWA also had serious structural limitations which included lack of adequate financial resources.¹³⁹ In most cases its allocation from the national budget was insufficient and it had to rely mainly on foreign aid. At the creation of the MCDWA, Minister Teurai Ropa Nhongo stressed the fact that only changes in the tradition and customary perception of women as mothers would pave way for full realization to women's aspirations.¹⁴⁰ The MCDWA in its first two years of inception battled with the issue of abolition of lobola payment which ZANU had promised it would deal with and end in the post-independence government.¹⁴¹ Seen as a symbol of male domination over daughters and wives, lobola was described as having changed in nature from its tradition function of bonding lineage groups to a financial transaction between individuals. The Ministry had also set up educational and income generating programs that are important in improving women's economic positions.¹⁴²

As the independence rhetoric faded however, women's progress in emancipation regressed. By 1989 the Ministry of Community Development and Women's Affairs had become a diluted department in the Ministry of Political Affairs. No standalone mandate or division for women's issues existed anymore. In 1993 the women's national vehicle was further demoted to a Department of Women in Development in the Ministry of National Affairs, Employment Creation

¹³⁷ M Cawthorne *The Third Chimurenga in Reflection on Gender Issues in Africa* (1999) 15.

¹³⁸ Cawthorne (n 140 above) at 16.

¹³⁹ Seidman (n 4 above) at 430.

¹⁴⁰ Seidman (n 4 above) at 430.

¹⁴¹ Seidman (n 4 above) at 430.

¹⁴² Seidman (n 4 above) at 430.

and Cooperatives. The Department's new parent ministry's mandate was only loosely related to promotion of gender parity. The staff compliment of this Department was six employees and it operated without a specific budget for gender-related activities.¹⁴³

In response to the Beijing Conference of 1995 which required that national vehicles for women's emancipation be situated at the highest possible level of government, the Zimbabwean government in 1997 set up a Gender Issues Department which was headed by a Minister of State in the President's Office.¹⁴⁴ In 2000, the Gender Issues Department was amalgamated with the Women's Unit in the Ministry of Employment Creation and Cooperatives to form the Ministry of Youth Development, Gender and Employment Creation.¹⁴⁵ The new Ministry had the following responsibilities:¹⁴⁶

- To mainstream and institutionalise gender in all programmes and policies
- To increase the participation of women in politics and decision making
- To promote gender equity and economic empowerment of women
- To promote an integrated approach towards the eradication of gender violence
- To establish gender desks for gender mainstreaming and monitoring the implementation of gender policies the legal status of women
- To promote gender sensitive legal framework and create awareness on laws that enhance legal status of women
- To coordinate gender-related activities of non-state actors.

In the African context woman are portrayed as second-class citizens and as inferior especially in relation to access to and control over resources and this is made possible by the patriarchal system.¹⁴⁷ Their roles are mainly reproductive roles which make it easy for men to control them and to harness their potential. Many women seem to be trapped in stereotypical roles of the

¹⁴³ C Matizha 'A stumbling Block of Foundation Builder: An Assessment of the Ministry of Women's Affairs in Promoting Women's Rights in Zimbabwe' unpublished Master's thesis University of Zimbabwe (2006) 10.

¹⁴⁴ Matizha (n 146 above) at 11.

¹⁴⁵ Matizha (n 146 above) at 12.

¹⁴⁶ Matizha (n 146 above) at 13.

¹⁴⁷ W Ncube; KC Dengeh -Zvobgo; BC Donzwa; EC Gwanzura; I Kazembe & TG Nzira *Paradigms of exclusion: Women Access to Resources in Zimbabwe* (1997) 11.

subservient and subordinate woman, serving the interests of man and constrained by positional constructs of society.¹⁴⁸ However, this is not the plight of every woman in Zimbabwe. Women in Zimbabwe are considered to have a chance to improve their social standing and to negotiate for better treatment from their husbands by taking advantage of relevant laws.¹⁴⁹ For women to be able to attain independence from men they need to have the courage to walk away from troubled or oppressive relationships.

Due to the conservative yet pervasive nature of the family institution in Zimbabwe, women are consistently found trying to build and maintain their status in both their natal and marital families. Men are not even burdened by this dilemma since they are in a better off position socially and are more likely to have unrestricted access to and monopoly over resources in the family.¹⁵⁰ Women need resources as much as men do, but women's need to access resources is in most cases severely downplayed. Women, unlike men, have to perform a diversity of livelihood activities in order to improve their economic fortunes and gain access to resources.¹⁵¹ This is the reality not only in Africa, but globally. Women's needs are not prioritised because it is expected that they will get married and their husbands will take care of their needs.¹⁵² Also, economic resources allocated to or accessed by women are overstretched because they, in most cases, continue to provide for their natal families as well as their marital families.¹⁵³

Female children are very likely to be fated to marriage at a very early age and upon marriage; they depend on their husbands for all their pecuniary needs. Women are expected to share their resources with both their natal and marital families yet in the natal families they are excluded in family resource allocation.¹⁵⁴ The persistent marginalization of women in control over marital resources forces them to consider their husbands as resources especially for their long-term future. Women end resorting to child-bearing to consolidate their positions in their marriages.¹⁵⁵

¹⁴⁸ W Ncube *et al* (n 150 above) at 11.

¹⁴⁹ W Ncube *et al* (n 150 above) at 11.

¹⁵⁰ W Ncube *et al* (n 150 above) at 12.

¹⁵¹ W Ncube *et al* (n 150 above) at 12.

¹⁵² W Ncube *et al* (n 150 above) at 12.

¹⁵³ W Ncube *et al* (n 150 above) at 14.

¹⁵⁴ W Ncube *et al* (n 150 above) at 14.

¹⁵⁵ W Ncube *et al* (n 150 above) at 14.

The word ‘resources’ is contextual and relative. Borrowing from the Oxford English dictionary the term resources can be defined as follows:¹⁵⁶

- a) A means of supplying somewhat or deficiency, stock or reserve which one can draw on when necessary.
- b) Possibility of aid or assistance
- c) An action or procedure to which one may have resources in a difficulty or emergency an expedient device.
- d) A means of relaxation or amusement
- e) Capacity in adapting means to ends or in meeting difficulties.

Despite difficulties in contextualising resources needs of two different groups of women, what is undeniable is that women in both rural and urban areas have practical gender needs.¹⁵⁷ Such resources include tangible resources such as land, housing, cattle, crops, wages and salaries. Non-tangible resources include labour, skills and knowledge. Women need to access and control resources for their advantage and advancement.

Access means, according to the Oxford dictionary, ‘way of approach or entry, right or opportunity to reach or use or visit. Access to resources may be ascribed at birth or through marriage or achieved by acquiring education and skills even in the face of exploitation of one’s sexual/reproductive capacities.¹⁵⁸ Many women are lagging behind men in terms of access to resources because their fixation is on maintaining and consolidating conjugal relationships rather than developing skills and knowledge which they can transform to economic gain. According to WILSA however, women’s capacity to access resources is a situational problem at it varies with their personal experiences, needs and expectations and opportunities available to them for access.¹⁵⁹

Women are treated as mere appendages to men in a marriage rather than equal partners. Thus, men are considered as the gateways to those resources, which compounds women’s dependence on men. Women, mainly in rural areas, regardless of their social class background, by getting married

¹⁵⁶ W Ncube *et al* (n 150 above) at 15.

¹⁵⁷ W Ncube *et al* (n 150 above) at 15.

¹⁵⁸ W Ncube *et al* (n 150 above) at 15.

¹⁵⁹ W Ncube *et al* (n 150 above) at 15.

into a man's family and moving onto the land allocated to him by his family, make marriage, in effect, their career. Their access to critical resources is mediated by men and their families.¹⁶⁰

Even when women acquired property through their own efforts they were in effect unable to manage and control such property because it would come under the possession of the man in the marriage.¹⁶¹ Thus women enjoyed usufruct rights on immovable property but control of the resources was not theirs. Men also control jointly owned resources. Regrettably this status quo has been preserved by the Zimbabwe Supreme Court in the case of *Mwazozo v Mwazozo*¹⁶² and *Jenah v Nyemba*¹⁶³. In these cases, women's economic contribution in the family was regarded as nugatory in terms of customs of and practices of not only the Shona, but by extension, among all ethnic groups within the country.

Another ironic dimension of women inequality was unveiled by WILSA in a research during the 1990s. It was discovered that women's entitlement to the care and protection of their marital families is based on their contributions in terms of labour and reproductive capacity as well as the capacity to generate personal wealth.¹⁶⁴ If a woman is lazy or cannot bear children she is likely to suffer ostracism within her marital family. Continued exclusion of women from the right to exercise control over resources, such as land and cattle is evident. Generally, there is an apparent reluctance to recognize the rights and entitlement of women under custom by the higher courts in Zimbabwe.¹⁶⁵ This continued exclusion of women from the right to exercise control over resources, such as land and cattle, perpetuates their apparent dependence on men.¹⁶⁶

Women have multiple social identities within families and across families¹⁶⁷ They are grandmothers, mothers, daughters, sisters, aunts, nieces, cousins, sisters in law and mothers-in law. Interestingly, the importance of these roles has been severely underrated Even in modern

¹⁶⁰ W Ncube *et al* (n 150 above) at 15.

¹⁶¹ W Ncube *et al* (n 150 above) at 15.

¹⁶² *Mwazozo vs Mwazozo* 1994 1 ZLR 147.

¹⁶³ *Jenah vs Nyemba* 1986 1 ZLR 138.

¹⁶⁴ W Ncube *et al* (n 150 above) at 15.

¹⁶⁵ W Ncube *et al* (n 150 above) at 15.

¹⁶⁶ W Ncube *et al* (n 150 above) at 15.

¹⁶⁷ W Ncube *et al* (n 150 above) at 26.

Zimbabwean society some families consciously discriminate against their children based on sex. Fortunately, these are becoming the exception rather than the rule.¹⁶⁸

While women regard marriage as an opportunity to earn a living and as a livelihood strategy as noted above, for the man it is symbolically an acquisition of property.¹⁶⁹ He acquires a housekeeper as well as a caregiver and he retains his productive role. The woman on the other hand is deprived of life chances and the liberty to pursue a career because of her expressive roles within the household. In *Jenah v Nyemba* it was held that property acquired during a marriage becomes the husband's property whether acquired by him or his wife.¹⁷⁰ This is legitimised by the customary practice of paying motherhood beast during *lobola* payment which symbolises transference of ownership of the woman to the man's household.¹⁷¹ Women's multiple roles within families led Stewart to argue that in those cases where a wife is responsible for both the tasks of homemaking and a career, her entitlement to a share in the joint estate could well be in excess of 50% if a realistic appraisal of the relative contributions of the spouse is made.¹⁷²

Political equality is enhanced by economic equality. Soon after independence Zimbabwe did not appreciate this fact hence the political inequalities in the current Zimbabwe. Women were also excluded from economic developmental initiatives during the period soon after independence. At this time, the economy was a vestige of the colonial epoch, founded on the philosophy of racism which promoted white supremacy.¹⁷³ The beneficiaries of the economy were whites who benefited from exploiting blacks. Black men had managed to penetrate into the economy only as part of the labour force and the majority of women were not employed. Women were the majority in the urban informal economy which constituted less than 10% of the labour force.¹⁷⁴ The colonial government did not regulate the informal sector neither did it support it.¹⁷⁵ The first post-independence economic policy was the Growth with Equity Policy of 1981 whose aim was to:

¹⁶⁸ W Ncube *et al* (n 150 above) at 28.

¹⁶⁹ W Ncube *et al* (n 150 above) at 29.

¹⁷⁰ *Jenah vs Nyemba* (n 166 above) at 138.

¹⁷¹ W Ncube *et al* (n 150 above) at 29.

¹⁷² W Ncube *et al* (n 166 above) at 32.

¹⁷³ Mazingi & Kamidza (n 64 above) at 325.

¹⁷⁴ Mazingi & Kamidza (n 64 above) at 325.

¹⁷⁵ Mazingi & Kamidza (n 64 above) at 326.

Inform the people of Zimbabwe and to enlist their participation and active support in the development process.

Mazingi and Kamidza state that this economic policy had the intention of ensuring rapid economic growth, full employment, price stability, dynamic efficiency in the allocation of resources and equitable redistribution of resources. This policy however did not have provision to address the needs of women in the economic sector. The informal sector in which women were the majority was left unregulated. Fundamentally, this policy was not gender sensitive and did not address the economic gender inequalities of the colonial era.

The Growth with Equity Policy was followed by the following economic policies:

- National Development Plan (1982-1990).
- Economic Structural Adjustment Program (ESAP) (1991-1995).
- Zimbabwe Programme for Economic and Social Transformation (ZIMPREST) (1996-2000).
- Millennium Economic Recovery Programme (MERP) and National Economic Revival Programme (NERP) (2000-2003).
- Macro-economic Policy Framework (MEPF) (2005-2006).
- Zimbabwe Economic Development Strategy (ZEDS) (2007-2011).¹⁷⁶

These economic policies and strategies were mainly aimed at improving the economy of Zimbabwe and eradicating poverty amongst the Zimbabweans, but they all lacked specific provisions that addressed women's economic empowerment. They did not address the issue of marginalisation of the female gender in Zimbabwe's development discourse historically. Although they all provided for land redistribution to all citizens, male and female, the methodology adopted was not beneficial to women as it was based on a willing buyer, willing seller basis.¹⁷⁷ Women could not afford to buy land in their own right and yet there were no funds in form of credit facility, allocated for them to be able to buy the land.

¹⁷⁶ Mazingi & Kamidza (n 64 above) at 326.

¹⁷⁷ Mazingi & Kamidza (n 64 above) at 326.

2.5.3. JUDICIAL CONTRIBUTION TO THE STATUS OF WOMEN

The 1980 Constitution, in chapter II provides a Declaration of Human Rights. However, human right issues could not be litigated in courts of all levels. Section 24(1) the 1980 Constitution of Zimbabwe provides that:

If any person alleges that the Declaration of Rights has been, is being or is likely to be contravened in relation to him (or, in the case of a person who is detained, if any other person alleges such a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may, subject to the provisions of subsection (3), apply to the Supreme Court for redress.

Then, Zimbabwe did not have a Constitutional Court and the Supreme Court was given powers to decide on matters of human rights. The Supreme Court was also there to deal with the appeals from the lower courts. This position put human rights issues on the backrow and created a backlog of human rights cases and appeal cases thereby limiting the accessibility of the Court. Failure to establish a Constitutional court which would deal with Constitutional and human rights issues was a flaw which perpetuated human rights abuse and this affected women since they were largely the victims of human rights violations.

Further the reading of section 26(3) of the 1980 Constitution alludes to the fact that laws which were in existence at the date of independence (18 April 1980) could not be challenged under The Declaration of Rights for a period of five years. This immunity took away the power of the Supreme Court to hear any matter of human rights violations which were linked to the laws of the Rhodesian era until five years had lapsed. Ultimately the Supreme Court could only deal with challenges to such laws after 18 April 1985.¹⁷⁸ Women who suffered during the colonial era had to continue without any recourse from the courts for five years.

On deciding on Constitutional matters, including human rights violations, the courts adopted a restrictive approach whereby a litigant would bear the onus to prove unconstitutionality and that

¹⁷⁸ Bourbon (n 129 above) at 202.

legislation is not reasonably justifiable in a democratic society.¹⁷⁹ In *Zimbabwe Township Developers (Pvt) Ltd v Lou's Shoes (Pvt) Ltd* the Supreme Court reaffirmed this approach.¹⁸⁰ Adrian de Bourbon regards this approach to be constraining as it makes it difficult for the litigant to establish his rights and to establish further that the violation was not justifiable in a democratic society.¹⁸¹

From the year 1985 to 2001 there were quite a number of human rights cases which were resolved by the Zimbabwean courts such that Bourbon called this period 'a golden era for human rights litigation'.¹⁸² Interesting to note however, is that during this 'golden era for human rights litigation', the Zimbabwean courts did little to mitigate discriminatory customs against women. An example of this is the case of *Magaya v Magaya*¹⁸³ an inheritance matter which was heard by the Supreme Court of Zimbabwe. Magaya, a polygamist died intestate and was survived by the eldest female child from his first customary marriage and oldest son (however being the second born child of the deceased) from the second customary marriage.

The Community Court had declared the eldest female child from the first customary marriage to be the heir and this was set aside on appeal by the High Court which declared the second born son from the second customary marriage an heir since the first-born son had declined to be an heir. The eldest female child appealed to the Supreme Court and the decision to declare the male child an heir was upheld. In upholding this decision, the Court simply applied the Constitution which did not prohibit discrimination on the ground of sex or gender. Thus, the Constitution exempted matters of marriage, adoption, divorce, burial, devolution of property on death or other matters of personal law from the section 23 (1) prohibition.

The *Magaya vs Magaya* case was a great setback on the road towards the achievement of toleration of women's rights. This case did not only disregard International law¹⁸⁴ but it reversed previous

¹⁷⁹ Bourbon (n 129 above) at 206.

¹⁸⁰ *Zimbabwe Township Developers (Pvt) Ltd v Lou's Shoes (Pvt) Ltd* 1983 2 ZLR 376 (SC).

¹⁸¹ Bourbon (n 129 above) at 206.

¹⁸² Bourbon (n 121 above) at 206.

¹⁸³ *Magaya v Magaya* (1999 1 ZLR 100 (Zim).

¹⁸⁴ Convention on the Elimination of All forms of Discrimination Against Women (CEDAW) 1979 available at www.un.org accessed on 31 May 2017.

resolutions which had made a significant contribution in the area of human rights and set a negative precedence for the courts to follow. In 1987 the courts had eliminated discrimination between male and female children in reference to intestate succession in *Chihowa vs Mangwende*¹⁸⁵ by applying the Legal Age of Majority Act¹⁸⁶. In passing its judgment in the *Magaya* case the Supreme Court disregarded the provisions of the Legal Age of Majority Act by arguing that the discrimination in that context was as a result of customary law which is endorsed by the 1980 Constitution and not as a result of being treated as a minor.

The *Magaya* case attracted national and international criticism.¹⁸⁷ Despite the Supreme Court's defensive attitude through their Chief Justice who threatened disciplinary action against lawyers proffering criticism to this matter, the Constitutional Commission was given pressure to initiate Constitutional amendment processes to disallow discrimination on the grounds of gender and sex.¹⁸⁸ While it was positive that this process was being undertaken, significant irreversible damage to the protection of the rights of women had already occurred. A follow up made on this case revealed that the daughter to the deceased who was disinherited by the Supreme Court in the *Magaya* case was then evicted from the house by the appointed heir.¹⁸⁹

The most intriguing aspect was the perpetual application of the decision of the *Magaya case* in other inheritance matters by the courts. This left women with no recourse whatsoever in this regard. A case in point in the matter *Chaumba vs Chaumba*¹⁹⁰ where a husband died and his only son died before he was appointed the heir. The Magistrate then declared a grandson to be the heir to the estate disregarding the daughter of the deceased. The daughter appealed to the Supreme Court which upheld the decision of the *court a quo*. In upholding this decision, the Supreme Court followed the Shona customs which totally disregarded the plight of women at any stage in determining inheritance.

¹⁸⁵ *Chihowa vs Mangwende* 1987 (1) ZLR 228.

¹⁸⁶ Legal Age of Majority Act 15 1982.

¹⁸⁷ F Banda 'Inheritance and Marital Rape' (2001) *International Survey on Family Law* 475.

¹⁸⁸ International Women's Rights Action Watch (1999) 12 *The Watch* available at <http://heinonline.org/HOL> (accessed on 17 March 2017).

¹⁸⁹ Banda (n 190 above) at 477.

¹⁹⁰ *Chaumba vs Chaumba* (277/97) 2002 ZWSC 15.

In 2002 the Zimbabwean court had an opportunity to change the discourse on discrimination of women in public institutions in the case of *Chaduka No. and Another vs Mandizvidza*¹⁹¹. In this matter a student at a teacher training college became pregnant after she had signed an agreement undertaking not to fall pregnant before completion of her training. The training was for three years and in her second year she entered into a customary marriage and became pregnant. Instead of her withdrawing from the college as per the terms of the contract, she approached the Court alleging discrimination on the part of the college in violation of Section 23 (1) (b) of the 1980 Constitution.

In this case the Supreme Court held that this was not discrimination on the prohibited grounds. However, the girl student was not dismissed from school on the reasoning that the contract which allowed expulsion was *contra bonos mores*. This case made a significant contribution towards improving the status of women in Zimbabwe as the court in *dictum* said that the contract was patently discriminatory in as far as it was treating male and female students differently because it only affected female students who would have fallen pregnant but not male students who would have impregnated the woman. Further the court held that the lack of maternal care facilities could not be used to justify the requirement for pregnant students to withdraw. Rather the lack of such facilities was itself a form of discrimination.

2.5.3. LEGISLATIVE REFORM AFTER 1980

After the Zimbabwean independence in 1980 there was some legislation which was enacted which significantly contributed towards the improvement of the status of women. These included the Legal Age of Majority Act 15 of 1982, Equal Pay Regulations of 1980, Labour Relations Act 1985, Minimum Wages Act of 1980, Sex Disqualification Removal Act of 1985 and the Domestic Violence Act 14 of 2006.

The Legal Age of Majority Act (LAMA) was enacted shortly after independence. It was a repeal of the Legal Age of Majority Act of 1890, which regarded women as minors under the colonial era. According to the LAMA all Zimbabweans, male, female, white or black attain full adult status at the age of eighteen. The Equal Pay Regulations were enacted to correct colonial era disparities

¹⁹¹ *Chaduka No. & Another vs Mandizvidza* 2002 (1) ZLR 72 (S).

where whites were given higher pay than blacks even for the same job. According to the new regulations, employees who were doing the same job were to be given the same pay. Incidentally, this contributed towards the elevation of the status of black women who could also now earn equal pay for doing the same job as men and whites. The Labour Relations Act 1985 provided for maternity leave for pregnant women. The difference it made was that women could now go on maternity leave for ninety days without the risk of losing their jobs. This Act set minimum wages for various unskilled occupations which incorporated many women. Seasonal workers were categorised as permanent workers for purposes of pensions and benefits. The Sex Disqualification Removal Act declared that women with the requisite qualification could not be barred from holding the same office and positions as men. The Domestic Violence Act added value to the status of women in the community as it protected them against domestic violence. Domestic violence was given a wider definition in Section 3 of the Domestic Violence Act. Moreover, all acts which were regarded as domestic violence were criminalised save for a few exceptions.

2.6. WOMEN STATUS UNDER THE GOVERNMENT OF NATIONAL UNITY

Zimbabwe's commitment to improve the status of women suffered a further setback during the era of the Government of National Unity (GNU) in Zimbabwe in the period 2008-2013. On the 15th of September 2008, the three major political parties¹⁹² signed a Global Political Agreement (GPA) under which they agreed to work together for the betterment of Zimbabwe.¹⁹³ Relevant to this study is Article VII of the GPA which had the following provisions:

7. Equality, National Healing, Cohesion and Unity

7.1. The Parties hereby agree that the new Government:

- a). will ensure equal treatment of all regardless of gender, race, ethnicity, place of origin and will work towards equal access to development for all;
- b). will ensure equal and fair development of all regions of the country and in particular to correct historical imbalances in the development of the

¹⁹² ZANU (Pf), Movement for Democratic Change under the leadership of Mr Morgan Tsvangirayi (MDC-T) and the Movement for Democratic Change which was then led by Prof Arthur Mutambara (MDC-M).

¹⁹³ Zimbabwe Global Political Agreement (GPA) 2008.

regions;

c). shall give consideration to the setting up of a mechanism to properly advise on what mechanisms might be necessary and practicable to achieve national healing, cohesion and unity in respect of victims of pre and post independence political conflicts; and

d). will strive to create an environment of tolerance and respect among Zimbabweans and that all citizens are treated with dignity and decency irrespective of age, gender, race, ethnicity, place of origin or political affiliation.

e). will formulate policies and put measures in place to attract the return and repatriation of all Zimbabweans in the Diaspora and in particular will work towards the return of all skilled personnel.

An analysis of this article reveals that while some effort to deal gender discrimination among other forms of discrimination was made, the wording of this particular article is ambiguous and lacks detail in its address of equality rights.¹⁹⁴ It has to be pointed out that the fixation during the formulation of this article was the power-struggle amongst the political parties involved, which parties were male-led. Considerations for the social status of women took a back seat since the primary agenda was for each party to be politically recognised. What happened during the independence negotiations recurred during the signing of the GPA. Women were again widely excluded from the power sharing negotiations resulting in redundant provisions for women's rights.

2.7. CONCLUSION

During the colonial and post-independence era in Zimbabwe, the pace at which the acknowledgment and conferring of the rights of women had been progressing was very slow such that the government did not achieve as much as it expected.¹⁹⁵ Considering the fate of women in sectors such as education, employment, property and land men have clearly gained more from independence than women. This is evidenced by the disproportionate distribution of resources and

¹⁹⁴ N Shvedova 'Obstacles to Women's participation in Parliament' (2002) available at <http://www.idea.int>. (accessed on 21 October 2016).

¹⁹⁵ JL Parpart 'Gender, Patriarchy and Development in Africa The Zimbabwean Case' (1995) available at <http://heinonline.org/HOL> (accessed on 17 March 2017).

access to opportunities that exists between men and women in these sectors. Interestingly however, in the employment sector women gained remarkable access to formal employment gradually after independence and managed to penetrate into the waged employment which was mainly dominated by males.

While in the pre-colonial era women were treated as reproducers and producers, colonial policymakers treated them as mothers and care givers of the family.¹⁹⁶ Colonial administrators differentiated between girls and boys. During the colonial era, women were never accorded full legal rights. Instead they were lowered to the rank of a minor such that they could not make important decisions on their own without the participation and consent of their husbands. Minority status given to women during the colonial era created disparities in power relations between men and women, which granted men power and control over women. In fact the combination of customary law, which subjected women to male dominance and colonial rule, which was characterised by racism left women more oppressed than they were before.¹⁹⁷ More so, black women were trapped in a cycle of oppression because even at the death of a husband customary inheritance law regarded the wife of the deceased husband as inheritable property which could be passed on to an heir and then become the wife of that heir or of any other member of the family if the heir was a son.¹⁹⁸

Apparently, the division of role between men and women was not strictly observed during the liberation struggle. Women especially those between 15-24 years joined the liberation struggle during the first years of the war. Women in the guerrilla initially served mainly as support staff, cooking and carrying supplies.¹⁹⁹ As time went by women were also trained as soldiers and by 1978 there were no sexual divisions in the camps. All tasks, such as agricultural activities and domestic and office duties were shared between men and women equally.²⁰⁰ In recognition of women's efforts Teurai Ropa Nhongo was given the position of a commander. Nhongo said, concerning equality of men and women after independence.²⁰¹

¹⁹⁶ Seidman (n 4 above) at 421.

¹⁹⁷ Shenje-Peyton (n 3 above) at 112.

¹⁹⁸ Shenje-Peyton (n 3 above) at 112.

¹⁹⁹ Seidman (n 4 above) at 426.

²⁰⁰ Seidman (n 4 above) at 426.

²⁰¹ Seidman (n 4 above) at 426.

In the struggle we were given the same responsibilities as men. The women shared power, determination, that they were not afraid. If women were comrades and equal to men during the struggle, then we should also be considered as comrades and equally reap the fruits of that struggle.

Moreover the war experience and the exposure of many Zimbabweans, who had been exiled during the war, to Western feminism during the years of the independence struggle created within ZANU a new awareness of women's needs.²⁰² During the liberation struggle both men and women fought on the same battlefield and during this time traditional customary laws dictating the social statuses of women and men were suspended.²⁰³ At this point in the history of Zimbabwe, women were given opportunities to showcase their potential as human beings at par with men. Shenje puts it in a more elaborative way and says: 'women began to feel not only equal to men but the same as men'.²⁰⁴

ZANU leadership after independence admitted that there was a need to transform negative aspects of Zimbabwe's own past in relation to gender inequality.²⁰⁵ Although ZANU agreed that colonialism had deprived women access to the means of production, feminists in government refrained from challenging gender ideologies and sought only improvements within the framework of existing gender relations.²⁰⁶ Since the independence of Zimbabwe, the ruling party has attempted to change women's position without changing the existing gender hierarchy within the family and society.

In terms of education, although few blacks enjoyed unrestricted access to education, girls were far less likely to receive formal education than boys. In 1984 60% of the nation's three million illiterates were women. While women advocacy groups continue to call for adult literacy programs the improvement of education in women was slowly improving.²⁰⁷

²⁰² Seidman (n 4 above) at 426.

²⁰³ Shenje-Peyton (n 3 above) at 115.

²⁰⁴ Shenje-Peyton (n 3 above) at 116.

²⁰⁵ Seidman (n 4 above) at 426.

²⁰⁶ Seidman (n 4 above) at 430.

²⁰⁷ Seidman (n 4 above) at 421.

The Ministry of Community Development and Women Affairs (MCDWA) which was established at independence did not do much to improve the status of women. It was responsible for facilitating the involvement of women in national development through the removal of all legal, cultural and socio-economic barriers that hindered the political participation of women. However because there exists a thin dividing line between government and the ruling party, the MCDWA's mandate was diverted from its primary agenda of catering for the social welfare of women to that of the party mobilization, thus hindering the ministry's efforts and achievements.²⁰⁸ This shift in focus became even clearer in 1990 when the Department of Women Affairs was moved from the Ministry of Corporate and Community Development to the Ministry of Political Affairs and from then on the Department concentrated on political mobilization of women to bolster the support base of the ruling party. This compromised other initiatives which were aimed at improving status of women socially and economically.²⁰⁹

After independence, Zimbabwe, through the MCDWA, advocated for strengthening family ties, the family unit and women's role as mothers, in order to preserve culture and maintain the social identity of Zimbabweans. Despite the fact that the Zimbabwe government established a department within the Office of the President and Cabinet to monitor the implementation of the gender policy there was no gender policy in place until 2000. There was a pronounced lack of political will to effectively address women affairs which translated into half-hearted measures to do the same. Since independence governmental departments set up for the purposes of dealing with gender issues underwent continuous changes of names, mandate and status. At first it was MCDWA whose mandate was broad enough to accommodate all issues affecting women's status and all forms of gender inequalities and to address them. In 1990 it was then changed to Ministry of Political Affairs which mainly focused on women political inclusion leaving other strategic and practical gender needs of women out of its purview.

In the next chapter I turn to how the position of women was affected by the 2013 Zimbabwean Constitution.

²⁰⁸ SR Sandusky 'Women's Political Participation in Developing and Democratizing countries: Focus on Zimbabwe' (1999) 5 *Buffalo Human Rights Review* at 262.

²⁰⁹ Sandusky (n 208 above) at 262.

CHAPTER THREE

EXAMINING EQUALITY OF WOMEN IN ZIMBABWE UNDER THE 2013 CONSTITUTION

3.1. INTRODUCTION

As evinced from the discussion in chapter one, the genesis of women's marginalisation in post-independent Zimbabwe can be traced back to the gender-blind independence negotiations of Zimbabwe. Gender issues were not given the attention that they rightly deserved. Thereafter this form of exclusion was perpetuated by the 1980 Zimbabwean Constitution that promoted discriminatory customary practices. Cognisant of the fact that the 1980 Constitution was inadequate in as far as addressing the issues of differential treatment between men and women was concerned, concerted efforts were made to embrace women's rights in the Constitution of Zimbabwe Amendment (No.20) Act 2013 (2013 Constitution).¹ In that regard the main research focus of this chapter is to explore how regional and international instruments and the 2013 Constitution currently guarantee equality between men and women in Zimbabwe. It is pointed out in this chapter that although Constitutional and State policy measures are important tools in the fight for the protection of women's rights, the role of International and Regional Conventions on human rights, as sources of social policy, must not be underestimated or ignored.² A look at International and regional instruments commences the discussion in this chapter considering their role in improving women's status mainly politically and legally, in Zimbabwe

Equality provisions in the 2013 Constitution are discussed with particular focus on to the ways in which women have benefitted from them. Equal rights and suffrage guarantees are, in most countries, constitutional provisions that directly apply to women.³ Admittedly the law is an important and necessary tool that can be used to improve women's status.⁴ According to liberal

¹ Constitution of Zimbabwe Act 1 of 1980 (1980 Constitution).

² PM Crotty 'Legislating Equality' (1996) 10 *International Journal of Law, Policy and the Family* 321.

³ Crotty (n 2 above) at 319.

⁴ Crotty (n 2 above) at 320.

feminists, the law can be a starting point and a basic foundation for the achievement of equal rights.⁵ However having the requisite law in place is one thing and putting it into practice is another. In other words, implementing gender equality laws to the extent that they meet the practical gender needs of women and improve their status of women is not an easy process. An analysis of the implementation of the 2013 Constitution in matters germane to women's equal rights becomes inevitable to ascertain the extent to which it has in actual fact addressed women's marginalisation in Zimbabwe. Judicial adjudication on the status of women and the role of state machinery in the enhancement of women's rights are also part of this chapter. Their role shall be discussed in the penultimate section of this chapter. In conclusion it is pointed out that the law alone cannot guarantee equality between men and women in Zimbabwe. Women need to have equal access to citizenship and democratic participation for them to enjoy equality fully.

The 2013 Constitution alludes to the importance of international and regional instruments. Section 326 of the constitution states that customary international law is part of the law of Zimbabwe, except where it contradicts the constitution or an act of parliament. The section mandates courts to adopt reasonable interpretation of legislation consistent with customary international law. Section 327 however states that an international agreement ratified by the President is not binding unless it has been approved by Parliament. Further, it does not form part of the law unless it has been incorporated

3.2. WOMEN'S EQUALITY: INTERNATIONAL AND REGIONAL INSTRUMENTS

Women's status and gender inequalities were first recognised on international platforms and then later gained regional attention in Southern Africa. This section contains an examination of international and regional instruments germane to the women's rights discourse, the purpose being to establish international best practices when it comes to women's politico-legal rights. Pointedly, since independence Zimbabwe had been reluctant to ratify some international instruments on gender equality until 1991. 1991 marked the genesis of Zimbabwe's commitment to improve

⁵ Crotty (n 2 above) at 320.

women's status and recognise their rights. Zimbabwe is a signatory to a number of regional and international conventions that promote gender equality. Relevant instruments are:

- International Convention on Civil and Political Rights (ICCPR).⁶
- Convention on the Elimination of All forms of Discrimination against Women (CEDAW).⁷
- Protocol of the African Charter on Human and People's Rights on the Rights of the Women.⁸
- SADC Protocol on Gender and Development.⁹

These instruments provide guidelines and broad frameworks on measures that are supposed to be taken to advance women's rights by member states. Hereunder the above-mentioned instruments are discussed in turn. The discussion highlights the contribution these conventions have made in improving women's equality and politico-legal status in Zimbabwe.

3.2.1. International Convention on Civil and Political Rights (ICCPR)

The first human rights instrument of the United Nations was the Universal Declaration of Human Rights (UDHR) that was adopted in 1948.¹⁰ The UDHR deals with the provision of human rights in general with no particular attention paid to women's rights, hence its exclusion from this chapter. However, it is acknowledged that its existence laid the groundwork for the birth of the ICCPR. The International Convention on Civil and Political Rights (ICCPR) was drafted as a follow up measure to help operationalize and implement the UDHR.¹¹ The ICCPR came into force in 1976 after meeting the required 35 ratifications. It has 53 articles in total of which 23 articles provide for various rights. Among them is the right to equality before the law in Article 26 which provides as follows:

⁶ International Covenant on Civil and Political Rights adopted by the United Nations general Assembly with resolution 2200A (XXI) on 16 December 1966 (ICCPR).

⁷ Convention on the Elimination of All forms of Discrimination against Women adopted in 1979 by the United Nations General Assembly (CEDAW).

⁸ Protocol of the African Charter on Human and People's Rights on the Rights of the Women adopted on July 11, 2003 (ACHPRRW).

⁹ Southern African Development Community Protocol on Gender and Development adopted in August 2008 (SADCPGD).

¹⁰ The Universal Declaration of Human Rights was adopted on 10 December 1948 under the United Nations General Assembly Resolution 217 A (III) (UDHR).

¹¹ UDHR (n10 above).

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any 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.

This article is an extension of Article 7 of the UDHR. Article 7 provides that ‘all are equal before the law’. Article 27 of the ICCPR has the same provisions but with prohibited grounds of discrimination. Among those grounds for discrimination are sex and gender. This article spells out the principle of equality which incorporates substantive equality and indicates that equality and non-discrimination are separate rights. As stipulated in the application clauses, States Parties are bound to uphold every right in the ICCPR equally.¹²

Zimbabwe ratified this treaty in May 1991, more than a decade after it attained independence. However, an analysis of the agreement reveals that it did not assist women in Zimbabwe as much as it should have because discrimination against women persisted in Zimbabwe even after the State had already ratified the ICCPR. For instance, the previously cited case of *Magaya vs Magaya*¹³ which perpetuated discrimination against women in inheritance laws was handed down in 1999; eight years after Zimbabwe became a signatory of the ICCPR.¹⁴ This may have been caused by the fact that the ICCPR, with regards to its application, does not place an obligation on State signatories to incorporate its provisions into domestic law. It is the discretion of a State to decide when and how it will incorporate international principles into domestic law. The existence of this loophole in an international law of such great substance in the women’s rights discourse is of great concern.

International treaties such as there are also limited by a general lack of awareness by women themselves of how they could take advantage of them. For instance, Zimbabwean women appear unaware of the existence of the Individual Complaints procedure provided for by the ICCPR. This

¹² Article 2 (2) of the International Covenant on Civil and Political Rights provides that State parties undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin property, birth or other status.

¹³ *Magaya v Magaya* 1999 (1) ZLR 100 (Zim).

¹⁴ *Magaya v Magaya* (13 above) at 100.

procedure gives women recourse against the State in the event of rampant abuse of their rights but it has not been engaged by Zimbabwean women up to date.¹⁵ In cases where they are aware of its existence women may be hampered from utilising such opportunities by lack of resources. As such the ratification of the ICCPR remains a superficial gesture which gives no direct benefit to Zimbabwean women. However, it is worthwhile to note that although the ICCPR has not been domesticated most of the rights therein are now contained in the 2013 Constitution.¹⁶ More precisely, the right to equality enshrined in the 2013 Constitution encompasses all the prohibited grounds which are contained in the ICCPR.

3.2.2. Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) is the first tool concentrating specifically on the rights of women at an international level. CEDAW was the fruit of advocacy efforts of women activists, diplomats and United Nations officials.¹⁷ CEDAW was crafted in March 1980 and came into force in September 1981. Its adoption signified a historic landmark in the struggle for gender equality. A further amendment to CEDAW was done in 1999. This amendment allowed for the establishment of the Optional Protocol that allows individual complaints to be made against State parties for violations of the Convention. CEDAW is recorded as the most widely ratified International Human Rights instrument with a total of 187 States having signed it by December 2013.¹⁸ Only seven countries in the world had not ratified CEDAW as at December 2013.¹⁹ A number of African states, including Zimbabwe, South Africa, Lesotho, and Kenya ratified this convention.²⁰ Zimbabwe ratified this convention in May 1991 at around the same time it ratified the ICCPR.

¹⁵ Individual Complaint Procedures Under The United Nations Human Rights Treaties United Nations 2013 <https://www.ohchr.org/Documents/Publications/FactSheet7Rev.2.pdf>. (accessed on 10 October 2018).

¹⁶ For example Section 26(a) and 78(2) of the Constitution of Zimbabwe Amendment (No 20) Act 2013(2013 Constitution of Zimbabwe) mirrors Article 23 of the ICCPR.

¹⁷ JE Bond 'Cedaw in Sub-Saharan Africa: Lessons in implementation' (2014) *Michigan State Law Review* 241.

¹⁸ Fast Facts About CEDAW, CEDAW 2012, <http://cedaw2012.org/index.php/press-room/fast-facts-about-cedaw>.

¹⁹ Fast Facts About CEDAW (n 18 above).

²⁰ Ratification of United nations Conventions available at www.un.org/ratification/. (accessed on 24 August 2018).

CEDAW offers a broad definition of what constitute discrimination against women. In Article 16 it defines it as any:

Distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

The treaty embraces the notion of substantive equality as it prohibits not only distinctions that intentionally discriminate but also those that have the effect of discriminating against women indirectly.²¹

CEDAW obligates state parties to take all appropriate measures to ensure the full development and advancement of women. The Committee on the Elimination of Discrimination against Women clarified the need to have both formal and substantive equality. In 2014 at the Conference on Gender Equality and Sustainable Development, the Committee said ‘A purely formal legal or programmatic approach is not sufficient to achieve women’s *de facto* equality with men.’²² Therefore, a generous interpretation to the provisions of CEDAW that encompasses substantive equality must always be adopted. According to Bond, such a generous interpretation must significantly expand the potential reach of CEDAW in curbing discrimination against women.²³

CEDAW requires that women be given an equal footing with men and that they be empowered by creating for them an enabling environment to achieve equality of results. It enjoins states not only to eliminate all forms of discrimination against women by building on the foundations of formal or legal equality but ensure the realization of their rights through positive duties.²⁴ In accordance with Article 2, State parties are required to condemn discrimination and to aggressively combat all forms of discrimination through their legal systems.²⁵ Gender stereotyping is dealt with in Article

²¹ Bond (n 17 above) at 241.

²² Gender Equality and Sustainable Development 18 of 2014 Available at <http://heinonline.org/HOL/License>. Accessed on 15 March 2017.

²³ Bond (n 17 above) at 241.

²⁴ Gender Equality and Sustainable Development (n 22 above).

²⁵ CEDAW (n 7 above) Article 2 provides that:

5. In terms of Article 5 State parties are required to take appropriate measures to modify the social and cultural patterns that perpetuate the idea of the inferiority or the superiority of either of the sexes or of stereotyped roles for men and women.²⁶ Another significant provision in CEDAW is Article 16 which provides that:

State parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations,’’

Other provisions of CEDAW allow for affirmative action, to enhance women equality, combat trafficking in women, promote women’s participation in public life by encouraging women’s representation in non-governmental organizations and development planning, particularly for rural women and prohibit discrimination in nationality rights, education, employment and social security, health care, social and economic life and legal capacity.²⁷

Although CEDAW was comprehensive enough to cover most forms of discrimination against women of the time, viewed in the present day it has some gaps especially with regards to issues

States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end undertake:

- (a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle;
- (b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;
- (c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;
- (d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;
- (e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;
- (f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;
- (g) To repeal all national penal provisions which constitute discrimination against women.

²⁶ CEDAW (n 7 above) Article 5 provides that:

States Parties shall take all appropriate measures:

- (a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women;
- (b) To ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that the interest of the children is the primordial consideration in all cases.

²⁷ CEDAW (n 7 above) Article 10-14 provides for these rights.

that had not gained international attention at the time of its adoption.²⁸ These issues include the protection of the rights of the lesbians, gays, bisexuals, transgender and intersex (LGBTI).²⁹ The CEDAW was totally mum on the plight of LGBTI community. Another critique posed by Bond on the provisions of CEDAW is its failure to provide explicit protection from gender-based violence targeting women.³⁰ This however has since been resolved by the CEDAW Committee through its General Recommendation No. 19 that has categorised gender-based violence as a form of discrimination.³¹

It has been noted that Zimbabwe ratified CEDAW. However, despite its ratification, regrettably CEDAW has not been applied directly in cases of gender discrimination especially in the 1990s. A regrettable case in point is the already cited case of *Magaya vs Magaya* in which despite the ratification of the CEDAW at the time, the courts restricted itself to the application of domestic law. Resultantly the court handed down a judgement that perpetuated discrimination against women in cases of inheritance.³² This judgement was in direct contradiction with the provisions of CEDAW. The court was criticised for not resorting to international law. The court's main argument in disregarding international law was that the law was yet to be domesticated. This position was contrary to the position of other Southern African countries whose courts freely apply international law in deciding in women's rights matters. For instance, Zambia's attitude towards international law as stated in *Longwe v Intercontinental Hotels*³³ embraces international law. In the matter the High court stated that:³⁴

It is my considered view that ratification of such documents by a nation state without reservations is a clear testimony of the willingness by that State to be bound by the provisions of such a document. Since there is that willingness, if an issue comes before this court which would not be covered by local legislation but would be covered by such international document, I would take judicial notice of that Treaty or Convention in my resolution of the dispute.

²⁸ Bond (n 17 above) at 246.

²⁹ Bond (n 17 above) at 246.

³⁰ Bond (n 17 above) at 246.

³¹ Representative of the Committee on the Elimination of Discrimination against Women, 11th Session January 20-30 1992 at 1-6 United Nations Document A/47/38. Available at <http://www.un.org/womenwatch/daw/cedaw/>. (accessed on 28 August 2017).

³² *Magaya vs Magaya* (n 13 above) at 100.

³³ *Longwe vs Intercontinental Hotels*, 1992 (4) L.R.C. 221 [HC] (Zam).

³⁴ *Longwe vs Intercontinental Hotels* (n 33 above) at 221.

Similarly, the Botswana High Court, in the matter of *Unity Dow vs Attorney General of Botswana*³⁵ relied on international commitments Botswana had made respecting women's rights.³⁶ In Tanzania the application of international law took centre stage in *Ephraim v Pastory and Another*³⁷ in 1990 and the Tanzanian High Court upheld the importance of applying CEDAW and other international laws ratified by the country.³⁸

If Zimbabwe had adopted the same position in the *Magaya vs Magaya* case, women could have benefited from CEDAW at a much earlier stage.³⁹ Moreover the attitude portrayed in *Magaya v Magaya* shows how passive international law is, especially if it is not domesticated. The 2013 Constitution brought a plug for this gap by first of all incorporating most of CEDAW's provisions.⁴⁰ Furthermore Section 46(c) mandates the courts to consider international law and all treaties and conventions to which Zimbabwe is party to. The inclusion of section 46(c) in the 2013 Constitution marks a great improvement from the 1980 Constitution which did not have any provision relating to international law and its application in Zimbabwean courts.

3.2.3. Protocol African Charter On The Human Rights And Peoples Rights On The Rights Of Women In Africa

Recognising that Africans have their own unique problems that were overlooked in international instruments, the African Charter on Human and People's Rights (African Charter) was drafted.⁴¹ However, the African Charter provided for the rights failed to make a distinction between women's

³⁵ *Unity Dow vs Attorney General of Botswana* 1991 L.R.C 574 (Bots).

³⁶ *Unity Dow vs Attorney General of Botswana* (n 35 above) at 574.

³⁷ *Ephraim vs Pastory and Another* 1990 L.R.C. 757 [HC] (Tanz)

³⁸ In *Ephraim vs Pastory and Another* (n 37 above) at 757. The court stated that:

the principle enunciated in the above-named documents [including CEDAW, UDHR and the African Charter] are a standard below which any civilized nation will be ashamed to fall. It is clear from what I have discussed what the customary law under discussion flies in the face of our Bill of Rights as well as the international conventions to which we are signatories.'

³⁹ *Magaya vs Magaya* (n 13 above) at 101.

⁴⁰ T Mutangi 'The Impact of the African Charter and the Maputo Protocol in Zimbabwe' in Ajoni VO (ed) *The Impact of the African Charter and the Maputo Protocol in Selected African States* (2016) 281.

⁴¹ African Charter on Human and People's Rights was adopted on 21 October 1986 available at <http://www.achpr.org/instruments/achpr/>. Accessed on 28 August 2017.

rights and men's rights. Therefore, the protections it offered for women were passive as they were hidden in the general provisions of the charter.

In a bid to emphasise and elaborate on women's rights, in 2003, African countries, particularly those that are members of the African Union, formed a legally binding continental instrument which gave specific attention to the rights of women in Africa.⁴² This is known as the Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa (African Charter Women's Protocol). In the preamble of the Protocol to the African Charter on the Human Rights and Peoples Rights on the Rights of Women in Africa (Maputo Protocol) the existence of the above-mentioned International instruments on Human rights is acknowledged.⁴³ African Charter Women's Protocol was also necessitated by the recognition of the crucial role of women in the preservation of African values based on the principles of equality, peace, freedom, dignity, justice, solidarity and democracy. It is driven by a determination to ensure that the rights of women are promoted, realised and protected in order to enable them to enjoy fully all their human rights.⁴⁴

Viljoen postulates that the African Charter Women's Protocol must be viewed as a direct response to limitations in implementation of international human rights law.⁴⁵ It is also important to note that there were some lacunae which were peculiar to women in Africa which International instruments were failing to effectively address with respect to gender equality. The African Charter Women's Protocol provides for both civil-political and socio-economic rights thereby reinforcing the notion that rights are indivisible and interdependent.⁴⁶

In its Article 2, the African Charter Women's Protocol deals with the Elimination of Discrimination Against Women and it provides as follows:

⁴² F Viljoen 'An Introduction to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' (2009) 16 *Washington. & Lee Journal of Civil. Rights. & Social. Justice* 11.

⁴³ Universal Declaration of Human Rights, International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of all Forms of Discrimination Against Women and its Optional Protocol, African Charter on the Rights and Welfare of the Child.

⁴⁴ Preamble of Protocol African Charter On The Human Rights And Peoples Rights On The Rights Of Women In Africa.

⁴⁵ Viljoen (n 42 above) at 16.

⁴⁶ Viljoen (n 42 above) at 20.

1. States parties shall combat all forms of discrimination against women through appropriate legislative, institutional and other measures.
2. States parties shall commit themselves to modify the social and cultural patterns of conduct of women and men through public education, information, education and communication strategies, with a view to achieving the elimination of harmful cultural and traditional practices and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes, or on stereotyped roles for women and men.

Status and equality of women in a marriage set up is dealt with by Article 6 which requires State parties to ensure treatment of both parties in a marriage equally, especially in consenting to marriage, choosing the type of marriage desired, choosing the matrimonial regime and place of residence, the use of maiden surname, rights to children and acquisition of property. The 2013 Constitution has somewhat replicated this Article in its section 25 and 26.

However, this article maintained African patrilineal values and norms. It did not recognise equality between man and women in choosing surnames of children. It seems to assume that children of a recognised marriage should have the surname of the husband and there is no room given for women to have a say in this. Largely this provision is premised on patriarchal beliefs of patrilineal family lineages that automatically give children the surname of the husband. This position does not only undermine women socially but it indirectly discriminates against children born out of wedlock who in most cases may only be given their mother's surnames because the fathers would have disappeared.

Moreover Article 6 does not address the issue of polygamy. Polygamy is a practice whereby men are allowed to have more than one wife. Clearly this culture of polygamy undermines the status of women. With regards to polygamy Article 6(c) simply states that:

Monogamy is encouraged as the preferred form of marriage and that the rights of women in marriage and family, including in polygamous marital relationships are promoted and protected.

This article does not only display an unwillingness to condemn polygamy by African States but it also ignores the irreparable harm polygamy causes to women as they suffer at the hands of men in a polygamous setup. In fact, by protecting the rights of women in polygamous marriages, signatory

States are recognising its existence, yet it is precisely African cultural practices such as these through which women have been undermined and exploited.

Article 9 of the African Charter Women's Protocol provides for the right to participation in the Political and Decision-Making Process. It enjoins States Parties to take positive action to promote participative governance and equal participation of women in the political life of their countries and increased and effective representation and participation of women at all levels of decision-making.

Zimbabwe stands to benefit from this instrument not only because it is an African country but also because it ratified this instrument in 2008. Contrary to the provisions of this instrument however, Zimbabwe has portrayed a gross negligence in compliance with the reporting procedures of the African Charter Women's Protocol. A report on the status of Implementation of the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa of March 2016 reflects that it has submitted not more than three reports to the Commission.⁴⁷ Its genuine commitment to its regional obligation to improve the status of women is therefore called into question.

3.2.4. Southern African Development Community (SADC) Protocol On Gender And Development⁴⁸

In an effort to advance gender equality the fourteen SADC member states came up with a Protocol on Gender and Development (SADC Protocol), a regional instrument for advancing gender equality and women's rights.⁴⁹ In its preamble, the SADC Protocol affirms the fact that it is based on SADC's commitment to other existing regional and international instruments on human

⁴⁷ L Asuagbor 'Status of Implementation of the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa' *60th Meeting-Commission On The Status Of Women* (2016) New York. Available at www.achpr.org (accessed on 1 August 2017).

⁴⁸ SADC PGD (n 9 above).

⁴⁹ In the Preamble of the SADC PGD the following are listed as countries that participated in the drafting of the instrument: Angola, Botswana, Democratic Republic of Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe.

rights.⁵⁰ In other words the SADC Protocol was a harmonisation and expansion of all those instruments on women's rights which existed before it came into force. The SADC Protocol is the most recent regional instrument on women's rights.

Article 1 of the SADC Protocol provides comprehensive definitions of important terms. This is a prominent distinctive feature to the SADC Protocol comparing it with the African Charter Women's Protocol. It defines key terms related to women's equality and status. Such terms include, affirmative action,⁵¹ discrimination,⁵² gender,⁵³ gender – based violence,⁵⁴ gender equality,⁵⁵ gender equity⁵⁶ and gender mainstreaming.⁵⁷ In its Article 2 the SADC Protocol calls upon its member states to harmonise their national legislation and policies with relevant regional and international instruments related to women's rights. States are also encouraged to adopt affirmative action measures to ensure implementation of the same. Using affirmative action as a tool to enhance women equality is an acknowledgement of the fact that women have been disadvantaged and the state should make it up to them by putting measures which give them preferential treatment.

⁵⁰ Nairobi Forward Looking Strategies (1985), Convention on the Rights of the Child (1989), the Africa Platform of Action, The Beijing Declaration and its Platform for Action (1995), The United Nations resolutions 1325 on Women, Peace and Security(2000) SADC Declaration on Gender and Development(1997) and its Addendum on the Prevention and Eradication of Violence Against Women and Children (1998).

⁵¹ Affirmative Action means:

a policy program or measure that seeks to redress past discrimination through active measures to ensure equal opportunity and positive outcomes in all spheres of life.

⁵² Discrimination means:

any distinction, exclusion or restriction which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise, by any person of human rights, and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

⁵³ Gender means:

the roles, duties and responsibilities which are culturally or socially ascribed to women, men, girls and boys.

⁵⁴ Gender based violence means:

all acts perpetrated against women, men, girls and boys on the basis of their sex which cause or could cause them physical, sexual, psychological, emotional or economic harm, including the threat to take such acts, or to undertake the imposition of arbitrary restrictions on or deprivation of fundamental freedoms in private or public life in peace time and during situations of armed or other forms of conflict.

⁵⁵ Gender Equality means:

the equal enjoyment of rights and the access to opportunities and outcomes, including resources, by women, men, girls and boys

⁵⁶ Gender Equity means:

the just and fair distribution of benefits, rewards and opportunities between women, men, girls and boys.

⁵⁷ Gender mainstreaming means:

the process of identifying gender gaps and making women's, men's, girls' and boys' concerns and experiences integral to the design, implementation, monitoring and evaluation of policies and programs in all spheres so that they benefit equally.

The objectives of the SADC Protocol are stated in Article 3 and they include to:

Provide for the empowerment of women, to eliminate discrimination and to achieve gender equality and equity through the development and implementation of gender responsive legislation, policies, programmes and projects.⁵⁸

The SADC Protocol, in its twenty-five articles, aims to see the improvement of women's lives in various fields which include politico-legal concerns such as constitutional protection for women's rights, equal access to justice, governance representation and participation. It also demonstrates a concern with socio-economic issues affecting women such as education and training, productive resources and employment, economic empowerment, health, HIV & AIDS, peace building and conflict resolution, media, information and communication.⁵⁹ In its framework, the SADC Protocol also establishes that equality must also be seen in the representation of women in decision-making positions in public and private spheres, electoral processes, and in economic programs. State parties are enjoined to ensure the attainment of at least 50% of women representation in such positions.

Zimbabwe was the second country to ratify this Protocol in 2009 after Namibia.⁶⁰ Zimbabwe's ratification of the Protocol came at a time when the country was drafting the 2013 Constitution and this made it easy for the provisions of the Protocol to be incorporated into the Constitution. This enabled the country to come up with a Constitution which is international human rights law friendly.⁶¹ It also accords public law and in particular international human rights law, a constitutionally defined status within the municipal legal system.⁶²

Notwithstanding, while the Protocol strives to achieve accountability of all SADC member states,⁶³ there is no monitoring mechanism set in place to ensure the implementation of this Protocol. For instance, there were twenty-eight substantive targets laid down in the SADC

⁵⁸ Article 3(a) of the SADC Protocol (n 9 above).

⁵⁹ SADC Protocol (n 9 above).

⁶⁰ SADC Protocol (n 9 above).

⁶¹ T Maluwa 'Implementing The Principle Of Gender Equality Through The Law: Some Lessons From Southern Africa' (1999) 3 *International Journal Of Discrimination And The Law* 252.

⁶² Mutangi (n 40 above) at 281.

⁶³ Article 35 of the SADC Protocol (n 9 above).

Protocol towards achieving gender equality by 2015. One of these targets was that by 2015 all member states must have reached 50/50 percent male and female representation in decision making positions.⁶⁴ Zimbabwe has failed to meet this target. This is reflected in the composition of the Cabinet of 2015, in which women carried 9% of the positions.⁶⁵ Given that there is no clear monitoring mechanism set in place to ensure the implementation of this protocol there is no guarantee that Zimbabwe would meet its 50/50 percent target any time soon.

3.4. WOMEN'S EQUALITY: 2013 CONSTITUTION OF ZIMBABWE

As noted before, international and regional frameworks alone cannot effectively foster changes in the politico-legal perception and status of Zimbabwean women. There needs to be concomitant changes complementing international and regional treaties and also domesticating international law on human rights for international and regional agreements to make any social impact. As such, the discussion at this point considers the nexus between the Zimbabwean 2013 Constitution and the International and Regional agreements cited above. Particular emphasis is paid to the protections on women's legal and political rights guaranteed by the constitution although socio-economic considerations are taken into account as well.

Zimbabwe had been operating under the 1980 Constitution until 2013 when it successfully enacted the 2013 Constitution. The 2013 Constitution came after a failed attempt to come up with a new Constitution in 2000 (2000 Draft Constitution). The 2000 Draft Constitution was crafted at a time when a strong opposition party called Movement for Democratic Change (MDC) was emerging in Zimbabwe. MDC, then had so much influence in challenging and opposing Government initiatives in their quest for change.⁶⁶ On the other hand the Government would not accept any contribution made by the MDC towards the drafting of the proposed Constitution.⁶⁷ This political environment was not suitable for sound constitutional reform. The result was a rejection of the 2000 Draft Constitution by the majority of people in Zimbabwe in a referendum. Changes which were to be

⁶⁴ Legal Resources Foundation: Gender Equality In Zimbabwe available at <http://www.lrfzim.com/gender-equality-in-zimbabwe/>. (accessed on 18 August 2017).

⁶⁵ 'Zimbabwe Drags Feet Implementing New Constitution' *Hivos People Unlimited* on 5 October 2016.

⁶⁶ M Ndulo 'Zimbabwe's Unfulfilled Struggle for a Legitimate Constitutional Order' available at https://www.usip.org/sites/default/files/.../Chapter7_Framing.pdf. (accessed on 28 August 2017).

⁶⁷ Ndulo (n 66 above).

brought by the 2000 Draft Constitution were thrown down the drain and the country had to continue with the 1980 Constitution as the Supreme law of the land. Resultantly women had to continue under the second-rate protection offered under the 1980 Constitution until 2013 when the new Constitution successfully came into operation.⁶⁸ The drafting of the 2013 Constitution followed the framework which was laid down in the Global Political Agreement (GPA) of 2008.⁶⁹

The 2013 Constitution came after a long drafting process and it passed the referendum of 2013 with a reasonably wide margin of 94.5 %.⁷⁰ It ushered in a new era in the country in terms of constitutionalism and respect for human rights. A reading of the 2013 Constitution indicates that it borrows heavily from the Constitutions of other African States, such as the 2010 Kenyan Constitution, the 1996 South African Constitution and the 1995 Ugandan Constitution amongst others which are strong on rights protection. What is also evident in its content and structure is that the 2013 Constitution domesticates International and Regional human rights treaties.⁷¹ The impact this has had on women's rights is considered in this section.

3.4.1. Equality as a Value and as a Right

Equality occupies a central position in most African countries' legal order. The right to equality is one of the most fundamental rights in any human rights protection regime. This right is protected not only as an individual right, but also within the general scheme of rights contained in the Bill of Rights. Equality could be conceptualized as both a right and a Constitutional value.⁷² It is a right because it provides the mechanism for achieving equality and a value because it gives substance to the vision of the Constitution.⁷³ In its jacket as a foundational value, equality can be used by

⁶⁸ Ndulo (n 66 above).

⁶⁹ F Banda 'The Constitution of Zimbabwe 2013: A Constitutional Curate's egg' in Atkin, B., (ed.) *International Survey of Family Law: (2014)* 491.

⁷⁰ A Nordem Special Report 'The Constitutional History and the 2013 Referendum of Zimbabwe' (2013) available at https://www.jus.uio.no/smr/english/about/programmes/nordem/publications/docs/zimbabwe_constitution_2013.pdf. (accessed on 6 October 2018).

⁷¹ Banda (n 69 above) at 492.

⁷² L Juma 'Chieftainship Succession and Gender Equality in Lesotho:-Negotiation the right to equality in a jungle of pluralism' (2013) 22:2 *Texas Journal of Women and the Law* at 172.

⁷³ Juma (n 72 above) at 172.

the courts to form parameters within which application of the law takes place.⁷⁴ Section 3 of the Constitution provides that (1):

Zimbabwe is founded on respect for the following values and principles –

(f) Recognition of the equality of all human beings

(g) Gender equality.

Furthermore Section 46 of the 2013 Constitution requires that when interpreting the Bill of Rights, courts, tribunals or any other fora must promote democratic values and principles which include equality. Thus, equality as both a foundational value and a right can play a number of different roles in the process of Constitutional interpretation in the courts. There is a need to therefore appreciate and apply the interpretation of equality beyond the content and the ambit of rights.⁷⁵ In as far as equality is classified as a value it follows that it can be used to interpret and inform other rights.⁷⁶

Rights have intra-constitutional hierarchy in Zimbabwe's 2013 constitution. While rights may stand on a higher plane than government policies, it is also common that rights have a different status in certain instances.⁷⁷ When this happens it is called Intra-Constitutional hierarchy. In applying the notion of Intra –Constitutional hierarchy the court may invoke one competing right to challenge another.

Intra-constitutional hierarchy has its origins in the United States of America (USA) in the case of *Brown v Board of Education* some decades ago.⁷⁸ In this matter the US courts decided that the right of the black minority to equal access to education should 'trump' the associational right of the white minority.⁷⁹ Furthermore in Ronald Dworkin's definition of rights it is clear that while they are possessed by each individual, they may also supersede some national goals.⁸⁰ An intra-constitutional hierarchy of rights is apparent in the 2013 Constitution which contains a Bill of

⁷⁴ *S Jagwanth 'Expanding equality'* in C Murray & M O'Sullivan (eds) *Advancing Women's Rights* (2005) 131.

⁷⁵ Jagwanth (n 74 above) at 131.

⁷⁶ Jagwanth (n 74 above) at 134.

⁷⁷ Juma (n 72 above) at 212.

⁷⁸ *Brown v Board of Education*, 349 US 294 (1995).

⁷⁹ *Brown v Board of Education* (n 78 above).

⁸⁰ Juma (n 72 above) at 212.

Rights which imposes human rights standards on domestic power relations and also restricts the enjoyment of customary and religious rights in its Section 63 (1) (b) when they violate other rights. Section 63 respects the practices of culture only to the extent that they do not violate any right in the Bill of Rights. Consequently, these cultural rights are limited because they can only be enjoyed as far as they do not infringe on any other right in the Bill of Rights. Inevitably a hierarchy is created which places cultural rights lower than other rights in chapter 4 which include equality. Any cultural practise which infringes on the right to equality is automatically rendered unconstitutional and must therefore not be practiced. This sets the stage for women to finally challenge the sociocultural basis of their systematic exclusion from powerful social positions and their status as minors under customary law.

By sticking to the provisions of the 2013 Constitution the courts would be respecting the aspirations of the society in terms of upholding constitutionalism. It is submitted here that equal rights and the protections they offer against discrimination are so fundamental that any violation of the same is an affront to constitutionalism. The law should create space for Zimbabwean women to realize their aspirations by removing and not bolstering, obstacles to equality. Looking at the emerging policies on gender since the inception of the 2013 Constitution, customary law no longer has much influence on rules defining the position of women in the society.

Societies and the cultures that bind them should aspire to achieve conformity to human rights standards and should ensure that those standards are unambiguously entrenched in the constitution.⁸¹ Section 63 of the 2013 Zimbabwean Constitution provides for this balance. Such provisions, guaranteeing protection of the rights of women, the 1980 Zimbabwean Constitution did not have. In fact, the 1980 Constitution barred State intervention and judiciary scrutiny where there were human rights violations caused by a customary practice. Therefore the 2013 Constitution must be applauded for new provisions it introduced placing the equal rights of women above the right to culture.

⁸¹ Juma (n 72 above) at 174.

3.4.2. Equality As A Right: The Equality Clause

The 2013 Constitution deals with women's rights and it has a comprehensive equality clause. It was one of the reasons why it was applauded for meeting international standards on human rights protection especially in the way it addresses women's rights.⁸² The Equality clause of the 2013 Constitution provides as follows:

Section 56 Equality and Non-discrimination.

- (1) All persons are equal before the law and have the right to equal protection and benefit of the law.
- (2) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.
- (3) Every person has the right not to be treated in an unfairly discriminatory manner on such grounds as their nationality, race, colour, tribe, place of birth, ethnic or social origin, language, class, religious belief, political affiliation, opinion, custom, culture sex, gender, marital status, age, pregnancy, disability or economic or social status, or whether they were born in or out of wedlock.
- (4) A person is treated in a discriminatory manner for the purpose of subsection (3)
 - (a) They are subjected directly or indirectly to a condition, restriction or disability to which other people are not subjected: or
 - (b) Other people are accorded directly or indirectly a privilege or advantage which they are not accorded.
- (5) Discrimination on any of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair, reasonable and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom.
- (6) 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, and-
 - a) Such measures must be taken to redress circumstances of genuine need
 - b) No such measure is to be regarded as unfair for the purposes of subsection (3).

Equality as defined by Hepple is all about 'ensuring consistent equal treatment of similarly placed individuals and also the removal of barriers to such treatment'.⁸³ Generally, equality provisions guarantee equal protection and benefits to all persons under the law.⁸⁴

⁸² Mutangi (n 40 above) at 284.

⁸³ B Hepple 'The Aims and Limits of Equality Law' in Dupper O. Garbers C eds) *Equality in the Workplace: Reflections from South Africa and Beyond*, (2009) 3.

⁸⁴ Banda (n 69 above) at 493.

3.4.2.1. Equality Before The Law and Equal Protection And Benefit Of The Law

Section 56 begins, in Subsection 1 of the 2013 Constitution, by according everyone equality before the law and equal protection and benefit of the law. Two important and yet distinct equality protections offered by Section 56(1) of the 2013 Constitution are equality before the law and equal protection of the law. Both equality before the law and equal protection of the law, are not defined in the 2013 Constitution. However, equality before the law has been said to denote equal treatment and equal protection before the law and it implies that the existing law will be applied or enforced equally on all people in similar situations and no person shall be denied the protection or benefit of the law without a legitimate reason.⁸⁵ Obviously, this includes women and as such constitutionally, protection of equal rights extends even to women. This provision therefore clearly accords women similar protection as men by law. The law, under which everyone is supposed to benefit and be protected by, is again not limited to any specific type of law. A reasonable conclusion to be derived from this wording is that everyone (men and women) must be protected in equal terms under every law in Zimbabwe be it private, public or customary law. However, sadly the constitution does not fully reflect this.

A law or conduct may violate constitutional rights to equality and equal protection of the law or both of them at the same time. Ackermann links the issue of equality before the law to human dignity.⁸⁶ He argues that equality before the law means that ‘all people should be treated equally with respect to their human dignity (human worth) and that the law should not differentiate in its treatment of persons in a way that impacts negatively on their human dignity.’ In Zimbabwe the link between rights to equality and dignity is clearly stated in Section 80 of the 2013 Constitution which provides as follows:

- (1) Every woman has full and equal dignity of the person with men and this includes equal opportunities in political, economic and social activities.

⁸⁵ Juma (n 72 above) at 174.

⁸⁶ LWH Ackermann ‘Equality and Non-Discrimination: Some analytical Thought’ (2006) 22 *South African Journal For Human Rights* 597.

In this respect the equality clause clearly denounces any differential treatment based on sex or gender. It however needs to be acknowledged that treating people of different sexes in an equal manner may not necessarily be fair. There is a difference between equality and equity. The same reasoning can be applied to equal protection and benefit under the law. It may not necessarily bring about fair treatment. This view is supported by Hepple who opines that equality has various meanings which mainly depend on the ‘practical realities of the economic environment’.⁸⁷ This point brings us to a discussion on formal equality and substantive equality which follows hereunder.

3.4.2.2. Equality Between Men and Women

Section 56(2) provides that:

Women and men have the right to equal treatment including the right to equal opportunities in political, economic, cultural and social spheres.

This section widens equality rights to extend equality before the law to equal protection and benefit from the law. It expressly calls for equal treatment and equal opportunities between men and women. This provision directly addresses gender equality. It testifies of Zimbabwe’s genuine commitment to gender equality, at least as the constitution is concerned. On paper therefore, Zimbabwe regards men and women as equal citizens who can participate in all spheres of life including politics equally. Although citizenship is not limited to politics, it is argued that women’s citizenship is seldom understood without participating in political discourse.⁸⁸

Section 56(2) acknowledges the fact that women’s entry into government as political representatives, economic empowerment and social and cultural status remain the most important components of equality.⁸⁹ Such a holistic approach empowers women to be involved in decision-making and policy-making processes for them to be able to represent their own interest in the

⁸⁷ Hepple (n 83 above) at 3.

⁸⁸ A Gouws (*Un)thinking Citizenship: Feminist Debates in Contemporary South Africa* (2005) 5.

⁸⁹ Gouws (n 88 above) at 5.

public spheres.⁹⁰ Cultural and social spheres have a strong bearing on how women are regarded in the private sphere. Putting men and women at par in the private sphere facilitates what was identified by Gouws as the creation of a more ‘egalitarian citizenship’.⁹¹ It brings out the interconnections between the public and private spheres because how the private sphere is constructed has fundamental implications on women’s citizenship.⁹² This approach finds its place in what Lister calls ‘the project of gendering citizenship’ in as far as it allows men and women to practice their citizenship equally in public spheres (political and economic) and private spheres (cultural and social).⁹³

3.4.2.3.Unfair Discrimination

In the 2013 Constitution there is a provision addressing unfair discrimination in Section 56(5) which is deemed as any discrimination which is based on grounds listed therein.⁹⁴ Unfair discrimination simply means different treatment of different people ‘attributable wholly or mainly to their respective descriptions by race, color, sex, origin, property...’⁹⁵ There are twenty-three listed grounds upon which unfair discrimination is presumed in the Zimbabwean Constitution. This can be described as a far-reaching provision of the 2013 Constitution which offers wider protection against discrimination than its predecessor, the 1980 Constitution. The prohibited grounds of discrimination, if enforced, may go a long way in protecting women from unfair discrimination and improving their status. Among these twenty-three grounds of discrimination, those that are related to women status are sex, gender, custom, marital status and pregnancy.

⁹⁰ Gouws (n 88 above) at 5.

⁹¹ Gouws (n 88 above) at 5.

⁹² Gouws (n 88 above) at 5.

⁹³ Gouws (n 88 above) at 5.

⁹⁴ Section 56(5) of the 2013 Constitution of Zimbabwe provides that:

Discrimination on any of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair, reasonable and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom.

⁹⁵ Juma (n 72 above) at 174.

3.4.2.3.1. Sex And Gender

The ascription of sex and gender as prohibited grounds of discrimination basically is indicative of the Zimbabwean government's commitment to creating a society where women are treated equally socially, politically economically and legally. Denunciation of gender equality finds its history in the American justice system. In the American case of *Frontier v Richardson*, it was held that gender-based discrimination:⁹⁶

Like classifications based upon race, alienage or national aging are inherently suspect, and must therefore be subjected to strict judicial scrutiny.

This set the global standard which most countries followed. Zimbabwe, by denouncing gender inequality, is aligning itself with global standards set up in the 1970s. Although it came a bit late it is a move that women have been anticipating and it will go a long way in adding value to women's status.

One renowned scholar justifies the need for gender equality in our society in saying,⁹⁷

As in the case of a female dog that accompanies the male dog to hunt or guard the flock, women should not be excluded from the category of guardians.

In essence his argument is that if the women are to fill the same roles as men then they should receive the same education as men. It is also argued that the only difference between females and males is biological, which is linked to their physiological makeup and not to their gender.⁹⁸ This means differences in gender cannot be used to explain differences in social, economic political roles between men and women. This is explicitly explained in the following quotation by Serban:⁹⁹

If it appears that the male and the female sex have distinct qualifications for any arts or pursuits, we shall affirm that they ought to be assigned respectively to each. But if it appears that they differ only in just this

⁹⁶ *Frontier v Richardson* 411 U.S. 677 (1973).

⁹⁷ S Serban 'On Inconsistencies' In Photo's Gender Equality Journal Of Research' (2014) 4 *Gender Studies* 1062

⁹⁸ Serban (n 97 above) at 1062.

⁹⁹ Serban (n 97 above) at 1062.

respect that the female bears and the male begets, we shall say that no proof has yet been produced that the woman differs from the man for our purpose, but we shall continue to think that our guardians and their wives ought to follow the same pursuits.

From a liberal feminist perspective, the need to address issues of women's status arises from the fact that women are given inferior positions in the society simply because of how society has defined their gender and nothing more.¹⁰⁰ Hence roles of women and their status must be redefined so that they are not dependent on the socially created roles set apart for them.¹⁰¹ Generally there is no art or skill 'proper only to women or men' because none is incidental to the nature of either women or men.¹⁰² There is no skill or job occupation that should be reserved for a woman because she is a woman or to a man because he is a man.¹⁰³ Consequently women and men must be treated equally because they both have the capacity and the right to pursue the same skills.

3.4.2.3.2. Sexual Orientation

The 2013 Constitution did not only omit sexual orientation from the listed prohibited grounds of discrimination, but also closed the door for this to constitute an analogous ground by specifically condemning same sex marriages. Section 78 (3) of the 2013 Constitution provides that 'persons of the same sex are prohibited from marrying each other.' In *S v Banana* the constitutionality of the crime of sodomy was brought before the Supreme Court.¹⁰⁴ The Appellant was convicted of two counts of sodomy and several other counts involving sexual offences between him and other men. The offences were committed at a time when the Appellant was the President of Zimbabwe. He was sentenced to an effective sentence of one-year imprisonment with labour with a suspended sentence of four years' imprisonment and a further four years suspended on condition that he pay a lump sum as compensation to one of the complainants. He appealed against conviction and sentence.

¹⁰⁰ Serban (n 97 above) at 1062.

¹⁰¹ Serban (n 97 above) at 1062.

¹⁰² Serban (n 97 above) at 1062.

¹⁰³ Serban (n 97 above) at 1062.

¹⁰⁴ *S v Banana* 2000 (1) LR 607 (SC).

On appeal, the full court sat as various matters were raised by the appeal, including the constitutionality of the crime of sodomy in relation to consenting adults. The decision on all the matters, except the constitutional issue, was unanimous. In relation to the constitutionality issue, there was a split decision with the majority of the court deciding that the criminalization of sodomy between consenting adults was not unconstitutional. The court held that¹⁰⁵

Discrimination on the grounds of sexual orientation is not forbidden by our Constitution. Additionally, it cannot be said that a law against sodomy is not reasonably justifiable in a democratic society.

This attitude clearly discriminates the minority group of lesbians. Lesbians, being women who are disadvantaged on the basis of them being women suffer further disadvantage in Zimbabwe. They suffer a double oppression firstly on grounds of gender and then on grounds of sexual orientation. Although homosexual men suffer the same fate as homosexual women, women might be more vulnerable to further abuse in the event that they marry a homosexual man who chooses to practice his homosexuality privately.

3.4.2.3.3. Political Affiliation

The inclusion of ‘political affiliation’ as a ground for non-discrimination in the 2013 Constitution has merged democracy and equality as factors that have a strong bearing on the status of women. Their contribution in Zimbabwean political situation, where women are suffering from fear and intimidation which hinder their participation in democracy, is of great value. This reinforces the representative aspect of liberal democracy.¹⁰⁶

3.4.2.3.4. Economic And Social Status

Economic and Social Status as a listed ground for non-discrimination is significantly appreciative of the difference in status of Zimbabwean citizens and extends the legal scope of liberal rights to those who were disadvantaged economically and socially. Women’s economic and social status in

¹⁰⁵ *S v Banana* (n 104 above) at 607.

¹⁰⁶ D Beetham *Democracy and Human Rights* (2000) 19.

Zimbabwe is generally lower compared to those of man because they do not have access to resources at the same platform with men.¹⁰⁷

3.4.2.3.5. Analogous Grounds

Analogous grounds are not specifically listed in Section 56 (3) of 2013 Constitution. However, they are implied and they can be developed by the courts in the exercise of their discretion. Section 56 (3) of the 2013 Constitution says:

Every person has the right not to be treated in an unfairly discriminatory manner on such grounds as.

This means the grounds listed in the constitution are example of the grounds but the list provided therein is not exhaustive. The use of the phrase ‘on such grounds as’, is implicit of the fact that the listed grounds are just examples. To date there is no ground that has been developed by the courts in the category of an analogous ground. However, there are many possible grounds upon which women’s rights may be stifled that may fit into the category of analogous grounds. These grounds may include virginity, HIV status and breastfeeding.

3.4.2.4. Affirmative Action

Affirmative action has been defined as any measure, beyond simple termination of a discriminatory practise, adopted to correct or compensate for past or present discrimination or to prevent discrimination from recurring in the future.¹⁰⁸ Affirmative action is thus within the ambit of Substantive equality. Section 56 (6) of the 2013 Constitution requires the state to take measures to advance the status of people who were disadvantaged in the past. It provides that:

The state must take reasonable legislative and other measures to promote those who have been disadvantaged by unfair discrimination, and –

¹⁰⁷ Research and Advocacy Unit ‘Gender Equality and Equity Analysis of Zimbabwe’s Constitution and Commission Legislation’ (2017) (RAU 2017) available at <https://www.researchandadvocacyunit.org/system/files/GenderEqualityandEquityAnalysis/May2017> (accessed 4 October 2018).

¹⁰⁸ DM Matthews ‘Avoiding Gender Equality’ (1998) 19 *Women’s Rights Law Reporter* 129.

- a) Such measures must be taken to redress circumstances of genuine need
- b) No such measure is to be regarded as unfair for the purpose of subsection (3)

Affirmative action must be mainly directed at nurturing a group of people who have been disadvantaged in the past.

Affirmative action constitutes an exception to the general prohibition of discrimination. Thus, the same section of the constitution of Zimbabwe prohibits discrimination while simultaneously permitting it in the form of affirmative action. Section 56 subsection 6's affirmative action allows differentiation of treatment on prohibited grounds but for causes specified therein. Further the State is required to take legislative measures and other measures to promote the achievement of equality. In this regard the State has managed to come up with the National Gender Policy¹⁰⁹ (2013-2017). The provisions and the implementation of the National Gender Policy shall be discussed hereunder in fuller details. However, any discriminatory law or conduct must pass the test of affirmative action.

Affirmative action, as a temporary measure which works in the short term to promote women's entry into previously segregated positions, is necessary and it constitutes an essential part of any gender equality policy.¹¹⁰ Equally, such policies must have measures to undo the effects of past discrimination not only in decision-making but also in other fields that have tended to be the exclusive preserve of men. Such fields include employment, politics and social life.¹¹¹ Affirmative action is one way the government has sought to increase women's visibility and participation in politics. To guard against reverse discrimination, the Zimbabwean Constitution, in section 56 (6), states that there must be a genuine disparity that needs to be addressed for affirmative action to apply. Women are among those who were disadvantaged in the past and as such the state must be proactive in putting measures in place to advance and promote women's visibility in decision making processes as well as in social sectors. These measures must be applied only for the purposes of addressing circumstances of genuine need.

¹⁰⁹ National Gender Policy (2013-2017).

¹¹⁰ Date-Bah E. 'Appropriate Policy For Gender Equality In Employment: - Insights From The LLO Interdepartmental Project On Equality For Women In Employment'(1996) 2 *International Journal Of Discrimination And The Law*, 15.

¹¹¹ Date-Bah (n 110 above) at 15.

3.4.2.5. Formal and Substantive Equality

Formal equality, which is synonymous to legal equality, is whereby legal impediments to access to opportunities by individuals are removed and everyone is given the same opportunity and protection by the law.¹¹² Fredman summarised the meaning of formal equality drawing on Aristotle's phrase that says 'alike must be treated alike'.¹¹³ Formal equality considers the State, juristic persons, as well as individuals as a potential threat to the violation of equal rights.¹¹⁴ Hence its provisions are focused on protecting human beings against any intrusion from any such actors. Rights, in this circumstance are therefore protected by means of prohibiting their abuse. This approach assumes that inequality is a result of acts of prejudice against individual victims by identifiable individuals, the State or other actors.¹¹⁵ However formal or legal equality is incapable of addressing latent barriers to equality. It is unable to address some legislation or policies which are fair in theory but discriminatory in practice.¹¹⁶ This realisation that formal equality does not adequately address equality gave birth to the need to develop the principle of substantive equality.

According to Fredman, substantive equality builds upon the limits of formal equality.¹¹⁷ Formal equality does not address social patterns of injustice as it only focuses on the individual's experience of inequality.¹¹⁸ The Aristotelian formula to equality which says that: 'equals ought to be treated equally and unequals treated unequally in proportion to their inequality' encompasses fully the notion of substantive equality.¹¹⁹ Substantive equality recognises the fact that equality cannot be achieved if individuals begin the race from different starting points. Therefore, there is a need to create an equal footing.¹²⁰

¹¹² Hepple (n 83 above) at 5.

¹¹³ S Fredman 'Proving Equality: - Substantive Equality And The Positive Duty To Provide' (2005) 21 *South Africa Journal on Human Rights* 163.

¹¹⁴ Fredman (n 113 above) at 166.

¹¹⁵ Fredman (n 113 above) at 166.

¹¹⁶ Hepple (n 83 above) at 7.

¹¹⁷ Fredman (n 113 above) at 166.

¹¹⁸ Fredman (n 113 above) at 163.

¹¹⁹ Ackermann (n 86 above) at 600.

¹²⁰ Hepple (n 83 above) at 7.

In Hepple's contention, in order to promote substantive equality the state should do more than just guaranteeing legal equality.¹²¹ Feminist and other legal scholars have argued that the purpose and principles of substantive equality should be derived from an understanding of systemic inequalities and the strategies of removing them.¹²² Accordingly substantive equality is understood as a remedy to systematic and entrenched inequalities as it advocates for an examination of the context and impact of discriminatory action on the individual and her group.¹²³ This at times may require the courts to take a close look at the private sphere and understand how the law influences social structure.¹²⁴ In the *Hugo* case, the Constitutional Court of South Africa held that an inquiry into a discrimination matter requires the court to consider the disadvantaged position of the complainant in society and whether she has suffered from past patterns of handicap.¹²⁵ In the adjudication of equal rights claims, what should be considered is the purpose of the right and the values that underline it.¹²⁶ This would enable the courts to reach a decision which is guided by the Constitution thereby upholding the Constitution's founding values.

Accordingly, substantive equality requires the state to take practical measures to promote equality, including, allocating of resources to the victims of discrimination. In pursuit of substantive equality, the allocation of resource is however not an easy task as it requires a complex assessment of wide-ranging factors and the balancing of priorities and interests.¹²⁷ Furthermore, resource allocation is generally a prerogative of policy makers and decision makers as it is considered to be a matter of policy and not law and it is hinged on governmental accountability to the electorate.¹²⁸

Substantive equality is more far-reaching than formal equality and it requires a different judicial approach. The principle of substantive equality emerged out of the realisation that formal equality obstructs progress towards equality. Formal equality, which was developed as a solution to the struggles against discrimination on the basis of practises such as slavery, racism and sexism, insists

¹²¹ Hepple (n 83 above) at 7.

¹²² C Albetyn 'Substantive Equality And Transformation In South Africa' (2007) 2 *South African Human Journal For Human Rights* 260.

¹²³ Albetyn (n 122 above) at 259.

¹²⁴ Albetyn (n 122 above) at 259.

¹²⁵ *President of the Republic of South Africa and Another v Hugo* 1997 (6) BCLR 708 (CC).

¹²⁶ Albetyn (n 122 above) at 260.

¹²⁷ Fredman (n 113 above) at 164.

¹²⁸ Fredman (n 113 above) at 164.

that one turns a blind eye to such group-based differences in the allocation of resource and in decision-making.¹²⁹

While formal equality holds the view that conformity to the law guarantees equal treatment, substantive equality moves away from the equilibrium approach favoured by formal equality and focuses instead on equity.¹³⁰ It is not colour, gender or other group characteristics which are the problem when dealing with cases of discrimination under the notion of substantive equality, but it is the handicap itself, which may be social or economic.¹³¹ Substantive equality takes the fight against discrimination further and maintains that discrimination is not limited to acts of prejudice against individuals.¹³² It postulates that it is not by avoiding acts of prejudice that equal rights can be observed. Rather the State should be proactive in promoting and upholding equality. Therefore, the state's obligation towards the protection of equal rights is not only to prevent individuals from infringing others' rights but to facilitate and provide for those equal rights as well.¹³³

Substantive equality places the onus of rights protection on the State, which is supposed to put in place measures to facilitate positive transformation. This positive duty does not necessarily require equal treatment in all cases. In some instances, the circumstances may require positive discrimination against individuals who enjoy an unfair advantage in favour of the disadvantaged for true equality to be achieved. The main objective of substantive equality is on achieving equality of opportunity and equality of outcomes. Equal opportunity means the removal of obstacles as well as opening up more opportunities for disadvantaged groups like women. Removal of barriers is a straight forward process. It can be done by, for example, removal of age limits or discriminatory tests which bar access to equal opportunities.

Genuine equality of opportunity can be achieved by taking progressive measures to ensure that persons from all sections of society are able to satisfy the criteria for access to a particular life chance.¹³⁴ Such progressive measures may assist the State in making a positive change in

¹²⁹ Albertyn (n 122 above) at 260.

¹³⁰ Albertyn (n 122 above) at 260.

¹³¹ Fredman (n 113 above) at 166.

¹³² Fredman (n 113 above) at 166.

¹³³ Albertyn (n 122 above) at 260.

¹³⁴ Fredman (n 113 above) at 167.

underlying discriminatory social structures and to facilitate the realisation of equal rights. In addition, substantive equality aims at achievement of equality of outcome.¹³⁵ Equality in outcome may not be achieved by merely redistributing resources but by ensuring that the resources distributed also reach the disadvantaged and the disadvantaged rightly use those resources for their benefit.¹³⁶ For instance in the employment sector, achieving equality of outcome may require initiating training programmes or skills development programs to give marginalised groups a firm footing.

Fredman suggests that a positive action taken by the State in pursuit of substantive equality must be aimed at achieving the following:¹³⁷

- a) To break the cycle of disadvantage associated with social groups.
- b) To promote respect for the equal dignity and worth of all, thereby redressing stigma, stereotyping, humiliation and violence because of membership in a social.
- c) It should entail positive affirmation and celebration of identity within the community.
- d) To facilitate full participation of marginalised groups in society

Under the umbrella of substantive equality, equal rights become not only a shield that can be used to defend gains secured by vulnerable groups but also a weapon in proactively implementing affirmative action to redress inequality.¹³⁸ In this regard the justiciability of substantive equality's obligation involves a lot more than just compensating victims.¹³⁹ Unlike formal equality, which has a duty to prevent persons from interfering with the rights of individuals and is therefore individualised and immediately realisable, substantive equality's positive duty is concerned with questions of resources and the distribution of such resources.¹⁴⁰ Jagwanth also supports this notion.¹⁴¹

¹³⁵ Fredman (n 113 above) at 167.

¹³⁶ Fredman (n 113 above) at 167.

¹³⁷ Fredman (n 113 above) at 167.

¹³⁸ Jagwanth (n 74 above) at 145.

¹³⁹ Fredman (n 113 above) at 168.

¹⁴⁰ Fredman (n 113 above) at 168.

¹⁴¹ Jagwanth (n 74 above) at 145.

Substantive equality faces many challenges since it is mostly resource based. Such challenges include scarcity of resources, system of priorities on the available resources, and decisions about how to prioritise resource allocation. Moreover, the duty bearer, who in most cases is the State, is not obligated to conform to these positive duties despite that its best placed to bring about change. Decisions of resource allocation in most States are a question of politics and law since they are made by those who are accountable to people affected.¹⁴² This thus poses a great challenge on the justiciability of positive duties at courts. Furthermore, in litigation, courts are limited to the information produced by the victims and may be unable to interrogate the decisions of resource allocation.¹⁴³

Despite the apparent challenges associated with the enforcement of the State positive duties in court there exists three arguments suggested by Fredman which justify its justiciability, which are:¹⁴⁴

- a) Negative duties are automatically enforceable. As such positive duties also need to be enforceable otherwise negative duties will be capable of trumping positive duties. This has a danger of restricting policy decisions which are aimed at welfare or positive provision. Significantly enforcing positive duties can help promote and uphold equality through policy change.
- b) Regarding equal rights, protection does not assist in uprooting social structures of inequality. If rights are implemented within the social structures of inequality then the disadvantaged will remain marginalised.
- c) The need to have positive rights enforceable in courts also rises from the need to be sure that the policy-making process is accessible to all and protects those with no say in that process.

It is through substantive equality that states are given responsibility to redress the plight of the disadvantaged. Thus, substantive equality develops a relationship with equal socioeconomic and politico-legal rights. The major common feature between social rights and substantive equality is that they both aim to redress disadvantages experienced by vulnerable groups. Whereas formal equality is concerned with classification of vulnerable groups, substantive equality is concerned

¹⁴² Fredman (n 113 above) at 168.

¹⁴³ Fredman (n 113 above) at 168.

¹⁴⁴ Fredman (n 113 above) at 168.

with groups who are excluded because of their vulnerability or disadvantage.¹⁴⁵ When courts adopt the principle of substantive equality they will have to determine whether the purpose is to militate disadvantage and if yes then whether the means chosen achieve that purpose.¹⁴⁶ This is unlike formal equality which is aimed at discontinuing differentiation in treatment without taking into consideration the effects of that treatment.

Where the State has decided to prioritise a certain group and not the other, the excluded class must prove that the reason for their exclusion challenges the principles of substantive equality.¹⁴⁷ Substantive equality encourages judicial deference on the part of policy-makers especially on resource allocation issues.¹⁴⁸ It protects the State from having to explain its decision to exclude a particular social group from a particular benefit. This is done as a way of upholding democracy by ensuring the independence and separation of powers of state organs. However, it is criticised on the basis that respect for the democratic process requires greater attention to accountability and transparency.¹⁴⁹ Providing an explanation for a decision enhances the accountability and transparency of decision-makers, exposing their decisions to public scrutiny and debate. Thus, besides its assurance of the equality of results substantive equality also promotes democracy.¹⁵⁰

The conception of substantive equality in the 2013 Constitution is apparent in Section 56(6) where the state is required to take ‘legislative and other measures to promote the achievement of equality and to protect or advance people or classes of people who have been disadvantaged ...’ This section reflects the notion of restitution which is key to substantive equality.¹⁵¹ According to De Vos and Freedman, substantive equality is remedial in nature and it focuses on overcoming the effects of past discrimination.¹⁵² As long as the 2013 Constitution focuses on remedying the past effects of discrimination through its legislature and other measures then it upholds substantive equality.

¹⁴⁵ Fredman (n 113 above) at 170.

¹⁴⁶ Fredman (n 113 above) at 170.

¹⁴⁷ Fredman (n 113 above) at 175.

¹⁴⁸ Fredman (n 113 above) at 175.

¹⁴⁹ Fredman (n 113 above) at 175.

¹⁵⁰ This is dealt with more fully in chapter three

¹⁵¹ I Currie & J De Waal *The Bill of Rights Handbook* (2017) 213.

¹⁵² P De Vos & W Freedman *South African Constitutional Law in Context* (2014) 423.

Whereas the notion of substantive equality opens more opportunities for women, there is no guarantee that they will take advantage of those opportunities. Whether they are in a position to take advantage of such opportunities will depend on other situational factors which women find themselves facing.¹⁵³ It is contended that when an individual is treated differently from another as a result of her own choices, then the disparity is not considered inequitable.¹⁵⁴ This means that if a woman does not choose at all to take advantage of the opportunity available to her it would not be considered as violation of equal rights because the State cannot force women to take advantage of opportunities.

3.4.3. Link Between Socio – Economic Rights and Equality

Substantive equality acknowledges the complex nature of inequality and its entrenchment in institutions and politico – economic systems of the society.¹⁵⁵ Any commitment to the advancement and application or implementation of equality is thus a commitment to the eradication of such systemic inequalities. The framing of the socio – economic rights in the 2013 Constitution clearly puts a mandatory obligation on the State. However, these rights are framed differently. The right to education in section 75 provides as follows:

- (1) Every citizen and permanent resident of Zimbabwe has a right to—
 - (a) A basic State-funded education, including adult basic education; and
 - (b) Further education, which the State, through reasonable legislative and other measures, must make progressively available and accessible.
- (2) Every person has the right to establish and maintain, at their own expense, independent educational institutions of reasonable standards, provided they do not discriminate on any ground prohibited by this Constitution.
- (3) A law may provide for the registration of educational institutions referred to in subsection (2) and for the closing of any such institutions that do not meet reasonable standards prescribed for registration.
- (4) The State must take reasonable legislative and other measures, within the limits of the resources available to it, to achieve the progressive realization of the right set out in subsection (1).

¹⁵³ Hepple (n 83 above) at 9.

¹⁵⁴ Hepple (n 83 above) at 9.

¹⁵⁵ Albertyn (n 122 above) at 253.

The right to health care in section 76 is provided as follows:

- (1) Every citizen and permanent resident of Zimbabwe has the right to have access to basic health-care services, including reproductive health-care services.
- (2) Every person living with a chronic illness has the right to have access to basic healthcare services for the illness.
- (3) No person may be refused emergency medical treatment in any health-care institution.
- (4) The State must take reasonable legislative and other measures, within the limits of the resources available to it, to achieve the progressive realization of the rights set out in this section.

And the right to food and water in section 76 provides as follows:

Every person has the right to—

- (a) Safe, clean and potable water; and
- (b) Sufficient food;

And the State must take reasonable legislative and other measures, within the limits of the resources available to it, to achieve the progressive realization of this right.

From a reading of the above sections on socio-economic rights it is apparent that Zimbabweans enjoy rights to education, food and water yet with regards to health they only have the rights of access. Having the right to a service and the right to access it are two different things. The right to access does not place a heavier burden on the state and is too broad to directly hold the state accountable. The 2013 Constitution provides for the right to education and right to food and water but on the right to health it spells out right of access only. However, these rights have the following common provision which gives the state a positive duty:

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 right set out.

When making these legislative measures the State must not do so in a discriminatory manner and they must ensure that these measures have the effect of putting disadvantaged groups at the same level as those who were advantaged. While the provision of socio-economic rights does not necessarily have to target disadvantaged groups only, at least it must have the effect of dismantling the structures of injustices of the past.

Substantive equality, and its duty to provide, has an undisputable link with social rights.¹⁵⁶ The duty to provide constitutes the core principle of substantive equality. However, the decision on how to provide, when to provide and which priorities to follow remains a political one.¹⁵⁷ Where the constitution includes express socio-economic rights, it becomes a clear-cut issue for the courts to apply substantive equality principles.¹⁵⁸ In enforcing the principle of substantive equality, which is mainly the duty to provide, the courts should demand democratic accountability and not usurp the decision-making powers of the state. Democratic accountability entails an explanation of the decision which is reasonable and proportionate giving due consideration to the evidence at hand.

3.4.4. Application and Interpretation of the Right to Equality

The application and implementation of equality rights and other rights is guided by Section 45 which gives duty to both State and non-State actors to respect the Constitution.¹⁵⁹ This reinforces the vertical and horizontal application and protection of all rights. The horizontal and vertical protection of rights is quite important to women's equality and status which is at risk of being compromised by private actors.¹⁶⁰ It also ensures that women are protected from both angles, closing all doors of discrimination.

3.4.5. Women's Rights

Over and above the Equality Clause the 2013 Constitution has some provisions which directly deal with gender equality in particular and with equality in general. An example of such provisions is Section 80 provides for women rights and it provides that:

- (1) Every woman has full and equal dignity of the person with men and this includes equal opportunities in political, economic and social activities
- (2) Women have the same rights as men regarding the custody and guardianship of children, but an Act of Parliament may regulate how rights are to be exercised.

¹⁵⁶ Fredman (n 113 above) at 170.

¹⁵⁷ Albertyn (n 122 above) at 260.

¹⁵⁸ Albertyn (n 122 above) at 262.

¹⁵⁹ Section 45 of the 2013 Constitution Of Zimbabwe.

¹⁶⁰ Banda (n 69 above) at 493.

- (3) All laws, customs, traditions and cultural practises that infringe the rights of women conferred by this Constitution are void to the extent of the infringement.

What is worrisome is the fact that Section 80 which deals with women's rights does not embrace substantive equality. It simply gives women formal equality. Yet, considering laws which were passed since the Independence of the country, formal equality in Zimbabwe is no longer an issue.¹⁶¹

Women are no longer being subjected to direct discrimination under any law. Furthermore, the other short coming of section 80 is that it does not provide for affirmative action with regards to women. This then calls to question the government's commitment to achieve equality. The section simply accords women equality in political, social and economic activities. Political, social and economic activities, being key concepts in this section, are left undefined and there is no mandate given to the state to provide any regulation of these activities in the form of legislation.

One glaring example of how this may affect women negatively is seen in Section 80(2). While Section 80 (2) gives women rights to guardianship and custody of children, they were not given a say over the identity of the child. In Zimbabwe a child born out of marriage is given a surname of the father. This position might be ameliorated by section 26(c) of the 2013 Constitution which provides that 'There is equality of rights and obligations of spouses during a marriage and its dissolution.' If this section is interpreted within the frames of equality, in due course, we could see children born in a marriage set-up having a double barrel surname or the surname of the mother alone. However, this kind of revolutionary approach may not be easily attainable considering the patriarchal values that are entrenched in the family set up in Zimbabwe.

As pointed out before, in a family set up based on patriarchal ideology, kinship is patrilineal. Children are born to men hence they acquire the surname of the father. A woman in a marriage set up in Zimbabwe cannot give her surname to her children. The only scenario in which a child would bear the surname of the mother is when a child is born out of wedlock. The protections offered by

¹⁶¹ Some of these laws are elaborated in chapter one.

the Equality clause are more far reaching and more elaborate than the one offered by the women's rights provisions (section 80).

3.4.6. Limitation Clause

Section 86 provides guidelines on Constitutional rights protected by law. It provides limitations of rights and freedoms which state that:

Limitation of rights and freedoms,

(1)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.

(2)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 based on openness, justice, human dignity, equality and freedom, taking into account all relevant factors, including--

(a) the nature of the right or freedom concerned;

(b) 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;

(c) the nature and extent of the limitation;

(d) the need to ensure that the enjoyment of rights and freedoms by any person does not prejudice the rights and freedoms of others;

(e) 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

(f) whether there are any less restrictive means of achieving the purpose of the limitation.

(3)No law may limit the following rights enshrined in this Chapter, and no person may violate them--

(a) the right to life, except to the extent specified in section 48;

(b) the right to human dignity;

(c) the right not to be tortured or subjected to cruel, inhuman or degrading treatment or punishment;

(d) the right not to be placed in slavery or servitude;

(e) the right to a fair trial;

(f) the right to obtain an order of habeas corpus as provided in section 50(7)(a).

Unfair discrimination only exists if the differentiation applied cannot be justified.¹⁶²Justification depends on factors such as the vulnerability of the person(s) allegedly discriminated against and the invasive nature of the act perpetrating inequality. The link between equality and unfair

discrimination is instructive and as such, in any discrimination matter, it must be established. This requires the application of prudence in determining whether the conduct or law violates rights, thereby striking a balance between the two alleged competing interests. The analysis of the limitation clause requires, *inter-alia*, balancing benefits given by the alleged discrimination against the harm it causes. If the harm caused outweighs the benefits then it cannot be regarded as a justifiable practice in a democratic society. According to Currie and De Waal the reasons for limiting a right must be exceptionally strong.¹⁶³ It requires the application of wisdom in determining whether a conduct or law violates rights thereby striking the balance between the two alleged competing interests. This balance according to Juma should be carefully negotiated bearing in mind the values that the society considers to be important.¹⁶⁴

On the whole, considering the Constitutional provisions on gender equality discussed above, the 2013 Constitution of Zimbabwe goes a long way in redressing the historic inequalities suffered by women politically and legally in the country. The Constitution widely addresses the problem of the socioeconomic standing of Zimbabwean women and it is my averment that by doing this, the state has made inroads in protecting and guaranteeing equal political and legal rights between men and women in Zimbabwe.

3.5. IMPLEMENTATION OF EQUALITY PROVISIONS

3.5.1. CONSTITUTIONAL GUARANTEES TO GENDER EQUALITY

While indeed efforts have been made at the institutional level to address structural constraints to women's emancipation, critics argue that these gestures are half-hearted. This necessitates an examination of whether the State is actually carrying out constitutionally guaranteed provisions on gender equality discussed above. Government's commitment to equality is hereto assessed on the basis of three criteria; constitutional guarantees to gender equality, the State as an extension of patriarchy and women's advocacy through representation in public office. Interesting to note is that a general assessment of the implementation of the 2013 Constitution points to a great diversion from commitments to improve women's status and recognition in the society.

¹⁶³ Currie I & De Waal (n 151 above) at 151.

¹⁶⁴ Juma (n 72 above) 174.

First and foremost, very little progress has been made by the Government to align existing legislation with the new Constitution.¹⁶⁵ This apparent reluctance to align the legal regime with the new Constitution compromises the process of constitutionalism in Zimbabwe such that the country would simply end up with a perfect Constitution on paper, without any progress in constitutionalism itself.¹⁶⁶ In that regard, women would end up enjoying rights in theory while in practice these rights are not implementable and accessible. Mr Munyaradzi Paul Mangwana, who was one of the drafters of the 2013 Constitution, did not hide his sentiments of doubt over the government's ability and willingness to help provide women unfettered access to their rights. In this regard, he said that even if Zimbabweans demand the full implementation of the 2013 Constitution 'the state would not serve up those rights on a silver platter.'¹⁶⁷

It is also argued that attempts at the protection of gender equality in the 2013 Constitution will remain largely ineffective unless constitutional and legislative intent is matched by real structural changes in power relations in the societies and social institutions in which women are a part of.¹⁶⁸ Clearly the 2013 Constitution requires that where any conduct (whether by an individual or the State) and legislation does not operate in harmony with the principle of equality, on which the idea of human rights is predicated, such action and legislation must be renewed or struck down.¹⁶⁹ Historically, all types and systems of law have been employed, through various epochs and to varying degrees, as a tool for men to secure a dominant position in society and to deny women equal access to, and participation in, all spheres of cultural, economic, political and social life.¹⁷⁰ It is not only customary law which has been used to entrench sex and gender-based discrimination. Some aspects of common law, for example, continue to be characterized by sex and gender

¹⁶⁵ Hivos People Unlimited (n 65 above).

¹⁶⁶ Constitutionalism is a political philosophy based on the idea that government authority is derived from the people and should be limited by a constitution that clearly expresses what the government can and can't do. It's the idea that the state is not free to do anything it wants, but is bound by laws limited its authority. Available at <http://study.com/academy/lesson/what-is-constitutionalism-definition-history-concept.html>. Accessed on 28 August 2017.

¹⁶⁷ Hivos People Unlimited (n 65 above).

¹⁶⁸ Maluwa (n 61 above) at 254.

¹⁶⁹ Section 2 of the 2013 Constitution provides that:

(1) This Constitution is the supreme law of Zimbabwe and any law, practice, custom or conduct inconsistent with it is invalid to the extent of the inconsistency.

(2) The obligations imposed by this Constitution are binding on every person, natural or juristic, including the State and all executive, legislative and judicial institutions and agencies of government at every level, and must be fulfilled by them.

¹⁷⁰ Maluwa (n 61 above) at 249.

discrimination, despite the changes and advances that have been realised in the struggle to remove such inequalities over the past three decades. For example, Labour Laws provide for maternity leave but they do not provide for paternity leave. This basically relegates care duties and domestic family responsibilities to women.¹⁷¹

There is no State - sanctioned implementation vehicle in place for the 2013 Constitution. Other countries like Kenya, when they came up with a new Constitution, had a special committee in place which was responsible for ensuring the new Constitution was implemented. In Zimbabwe there is no such committee, hence no monitoring and evaluation tools exist for appraising any progress in implementing the new Constitution. This status quo greatly limits the level of awareness of the changes brought about by the 2013 Constitution on matters such as women's rights and creating such awareness is the State's obligation. These sentiments were echoed by Mangwana who said that no 'measure had been put in place to effectively implement the 2013 Constitution despite the fact that its provisions are among some of the best in the world.' He further regards the 2013 Constitution to be a rushed instrument which was aimed at addressing the pending elections of the day yet the significant step of putting in place a transitional mechanism and an implementation tool was overlooked. The result has been non-implementation and non-alignment of the legal regime to the new Constitution five years after its inception, which has become a roadblock in the full realisation of women's rights.

In a nutshell, inequality against women still persists in Zimbabwe. Indirect discrimination against women is evidenced in recent laws of Parliament which are adversely affecting the welfare of women which were passed without adequate consultation and public participation. A notable example is Statutory Instrument 64 of 2016 (The S I 64).¹⁷² The Statutory Instrument banned the

¹⁷¹ Section 18 of the Labour Act Chapter 28:01 Of 2002 provides that:

(1) Unless more favourable conditions have otherwise been provided for in any employment contract or in any enactment, maternity leave shall be granted in terms of this section for a period of ninety days on full pay to a female employee who has served for at least one year.

¹⁷² Statutory Instrument 64 of 2016 Control of Goods (Open General Import License) No.2 Amendment Notice, 2016 No. 8, available at <http://www.saaff.org.za/wp-content/uploads/2016/06/sI-64-of-2016.pdf>. (accessed on 16 September 2016).

importation of basic commodities¹⁷³ which many Zimbabwean women were trading in.¹⁷⁴ In 2017 the SI 64 was replaced by SI 122 which still banned the importation of the same goods however for the purposes of protecting local industry.¹⁷⁵ Considering that the responsibility of preparing food in a home setup is put on women in the Zimbabwean society hence the non-importation of such will affect women in their home economics. Uproar over its implementation proved to be an inadequate form of consultation and participation of relevant stakeholders which included women in the crafting of the statutory instrument.¹⁷⁶ Although this statutory instrument was recently removed it needs to be pointed out it was done not for the plight of women because the government perceived its removal as a means to control the unstable economic situation.¹⁷⁷

As a country we have beautiful policy papers on gender, laws and a new constitution which are there as mere window dressers but are not implemented...It is high time the government moved from gender theory to action and start walking the talk.

The Government's attitude and its unwillingness to promote the social status of women in Zimbabwe was shown in the case of *Loveness Mudzuru & Another vs Minister Of Justice, Legal & Parliamentary Affairs N.O & two others*¹⁷⁸ (*Mudzuru case*). In this case, the applicants made an application to the Constitutional Court challenging the practise of child marriage which was

¹⁷³ The Instrument banned the importation of the following goods:

coffee creamers (cremora), camphor creams, white petroleum jellies and body creams, plastic pipes and fittings, wheelbarrows, structures of iron or steel, plates, rods, angles, shapes, sections, flat-rolled products of iron or non-alloy steel, metal furniture of steel kitchen units, baked beans and potato crisps, cereals, bottled water, mayonnaise, salad cream, peanut butter, jams, maheu, canned fruits and vegetables, pizza base, yoghurts, flavoured milks, dairy juice blends, ice creams, cultured milk, cheese, second hand tyres (all re-treaded or used pneumatic tyres or rubber, baler and binder twine, fertilisers (urea and ammonium nitrate), compounds and blends, tile adhesive and tylon, shoe polish, synthetic hair products, flash doors, beds, wardrobes, bedroom and dining room suites, office furniture and tissue wading, woven fabrics of cotton and woven fabrics of cotton.

¹⁷⁴ Women in Informal Employment: Globalizing and Organizing available at:

<http://www.wiego.org/content/Zimbabwe-cross-border-traders-association>. Accessed on 16 September 2016.

¹⁷⁵ Statutory Instrument 122 of 2017 Control of Goods (Open General Import Licence) (Amendment) Notice, 2017 (No.5).

¹⁷⁶ ENCA News Report: Import Ban Poisoning Business 4 July 2016 available at www.enca.com/africa/zimbabwes-import-ban-posoning-businesses-icbta. Accessed on 16 September 2016.

¹⁷⁷ 'Govt lifts imports ban' *The Newsday* 24 October 2018.

¹⁷⁸ *Loveness Mudzuru and Ruvimbo Tsopodzi vs Minister of justice, Legal and Parliamentary and others* CCZ12/2015 available at <https://www.zimlji.org/zw/judgment/constitutional-court/2016/12/CCZ%252012-15%2520> (accessed on 18 August 2017).

still practised under certain laws and customs of Zimbabwe. Child marriage enabling laws were the Marriage Act¹⁷⁹ and the Customary Marriage Act.¹⁸⁰

In the *Mudzuru* case applicants argued that the laws which were allowing child marriages were unconstitutional since the Constitution set the age of majority at eighteen years. This case is of relevance in this research because victims of child marriages are mostly girls. Child marriage affects the status of women because they are forced to marry without their consent and once they are married, despite their age they are already regarded as majors and they would be expected to

¹⁷⁹ Marriage Act 81 of 1964 as amended through Act No. 18 of 1989 provides as follows:

Section 22. Prohibition of marriage of persons under certain ages

(1) No boy under the age of eighteen years and no girl under the age of sixteen years shall be capable of contracting a valid marriage except with the written permission of the Minister, which he may grant in any particular case in which he considers such marriage desirable:

Provided that-

(i) such permission shall not relieve the parties to the proposed marriage from the obligation to comply with all other requirements of this Act;

(ii) such permission shall not be necessary if by reason of any such other requirement the consent of a judge is necessary and has been granted.

(2) If any person referred to in subsection (1) who was not capable of contracting a valid marriage without the written permission of the Minister in terms of this Act, contracted a marriage without such permission and the Minister considers such marriage to be desirable and in the interests of the parties concerned, he may, if such marriage was in every other respect solemnized in accordance with this Act and there was no other lawful impediment thereto, direct in writing that it shall for all purposes be a valid marriage.

¹⁸⁰ Customary Marriages Act (Ordinance No. 5 of 1917 as amended through Act No. 6 of 1997 does not provide for a minimum age limit of 18 years in respect of any marriage contracted under the same. This can result to children marrying under the age of majority of 18 years thereby violating Section 78(1) and 81(1) of the Constitution of Zimbabwe which provides as follows:

Section 78 Marriage Rights

(1) Every person who has attained the age of eighteen years has the right to found a family.

(2) No person may be compelled to enter into marriage against their will.

(3) Persons of the same sex are prohibited from marrying each other.'

Section 81 Rights of Children

(1) Every child, that is to say every boy and girl under the age of eighteen years, has the right –

(a) to equal treatment before the law, including the right to be heard;

(b)

(c) ...

(d) to family or parental care or to appropriate care when removed from the family environment;

(e) to be protected from economic and sexual exploitation, from child labour, and from maltreatment, neglect or any form of abuse;

(f) to education, health care services, nutrition and shelter;

(g) ...

(h) ...

(2) A child's best interests are paramount in every matter concerning the child.

(3) Children are entitled to adequate protection by the courts, in particular by the High Court as their upper guardian.'

perform duties and responsibilities as majors yet in actual fact they were minors. In the judgement it was stated that:¹⁸¹

Evidence shows that child marriage is a tool of oppression which subordinates not just the woman but her family.

Arguments raised by the State through the respondents were evidence of the fact that it lacks serious commitment to address the issues of women from the grassroots. First and foremost, they were in support of child marriages despite its consequences and adverse effects on the status of women.¹⁸² Secondly, they argued that child marriage was a means of forcing people who impregnate girl children to take responsibility.¹⁸³ Taking responsibility of impregnating a minor through marriage is clearly a strategy for covering up and protecting the man. A woman gains nothing but losses a lot in the whole process. This was aptly reflected in the judgment in the following words:¹⁸⁴

The studies showed that where child marriage was practised, it was evidence of failure by the State to discharge its obligations under international human rights law to protect the girl child from social evils of sexual exploitation, physical abuse and deprivation of education, all of which infringed her dignity as a human being.

Once a minor is married because she is pregnant, chances of pursuing her goals in life become restricted. In this case the court declared unconstitutional all laws that support child marriages. This was a major contribution by the Judiciary system of Zimbabwe to the status of women who will not be forced into marriage at an early age, foregoing all other goals of their lives.¹⁸⁵

With regards to women's reproductive rights, Zimbabwe has taken away women's right to choose to have an abortion by disallowing and criminalizing any abortion which does not fall in certain categories of extenuating circumstances.¹⁸⁶ Furthermore a girl child in Zimbabwe is not protected

¹⁸¹ *Loveness Mudzuru & Another vs Minister of Justice, Legal & Parliamentary & others* (n 178 above) at 30.

¹⁸² *Loveness Mudzuru & Another vs Minister of Justice, Legal & Parliamentary & others* (n 178 above) at 30.

¹⁸³ *Loveness Mudzuru & Another vs Minister of Justice, Legal & Parliamentary & others* (n 178 above) at 31.

¹⁸⁴ *Loveness Mudzuru & Another vs Minister of Justice, Legal & Parliamentary & others* (n 178 above) at 31.

¹⁸⁵ *Loveness Mudzuru & Another vs Minister of Justice, Legal & Parliamentary & others* (n 178 above) at 34.

¹⁸⁶ Crotty (n 2 above) at 323.

by the law against unwanted pregnancy. Women's reproductive health rights are therefore restricted. This potentially compromises the future of young girls who might have been impregnated at school and would have to leave school for a while to take care of the pregnancy. This position now leaves the impregnated girls with the responsibility of taking care of the baby alone since most men would not own up to the pregnancy in fear of marrying a minor or being charged with statutory rape.

Non-alignment of laws with the new Constitution in Zimbabwe is indicative of the lack of political will to embrace Constitutionalism and this has adversely affected women's equality and status in Zimbabwe. Women are still being marginalized. A glance at the situation on the ground paints a gloomy picture. Provisions on women's rights have so far proved to be mere window dressing. Three months after the promulgation of the 2013 Constitution, the President appointed a Cabinet which comprised only three women.¹⁸⁷ Even the current cabinet has six women out 20, a number which is far from the SADC 50/50 target of 2015. This action seems to suggest that the protection of gender equality is a myth especially when one is considering the stark contrast between the provisions contained in the Constitution and the situation on the ground. Evidently, while the 2013 Constitution has been commended for being very progressive on issues of gender equality these progressive provisions are only on paper and are therefore not enough.

3.5.2. THE STATE AS AN EXTENSION OF PATRIARCHY

Arguably, the major obstacle in efforts to implement the principle of gender equality is the institution of patriarchy, which is fundamental to African customary legal systems. However, Zimbabwe has taken initiative in addressing this kind of institutionalized inequality. Notwithstanding, in Zimbabwe, like many African countries, cultural practices based on customary law such as payment of bride prize are followed at the expense of civil law, with disastrous consequences on the social status of women. The same happens even in Eastern countries. For example, dowry deaths occur when a husband and his family become dissatisfied with the dowry they receive from the bride's family. One solution is to get rid of the wife with the insufficient dowry so that the husband is free to marry again. Polygamy is another cultural practice

¹⁸⁷ Legal Resources Foundation (n 64 above).

which discriminates against women. Males and females do not have equal rights to multiple spouses. Other discriminatory cultural practices like wife battering have however now been outlawed through the Domestic Violence Act. Having a law that specifically forbids spousal battery reveals commitment by a national legislative body to deal with this important issue directly.

It should be noted that the State is not playing a proactive role in the eradication of patriarchal customs which demean the status of women. Nothing has been done by the State and the Ministry of Women affairs to denounce such customs formally. The state of affairs with regards to the status of women in Zimbabwe was best described by Edinah Masanga, a gender activist quoted in the News Day of 7th February 2014, pointed out that the cabinet is not gender balanced.

3.5.3. WOMEN REPRESENTATION IN PUBLIC OFFICES

An assessment of women political participation must not be based only on measures of representation, which are easily determined by a cursory glance at the numbers.¹⁸⁸ Regard must also be given to female legislators' accountability and scope of delivery.¹⁸⁹ Women parliamentarians' accountability to other women in the rest of society is currently being glossed over in favour of party interests, for the simple reason that women parliamentarians' first priority is party objectives and not women issues. Their ability to deliver is also being compromised by lack of resources or lack of access to such resources especially for those female Members of Parliament from opposition parties. Participation in politics goes beyond numbers of representatives in parliament to their effectiveness in representing their constituents. The issue of women's participation in politics in Zimbabwe has remained a challenge to the extent that even those that are seating in the 2013 Parliament are seldom making any remarkable impact on general governance issues and particularly on gender issues.¹⁹⁰

If women with genuine concerns about gender issues at heart would obtain a majority in parliament they would be in a position to also push for laws that improve women's status in society. The idea

¹⁸⁸ Gouws (n 88 above) 3.

¹⁸⁹ Gouws (n 88 above) 3.

¹⁹⁰ 'Women Struggle to make Parliament Impact' The Independence News Paper 11 April 2014.

of having women push for laws which are in their interest has been observed in African countries outside Zimbabwe. In South Africa, female Parliamentarians pushed for stronger sexual assault laws in 2006,¹⁹¹ after the acquittal of former President Jacob Zuma in a rape case¹⁹² which he justified using his Zulu cultural beliefs and practices.¹⁹³ In most cases laws which violate women's interests work to the advantage and privilege of men such that without women voicing their concerns, there can never be any remarkable policy change in favour of women. This emanates from the fact that women's needs and expectations are different from those of men¹⁹⁴ yet the majority of government institutions, which are male dominated, seem biased in favour of the interests of men and mostly oblivious to women's needs.¹⁹⁵

Even in the process of fighting for policy transformation in favour of women there is always great resistance from males who seek to perpetuate the *status quo* because of the privileges they are enjoying.¹⁹⁶ The reality is that both women and men have equal stakes in all public policies hence both must be equally involved in the process of making such policies. It can no longer be presumed that men can stand for women and represent their interest.¹⁹⁷ If the gender-imbalance in decision making and in politics persists in Zimbabwe men will continue to monopolize politics and male privilege will continue. This is against the ideals of genuine democracy, which require a political system to be reflective and representative of the various segments of its population.¹⁹⁸

Women have less time than men do to participate as active citizens.¹⁹⁹ This is because women are responsible for caregiver roles in the family, including taking care of the children, the disabled and the elderly. This further causes unequal division of labour in the domestic sphere, which then hampers women's access to the public sphere in comparison to men. Once women's political

¹⁹¹ Criminal Law (Sexual Offences And Related Matters) Amendment Act 32 of 2007.

¹⁹² *S v Zuma* 2006 SA (WLD) 2.

¹⁹³ K Standt 'Women on Gender' in P Burnell; P Randall & L Rakner (eds) *Politics In the Developing World* (2011) 165.

¹⁹⁴ T Dube 'Engendering Politics and Parliamentary Representation in Zimbabwe' 5 *Journal of African Studies and Development* 207.

¹⁹⁵ N Shvedova 'Obstacles to Women's participation in Parliament' (2002) available at <http://www.idea.int>. (accessed on 21 October 2016).

¹⁹⁶ Standt (n 193 above) at 171.

¹⁹⁷ Dube (n 194 above) at 201.

¹⁹⁸ Dube (n 194 above) at 201.

¹⁹⁹ SR Sandusky 'Women's Political Participation in Developing and Democratizing countries: Focus on Zimbabwe' (1999) 5 *Buffalo Human Rights Review* 264.

participation is hampered then they are kept from realizing their full citizenship rights. What needs to be noted is that merely granting suffrage to women is insufficient if the State is to aid the full realization of these political rights.²⁰⁰ There still exists gender bias against women which keeps them out of the political arena despite the fact that they have been granted suffrage.

Impediments to political participation may be compounded by racial and economic factors.²⁰¹ In general, women are poorer and less financially independent than man. If women have failed to secure a meaningful economic and social status it follows that the number of women in decision making positions is reduced. When women are denied an equal opportunity to make decisions which affect their economic and social status in reality they will lack representation, along with the capacity to influence policy formulation. An example can be derived from national budget allocations which do not prioritize women's issues.

One female activist, Netsai Mushonga's reaction to the action of the President in 2013 to appoint a male dominated Cabinet mirrors the great disappointment felt by women when left out of influential political offices. She said:²⁰²

We are disappointed at the low number of women appointed to Cabinet. The level of women representation is low. Women just have 9% representation and it is really inadequate. It goes against the SADC Protocol on Gender and Development which calls for 50/50 representation in governance by 2015.

Many people described the action by the President as retrogressive and he justified this position by attributing it to women's lack of education.²⁰³ The President's justification was however baseless because there was no proof that he, at any given time, called women to submit their curriculum vitae for consideration for appointment to ministerial positions. Ironically there were a greater proportion of women in Cabinet during the era of the 1980 Constitution than under the 2013 Constitution which has specific gender equality provisions. For example, in 2008 women constituted 16% of Cabinet Ministers. Yet under the 'progressive' 2013 Constitution females

²⁰⁰ Sandusky (n 199 above) at 264.

²⁰¹ Sandusky (n 199 above) at 264

²⁰² Hivos People Unlimited (n 65 above).

²⁰³ Ministerial posts of Higher and Tertiary Education, Women Affairs, Gender and Community Development and Small and Medium Enterprise Developments.

constituted only 9% of Cabinet, translating to three female Ministers out of twenty-six Cabinet Ministers in figures.²⁰⁴ This does not only portray a lack of political will to recognize women as being at par with men in top decision-making positions but it also kills all hope of achieving gender equality considering such an approach is being taken and justified at the highest level of government. This trend continued in the President's appointment of Deputy Ministers,²⁰⁵ Permanent Secretaries²⁰⁶, Chairpersons of Commissions²⁰⁷ and Judges.²⁰⁸ The number of women appointed in all these positions still lagged behind that of men. With regards to political representation, the State did not effectively implement the required proportional representation²⁰⁹ such that in parliament there are only 123 women out of 350 translating to 35.14%.²¹⁰ This falls far short of the Southern African Development Community (SADC) stipulated benchmark of 50% of women in decision making positions by 2015.

The 35.14% must also be viewed in the context of the processes and strategies employed in coming up with this percentage. This percentage was arrived at through the efforts made by political parties to rectify women's exclusion and marginalisation through the introduction of a quota system in the selection of their candidates. In such scenarios however, the criteria for nomination and deployment of candidates is party allegiance. It therefore follows that their goal would be to advance party-political interests at the expense of genuine women concerns.

3.5.4. INEQUALITIES IN THE EMPLOYMENT SECTOR

With regards to gender equality in the employment sector, the dynamics are linked to a number of issues such as market liberalization, technological transformations, globalization of production, trade markets and demographic trends. These factors create challenges as well as opportunities for gender equality and thus they require serious consideration in any endeavour to promote gender

²⁰⁴ Legal Resources Foundation (n 64 above).

²⁰⁵ Legal Resources Foundation (n 64 above).

²⁰⁶ Of the 24 permanent secretaries in 2017 only eight are females.

²⁰⁷ Legal Resources Foundation (n 64 above).

²⁰⁸ Legal Resources Foundation (n 64 above).

²⁰⁹ Section 120(2) (a), which provides for the election of senators under a party system of proportional representation,

²¹⁰ Parliament of Zimbabwe, Gender Disaggregated data in the Parliament of Zimbabwe since 1980 <http://www.parlzim.gov.zw/about-parliament/publication/history-of-women-parliamentarians>. Accessed on 21 October 2016.

equality. For the past three decades there has been remarkable improvement in many aspects in the area of women and gender equality in the world of work. For instance, there has been a remarkable increase of women's involvement in paid employment. Promotion of equality should, *inter-alia*, eliminate the differences in opportunity and treatment between men and women, the discrimination in the work situation and barriers that hinder women's vertical and horizontal mobility and entry into the so called traditional male jobs at different levels as well as ensure gender sensitivity in every facet of the work situation.²¹¹

Gender equality in opportunity and treatment in the world of work also contributes to economic efficiency and sustainable development since it permits the harnessing of the diverse skills of different population groups to enhance, for example, an enterprise's productivity and thereby improving the lives of the wider society.²¹² Promotion of gender equality in employment sector requires more than simply granting similar labour hours especially in developing countries, such as Zimbabwe, where the bulk of women workers work outside the purview of labour laws. Furthermore, the discrimination and gender inequalities which are faced in the world of work tend to be closely linked to women's treatment under other laws apart from labour law.²¹³

Gender equality in employment in Zimbabwe is being affected by the macro-economic and socio-political context.²¹⁴ These factors affect especially the quantity and quality of employment opportunities for women as well as men. There is a need to consider gender balancing in the formulation, implementation and maintenance of macro-economic policies. Equality between men and women in social security coverage and also in sharing family responsibilities needs to be reflected in an appropriate gender equality policy.²¹⁵ The burden borne by women in the care of children and the elderly continues to hinder women's engagement and access to equal opportunity and treatment at work and to disadvantage them generally in the labour market.

²¹¹ Date-Bah (n 110 above) at 4.

²¹² Date-Bah (n 110 above) at 4.

²¹³ Date-Bah (n 110 above) at 4.

²¹⁴ Date-Bah (n 110 above) at 9.

²¹⁵ Date-Bah (n 110 above) at 13.

Women continue to be grossly underrepresented in managerial and top administrative positions even in work organisations with large numbers of female workers.²¹⁶ Gender equality in employment should imply women's adequate representation at higher levels of policy formulation. Measures must be taken to promote women's increased representation and participation in decision-making at corporate level. In 1993 the International Labour Organisation observed that it will take at least 500 years-(5 centuries) for equal representation of women in decision-making to be achieved.²¹⁷

Furthermore, promotion of gender equality in the employment sector cannot remain the sole responsibility of the government. Other institutions can also play a critical role in this regard. Change in the labour sector requires a balance in trade unions. As long as women's representation remains unequal to that of men and women are much underrepresented in the union's leadership positions, women will not make much inroads in achieving gender equality. Above all, representatives of women must be able to use the numerical strength of female workers to get trade unions to pursue issues of concern to them such as sexual harassment, child care and the sharing of family responsibilities.²¹⁸ The bulk of women workers are found in the informal and rural sectors which are often outside the purview of labour legislation and the activities of the unions.²¹⁹ These include domestic workers and rural and urban informal sector workers.

3.6. OTHER FACTORS HINDERING GENDER EQUALITY

Challenges to women's equitable access to citizenship rights of participation are examined in this section to give a bearing on the extent to which women's politico-legal status has improved in Zimbabwe's post-independence era, if at all it has improved.

²¹⁶ Date-Bah (n 110 above) at 15.

²¹⁷ Date-Bah (n 110 above) at 15.

²¹⁸ Date-Bah (n 110 above) at 15.

²¹⁹ Date-Bah (n 110 above) at 15.

3.6.1. Poverty

Poverty negatively affects women's status and inconveniences their ability to enjoy civil liberties.²²⁰ Poverty paralyses the socio-economic status of women, thereby frustrating gender inequality reform efforts by government. People whose focus are on meeting basic daily needs, like women of low socioeconomic standing, have little time to engage in political participation and development programs initiated by government.²²¹

3.6.2. Fear And Violence

During the 1980's the government of Zimbabwe introduced the Emergency Powers Regulations under the Law and Order Maintenance Act.²²² Under these regulations several rights and freedoms were curtailed. Such rights included freedom of expression and association and freedom from discrimination. These regulations were the government's tool to ban political parties and gatherings. People were detained without trial for indefinite periods and extensive curfews were put in place. Violent activities of the Zimbabwean Army's Fifth Brigade and the subsequent violence experienced during election time after independence created an environment of fear which has left Zimbabweans, especially women, feeling uncomfortable to freely exercise their political rights in the current political environment.²²³ This same kind of violence resurfaced in Zimbabwe even in the 2000 and 2008 elections, when a powerful opposition party emerged. As such in respect of their political participation, women are being obstructed by fear and apprehension. Women in Zimbabwe have a fear of being politically active as a result of the abuse of power and restrictions on political rights perpetrated by the ruling party since independence.²²⁴

²²⁰ Sandusky (n 199 above) at 263.

²²¹ Sandusky (n 199 above) at 263.

²²² Law and Order Maintenance Act 53 Of 1960.

²²³ Sandusky (n 199 above) at 264.

²²⁴ Sandusky (n 199 above) at 264.

3.6.3. Lack Of Knowledge

Women also lack requisite knowledge of their rights and freedoms as they are still caged in the beliefs of patriarchal societies. When one does not know her rights she cannot claim them. This is why education is very much the key to involving society's traditionally marginalised groups in any development discourse. Teaching women about their constitutional rights helps in setting in motion changes in societal perceptions about the changing social roles of women.²²⁵ Knowledge is key in empowering and emancipating marginalized groups in any given society.

Another explanation for women's low political participation, it has been argued, is the position and the responsibilities which women are forced to hold in society by custom, which render them less skilled in political activities such as lobbying and engaging in law reform.²²⁶ Education is the key to remedying this situation as it will address the lack of skills affecting especially rural women. For example, uneducated women may not see the relationship between the right to vote and improvement of their socio-economic situation. Women need to be educated so that they appreciate their rights and the need to exercise their rights through participation.²²⁷

At the attainment of independence, women had a higher percentage of illiteracy rates as compared to their male counterparts.²²⁸ However due to educational programs and the 'free education for all' policy initiative which was introduced by the Government of Zimbabwe the illiteracy rate of women has remarkably decreased. Therefore, if the right to education is extended to women they would be in a position to appreciate and understand the language of politics. Human rights education must be extended to women by State machineries such as the Gender Commission. Unfortunately, these institutions are financially incapacitated.

The foregoing discussion demonstrates that, in as much as there are progressive provisions on gender equality enshrined in the supreme law of the land, a lot still needs to be done in order for Zimbabwe to attain gender equality as provided for in various regional and international

²²⁵ Sandusky (n 199 above) at 264.

²²⁶ Sandusky (n 199 above) at 264.

²²⁷ Sandusky (n 199 above) at 264

²²⁸ Sandusky (n 199 above) at 264.

instruments. Political will is instrumental in translating constitutional provisions into reality. It is not enough for the State to pay lip service to issues of gender equality. Where it is within the power of the State to ensure the attainment of gender equality then the State should demonstrate its commitment to the value of gender equality by ensuring that all genders are equally represented in all spheres of society. The provisions must be given effect by tangible action on the part of those whose responsibility and efforts are to promote gender equality. There is therefore a need to push for gender equality through advocating for compliance with constitutional provisions. A lot can be done through the Ministry of Women Affairs and Community Development which is a State apparatus in the advancement of gender equality and the promotion of women status. The Ministry of Women Affairs' capacity and mandate to implement the 2013 Constitution's equality Clause is discussed hereunder.

3.7. THE ROLE OF THE MINISTRY OF WOMEN AFFAIRS, GENDER AND COMMUNITY DEVELOPMENT

The current Ministry of Women Affairs, Gender and Community Development (hereinafter referred to as Ministry of Women Affairs) was birthed in 2005. In this section the discussion is centred on the Ministry of Women Affairs' efforts to move gender discourse beyond papers and policy documents under the 2013 Constitution. There is a need for effective institutional mechanisms to see the translation of policy and legislative commitment into practice for the benefit of women and for the betterment of women's status in Zimbabwe. By analysing the following functions assigned to a Ministry of Women Affairs it becomes clear that the Ministry constitutes a parent government department which has a mandate to address issues of the status of women and their equality in Zimbabwe. Its functions are clearly articulated as follows:²²⁹

- To formulate and implement policies, strategies and programmes that promote women's participation in national development.

²²⁹ Ministry of Women Affairs, Gender and Community Development available at <http://www.women.gov.zw/site-map/about-the-min> Accessed on 28 August 2017.

- To coordinate the implementation of the National Gender Policy
- To formulate and implement policies, strategies and programmes that enhance community development in liaison with relevant line ministries stakeholders
- To develop markets and marketing systems for goods and services produced by women and communities in consultation with other line ministries and stakeholders
- To promote entrepreneurial skills development for women and communities in consultation with line ministries and stakeholders.
- To coordinate non-governmental organizations involved in women, gender and community development work
- To promote a gender-sensitive legal framework and create awareness on laws that enhance the legal status of women
- To administer and manage the operations of community income-generating projects
- To monitor and evaluate the impact of policies, programmes and projects that enhance women's community development.

All these functions of the Ministry of Women Affairs are summed up in its mission, which is:²³⁰

To spearhead women empowerment, gender equality and equity for community development.

The major functions of the Ministry of Women Affairs are to spearhead and coordinate all the efforts essential for women to enjoy their rights. Women must ideally be informed of their rights and a platform for them to enjoy their rights must be created by the Ministry of Women Affairs. However, the challenge that still remains is the Ministry's effectiveness in the institutionalization of gender in all development processes.²³¹ Still, the Ministry of Women Affairs is expected to effectively play a catalytic, advisory and monitoring role in enhancing coordinated efforts to mainstream gender and promote women's rights.²³²

²³⁰ Ministry of Women Affairs, Gender and Community Development (n 228 above).

²³¹ C Matizha 'A stumbling Block of Foundation Builder: An Assessment of the Ministry of Women's Affairs in Promoting Women's Rights in Zimbabwe' unpublished Master's thesis University of Zimbabwe (2006) 10.

²³² Matizha (n 231 above).

With regards to policy formulation, the Ministry of Women Affairs made a commendable contribution to gender equality in Zimbabwe when it came up with the National Gender Policy (2013-2017). The policy's vision is to: ²³³

promote a Zimbabwean society where there is equality and equity among women and men in all spheres of life and at all levels, which is anchored on the protection and respect of the rights of individuals

The broad spectrum of the National Gender Policy is to provide guidelines, institutional frameworks and parameters to ensure the availability of resources for the implementation of Constitutional requirements, regional and international conventions and other agreements on gender equality and non-discrimination.²³⁴ However it took the Ministry of Women Affairs three years²³⁵ to come up with the policy and a further two years for it to be published and launched.²³⁶

What is remarkable about the Ministry of Women Affairs achievements is the efforts it has made to devolve its functions by setting up Gender Councils in every province and all districts in Zimbabwe. Membership of these Gender Councils include non-governmental organisations, local leadership, faith – based organisations, local authorities and representatives from ministries. The Gender Councils have the following functions:²³⁷

1. Facilitating discussion of gender issues at local level.
2. Assisting in the identification of local practices, customs and beliefs that hinder gender equality and suggesting local interventions for the same.
3. Facilitating the planning and commemoration of occasions such as International Women's Day and 16 Days of Activism against Gender – based Violence.
4. Providing a forum for contribution towards legal and administrative reforms.

While this is a noble initiative aimed at improving the status of women from the grassroots, the functionality of these Gender Councils is hampered by lack of resources. Furthermore, the fact that these councils operate only at the provincial and district level shows that they have limited outreach

²³³ National Gender Policy (n 108 above).

²³⁴ Matizha (n 231 above).

²³⁵ The drafting of the National Gender Policy commenced in 1997 and it was finalized in 2001.

²³⁶ It was then launched in 2003

²³⁷ Matizha (n 231 above) at 10.

since they have not yet penetrated the rural areas. They could be closer to victims if they could operate at ward levels, but then if the current challenge of resource constraints remains unaddressed, further decentralisation from the district may not be immediately achievable.

Although membership to the Gender Councils is reasonably broad, with regards to the membership from the community, there are notable limitations inherent in its structure which limits its capacity to effectively advance the improvement of women's status. Gender Councils members are not adequately trained to be gender sensitive and they lack the capacity to implement programmes. Furthermore, their programmes are always hindered by lack of financial resources to implement their programmes. There are no incentives given to the members for participating and as such its meetings are not prioritised by its members.

Addressing gender issues while one is operating at the macro level, in provinces and districts, is on its own a challenge as it limits access for women who are the real victims of gender inequality or gender oppression. The inconvenience of the location of these councils makes it difficult to reach such offices when the need arises. Even in terms of improving awareness through encouraging women's involvement in activities such as International Women's Day, the Gender Council is not decentralized enough to actually capture the attention of women at the grassroots level.

In trying to promote gender mainstreaming in government ministries' programmes and projects, the Ministry of Women Affairs introduced the concept of Gender focal persons in every ministry. The responsibilities of gender focal persons are as follows:²³⁸

- Produce action plans to guide gender mainstreaming.
- Collect and analyse relevant gender-related or disaggregated data pertaining to the organization or sector.
- Submit periodic monitoring and evaluation reports to the national gender machinery.

²³⁸ Matizha (n 231 above) at 10.

- Develop initiatives promoting women’s full participation in all decision-making structures and in trade unions or employees’ associations in their respective organizations.
- Disseminate information on gender-related regional, continental and international agreements or conventions that the government accedes to or ratifies.
- Assists in the compilation of periodic reports on the implementation of conventions, protocols and declarations.
- Ensure gender-responsive implementation of employment policies and practices with respect to recruitment, selection, promotion, retrenchment, retirement and remuneration.

Although these gender focal persons would receive some periodic training from the Ministry of Women Affairs on their role in the implementation of the National Gender Policy, their activities are not part of their job descriptions because they are selected from among Ministries’ employees and not employed by the Ministry of Women’s Affairs itself. Hence in some cases there is no time or budget to accommodate them. The terms of reference of the gender focal persons are not part and parcel of their job description and as such they are not acknowledged in terms of time and remuneration. Under such circumstances it then follows that these gender focal persons will give little commitment to gender issues. It is also likely that they may not feel motivated to pay attention to those gender issues. Gender focal persons also lack decision making powers with regards to their Ministry’s gender issues as they operate under heads of their Ministry.

In 2001 and 2002 the Ministry of Women Affairs held consultative workshops with traditional leaders²³⁹ through their Gender Councils.²⁴⁰ Discussions at these workshops were focusing on gender issues, customary law, culture and women’s rights. This was a positive initiative which helped in changing attitudes on women’s status and inequality.²⁴¹ However these workshops were severely impaired by lack of funding and the program was suspended and it eventually died a natural death. The Ministry of Women Affairs has also since 2005 implemented some income – generating projects for women.²⁴² These projects include women’s clubs, village banks, women bakeries, uniform-making, cookery, hand knitting, crocheting, sewing, catering, peanut butter

²³⁹ These traditional leaders included chiefs, headmen, village heads and church leaders.

²⁴⁰ Matizha (n 231 above) at 11.

²⁴¹ Matizha (n 231 above) at 11.

²⁴² Matizha (n 231 above) at 11.

making, oil pressing and candle making. The Ministry of Women Affairs also facilitated the acquisition of peanut butter and oil-processing machines for eight rural provinces.²⁴³

An analysis of the nature of the projects which the Ministry of Women Affairs is availing to women however leads to a reasonable conclusion that women's status is far from being improved and inequality cannot be achieved overnight. Firstly, the domestic nature of these projects is similar to the domestic roles women are being forced to do by their husbands in their homes. These projects just give women a false sense of comfort and this appears to justify Matizha's argument that they are not meant to benefit women but they are used to win their votes.²⁴⁴

Secondly these projects do not have the potential to elevate women's social status because they are low income projects which cannot achieve much in way of economic independence of women. Their sustainability is highly questionable since there was no substantive capital issued for the projects. What the Ministry of Women Affairs is doing is that they identify a woman in the rural area who is already socially and economically disadvantaged and they give her a small project as a consolation while they do not address gender issues hindering her progress. Thirdly there are various categories of women who are not benefiting from these programs such as school going girl children, homeless girl children and educated middle – class women.

In accordance to its mandate, the Ministry of Women Affairs is expected to play a leading role in advocating for women's rights and in improving awareness of these rights. In a research done by Matizha in 2012 it was established that very few women are aware of their rights both in the urban and rural setup.²⁴⁵ The lack of awareness of women's rights demonstrated in that research showed that the Ministry of Women Affairs does not have the capacity to effectively play its advocacy role. Most women get to know of their rights through non-governmental organisations, through radio programmes and at political rallies.²⁴⁶

²⁴³ Matizha (n 231 above) at 11.

²⁴⁴ Matizha (n 231 above) at 11,

²⁴⁵ Matizha (n 231 above) at 12.

²⁴⁶ Matizha (n 231 above) at 12.

Another criticism against the Ministry of Women Affairs' role in upholding the status of women is its reactive attitude as opposed to a proactive one, in dealing with issues concerning women's rights.²⁴⁷ The Ministry is invisible in as far as lobbying for legislation around women issues is concerned. The Ministry of Women Affairs is only visible in gender equality, empowering women economically and challenging all forms of discrimination and gender-based violence.²⁴⁸

Additionally, since the promulgation of the 2013 Constitution the Ministry has not received a significant percentage of their annual budget. An analysis of the 2014 budget shows that there have been half-hearted efforts on the part of the State to promote gender equality in Zimbabwe. Under the 2014 budget the Ministry was allocated a paltry US\$10.8 million, less than 1% of the US\$4.3 billion national budget and nothing was allocated to the Anti-Domestic Violence Council.²⁴⁹ This does not do much to improve the economic and social status of women.

In a nutshell, no major structural changes have been noted in the Ministry of Women's Affairs in response to the 2013 Constitution. The local and governmental structures in place predate the 2013 Constitution. This has seen the Ministry fail to tailor programmes that effectively respond to the shortcomings of the 2013 Constitution and legislative loopholes in access to equal rights by women.

3.8. CONCLUSION

In reference to the fight for gender equality and women's status in Zimbabwe, the promulgation of the 2013 Zimbabwean Constitution saw women celebrate the inclusion of provisions on gender equality and women's rights.²⁵⁰ The 2013 Constitution of Zimbabwe seeks to promote specified constitutional rights of individuals through the Bill of Rights. It espouses the values and principles of gender equality. From a gender perspective the 2013 Constitution has been rated as one of the most progressive Constitutions.²⁵¹ There has been notable improvements from the 1980

²⁴⁷ Matizha (n 231 above) at 12.

²⁴⁸ Legal Resources Foundation (n 64 above).

²⁴⁹ Legal Resources Foundation (n 64 above).

²⁵⁰ Legal Resource Foundation (n 64 above).

²⁵¹ Mutangi (n 40 above) at 284.

Constitution, which had provisions which allowed discrimination in areas of personal law. The State is to be commended for having included section 80 in the Constitution, which outlines the rights of women and states that women have the right to full and equal dignity with men, including equal opportunities in political, economic and social activities. It also denounces customs and culture which discriminate against women.

Additionally the State has to be lauded for having taken steps to comply with its international and regional obligations under the various international and regional conventions by enshrining provisions for gender equality in the 2013 Constitution.²⁵² While international instruments such as ICCPR, CEDAW, and ICOSER set international women's rights standards, regional instruments such as the Protocol on the African charter on the Rights of Women in Africa and the SADC Protocol on Gender Development regulate human rights standards of regional bodies and the apparatus for the protection of human rights in Africa.²⁵³

While it has been established that Zimbabwe has a commendable Constitution with progressive provisions for gender equality there still exists major hindrances to its effective implementation, including lack of political will. Proper and prompt implementation of gender equality provisions of the new constitution requires a genuine commitment from the executive which must be seen through appointment of women as Ministers, Deputy Ministers, Permanent Secretaries and members of commissions and other decision-making positions such as the Attorney general and the Chief Secretary being given to women too.

Zimbabwe does not have a national legislation which provides for the implementation of its constitution's equality clause and for mechanism to monitor implementation of women's rights provisions as well. The only available state machinery for the enhancement of women's rights is the Ministry of Women Affairs. Its effectiveness is being hampered by a number of factors. Lack of adequate financial resources is a major setback. In terms of National Budget allocations, the Ministry of Women's Affairs, Gender and Development is not being prioritised.²⁵⁴ Finances given

²⁵² Mutangi (n 40 above) at 283.

²⁵³ Maluwa (n 61 above) at 252.

²⁵⁴ Matizha (n 231 above) at 10.

to the Ministry for women developmental issues must be commensurate to the demands of their task. Paltry financial allocations, which are been given to the Ministry of Women Affairs, consistently have been insufficient to make the Ministry carry out its mandate effectively. With the little resources it has been receiving the Ministry of Women affairs ceased to prioritise women developmental issues and focused more on its own administration.

I note with concern in this discussion that in as much as the Ministry of Women Affairs is supposed to improve the status of women economically, socially and politically, with the kind of projects being funded and facilitated by the Ministry of Women Affairs basically it subjects women to the same low-level socio – economic status they face in society. On top of this, these projects are not accessible to women of all social backgrounds. In most cases, the projects are politicised and they are distributed along lines of politics of patronage.

Overall, the above discussion has proved that Zimbabwe lacks a genuine commitment to advancing the status of women and improving their welfare. The government is totally disregarding its own Constitution. It has failed to meet the 50/50 percentage of male to female representation in decision making positions by 2015 as required by the SADC Protocol and it is not giving any regard to its international obligations.

As progressive as the 2013 Constitution of Zimbabwe may appear on the outset considering its Section 80 which gives specific rights to women it has to be noted that it silently promotes the attributes of male dominance in a family set. The section gave women rights to custody and guardianship but did not abolish patrilineal kinship. A child in Zimbabwe carries a surname of the father only and the mother has no say over that. Furthermore, practices such as bride wealth which promote male dominance over women have not yet been denounced. A lot still needs to be done in Zimbabwe in terms of the legislative framework and implementation of laws and policies to advance the equality of women. A serious commitment to address women's inequality in Zimbabwe must be evidenced by the implementation of policies and laws that improve women's status practically. Otherwise simply writing laws does not guarantee achievement of the desired end. Of note, few legislative enactments were directly derived from international human rights law

but interestingly, Zimbabwean courts are generally reluctant to apply provisions of international instruments.²⁵⁵

Besides lack of effective implementation of the 2013 Constitution other factors such as traditional thinking and customary law has been regarded as the largest impediment to the realization of true equality of women in Zimbabwe.²⁵⁶ This now leaves one pondering as to whether women in Zimbabwe are being treated as equal citizens to men in Zimbabwe. If women are not equal citizens with men then it means that there is no democracy in Zimbabwe. Democracy and citizenship underpin equality because both must be accessed equally by both men and female. This inevitably warrants a discussion on women's access to citizenship and democracy in Zimbabwe which follows in the next chapter.

²⁵⁵ M.G. Bochenek 'Compensation for Human Rights Abuses In Zimbabwe' 26 *Columbia Human Rights Law Review* 515.

²⁵⁶ Sandusky (n 199 above) at 126.

CHAPTER FOUR

CITIZENSHIP, DEMOCRACY AND WOMEN'S EQUALITY

4.1. INTRODUCTION

An examination of the issue of women's status and equality politically and legally in Zimbabwe cannot be complete without addressing differential access to citizenship and democracy based on gender. Ergo, this chapter focuses on Zimbabwean women's access to democracy and citizenship to expose these inequalities between men and women legally and politically in Zimbabwe. Democracy, citizenship and political and legal equality in terms of gender are concepts that are interlinked and interrelated hence the need to unpack their interrelatedness. Of major concern is the ways in which women's socioeconomic roles have compromised access to citizenship and democracy and along with this, women's civil rights and visibility in the public sphere.

Despite international commitments and intra - national pledges and obligations that Zimbabwe has made, gender gaps still exist between men and women in terms of access to democratic rights and citizenship. At the commencement of this chapter the definition of the concept of democracy and citizenship are proffered. An analysis of how the two concepts link respectively with the concept of socioeconomic and politico-legal gender equality then follows, after which the concepts are analyzed jointly. Numerous restrictions on the democratic rights and active citizenship of women in Zimbabwe are brought to the fore. Furthermore, strides taken by the Zimbabwean government in this arena as a way to redress gender inequality and foster parity are looked at.

For women to enjoy equality they should have proper access to citizenship and democracy. This chapter focuses on how women's citizenship has developed in Zimbabwe's democratic and constitutional transitions. Economic meltdown and high levels of gender-based violence are some of the encumbrances which counter government's efforts to uphold women's citizenship.¹

¹ United Nations Education, Scientific and Cultural Organisation (UNESCO) Report on Women And Democratization Process in Africa Report October 1994 Available at www.unesco.org/education/pdf/283_108.pdf. (accessed on 31 August 2018). At 14.

Government has from 1980 to 2018, in its effort to uphold women citizenship and eradicate their apparent oppression, engaged in a large-scale law reform through enacting women friendly legislation which promotes gender equality and it also has one of the most liberal constitutions in the region.² This chapter follows the analysis of Gouws on citizenship on the extent to which a rights-based democracy can really deal with inequalities and non-access to citizenship of women at a grassroots level.³ While women were given rights through a broad based law reform in Zimbabwe and a liberal 2013 constitution this chapter underscores the fact that it is difficult for women to claim rights accorded to them under the laws of Zimbabwe.

According to Gouws a conceptualization of citizenship should include status and participation.⁴ While status determines the ability to claim rights on all levels socially, participation includes activism in a number of political arenas such as national and local government along with civil society such as social movements and formal and informal organizations and discourse.⁵ With regards to democracy, what comes under scrutiny in the scope of this chapter are the complexities of the implementation of liberal democracy in a developing state where procedural equality often takes priority over substantive equality. While in Zimbabwe there are no laws that disqualify women to participate in elections and to run for public office the systematic barriers that were there during independence still exist and little is being done to address them.⁶

Democracy has been traditionally defined as rule by the majority.⁷ It however consists of two important but dissimilar components, these being direct and representative democracy.⁸ While direct democracy requires a direct involvement of the public in the decisions that affect their lives, representative democracy requires representatives of the public to make decisions on the public's behalf. In Zimbabwe, as in various African countries, these two components are being merged especially in law making processes.⁹ Members of Parliament are given the mandate to make laws

² T Mutangi 'The Impact of the African Charter and the Maputo Protocol in Zimbabwe' in Ajoni V.O. (ed) *The Impact of the African Charter and the Maputo Protocol in Selected African States* (2016) 281.

³ A Gouws (UN) *Thinking Citizenship Feminist Debates in Contemporary South Africa* (2005) 2.

⁴ Gouws (n 3 above) at 2.

⁵ Gouws (n 3 above) at 2.

⁶ Gouws (n 3 above) at 2.

⁷ G Parry & Moyser G 'More Participation, More Democracy' in R Blaug R & Schwarzmantel (eds) *Democracy a Reader* (2016) 76.

⁸ D Beetham *Democracy and Human Rights* (2000) 19.

⁹ UNESCO Report (n 1 above) at 19.

for the nation and yet in the process they are enjoined by the Constitution to take into consideration the principle of public participation.¹⁰

Representative democracy requires that representation must also be reflective of the community being thus represented.¹¹ This therefore implies that where a community comprises of women and men the representation at all levels should be proportionate to the number of males and females in that community. All citizens must be given an equal opportunity to be represented and to represent their interests.

With regards to citizenship and women's status in Zimbabwe the fulcrum of any examination should demonstrate an appreciation of the fact that even within the social category of women, access to citizenship vary. Barbalet points out that ignoring intra-class differences is a fundamental mistake in any discussion of access to citizenship by vulnerable groups.¹² This insight is of great significance in that it sheds light on the fact that women in Zimbabwe do not really have the same status. Within this group of women there are few who have made it to the top and who are not being affected by the inequalities in Zimbabwe. Barbalet further argues that the difference of social status within a social group can easily be dealt with unlike the difference across social groups.¹³ The difference in status within a class can be ameliorated by what Barbalet, quoting Marshall, calls 'class fusion'.¹⁴ Class fusion is when a certain class appreciates that the differences between them are less important than 'what they have come to share through the development of a common social citizenship'.¹⁵

It was discussed in the preceding chapter that Zimbabwe is a signatory to the Convention on the Elimination of Discrimination against Women and is also committed to the South African Development Community (SADC) Declaration on Gender and Development. These documents bind the Zimbabwean Government to implement rights-based citizenship for women. Considering Zimbabwe's inroads in these initiatives, at first glance, it may seem like women have been included

¹⁰ Section 141 of the Constitution Of Zimbabwe Amendment (No. 20) Act 2013 (2013 Constitution Of Zimbabwe).

¹¹ Beetham (n 8 above) at 8.

¹² JM Barbalet *Citizenship* (1988) 55.

¹³ Barbalet (n 12 above) at 55.

¹⁴ Barbalet (n 12 above) at 56.

¹⁵ Barbalet (n 12 above) at 56.

in the body politic and that gender parity is being pursued.¹⁶ Yet, the liberal project which involves upholding individual rights at times stands in conflict with claims made by collectivities such as women for rights of their own.¹⁷ There still exists a serious shortcoming in as far as women's inclusion into citizenship is concerned, at the level of both rights and participation as well as in the opportunity structures presented by the state for women.¹⁸

Women's inclusion in citizenship through the extension of rights embodies the liberal ideal of citizenship.¹⁹ The rights of citizenship that are entrenched in the constitution can only be realized practically through state agency, which would involve formulation and implementation of appropriate policies. Otherwise citizen rights will remain an abstract and nonconcrete concept.²⁰ In some cases, the channel through which rights are claimed is one of the greatest obstacles to full enjoyment of citizenship by women in Zimbabwe because such processes may become political and inaccessible to ordinary women.²¹ Women also lack access to key financial resources which would expedite their action in claiming citizenship rights. One would then wonder as to the meaning of citizenship and its benefit for women.

4.2. CITIZENSHIP

4.2.1. DEFINING CITIZENSHIP

There are competing views pertaining to the definition of the term citizenship. Citizenship has been determined to refer to those who belong to and those who do not belong to the community.²² Barbalet poses two dimensions of citizenship. The first dimension pertains to the legal scope of citizenship and its related rights.²³ The second dimension is all about the 'non-political capacities

¹⁶ UNESCO Report (n 1 above) at 20.

¹⁷ A Gouws 'Shaping women's citizenship-: Contesting the boundaries of state and discourse' in Gouws A. (ed) *(UN)Thinking Citizenship Feminist Debates In Contemporary South Africa* (2005) 71.

¹⁸ Gouws (n 17 above) at 71.

¹⁹ Gouws (n 17 above) at 71.

²⁰ Gouws (n 17 above) at 71.

²¹ Gouws (n 17 above) at 72.

²² Barbalet (n 12 above) at 1.

²³ Barbalet (n 12 above) at 1.

of citizens that derive from the social resources they command and to which they have access.²⁴ Jones extends the concept of citizenship to include issues of identity and locale. According to her, 'Citizenship is a boundary project where citizens share a common identity in relation to the state.'²⁵

From the foregoing, it appears different scholars define the term citizenship variously.²⁶ Kymlicka and Norman point out that contestations over the concept of citizenship are not simply definitional, but they also involve a major debate over two views of citizenship, these being 'citizenship-as-legal-status' and 'citizenship-as-desirable-activity' (participation).²⁷ These different views seem to depart from the more conventional typologies of forms of citizenship which are Liberal, Communitarian and Civic Republican. In Zimbabwe, Liberal concepts of citizenship are enshrined in the National Objectives and the Declaration of Rights, encompassing the concept of citizenship-as-legal-status. However, both are reformed in the section relating to citizenship which mandates that a citizen must be loyal to the country, must respect the constitution and must defend Zimbabwe and its sovereignty.²⁸ The latter introduces the notion of 'citizenship-as-desirable-activity'. Probably all states, and not just Zimbabwe, embrace mixtures of different aspects of citizenship.

Citizenship has also been described as a status and set of rights and obligation.²⁹ Barbalet makes an interesting link between rights and status.³⁰ He contends that rights are a significant component of citizenship because they give an individual either a legal or conventional status.³¹ Legal rights are provided to individuals as a result of their legal status. Inevitably rights provide individuals with capabilities, capacities and opportunities and when they are exercising these, they would be practicing their citizenship.³² However different rights attach different capacities and capabilities to individuals as well.³³

²⁴ Barbalet (n 12 above) at 1.

²⁵ K Jones *Compassionate Authority Democracy and The Representation of Women* (1994) 260.

²⁶ Barbalet (n 12 above) at 1.

²⁷ W Kymlicka & W Norman 'Return of Citizenship: A survey of Recent Work on Citizenship Theory' (1994) 2, *Ethnicities* 352.

²⁸ Kymlicka & Norman (n 27 above) at 351.

²⁹ Barbalet (n 12 above) at 1.

³⁰ Barbalet (n 12 above) at 16.

³¹ Barbalet (n 12 above) at 16.

³² Barbalet (n 12 above) at 16.

³³ Barbalet (n 12 above) at 16.

Despite the established link between rights and citizenship it has been argued that not all rights are citizenship rights.³⁴ Acknowledging the fact that citizenship status is bestowed on full members of a nation, it follows that citizenship rights are those that facilitate participation of citizens.³⁵ Another common characteristic of citizenship rights is the fact that they impose certain limitations on the state's sovereign authority.³⁶ There is a reciprocal and interdependent relationship that exists among citizens themselves and between citizens and the state or community.³⁷ This relationship is bound by rights and responsibilities. Rights do not exist in a vacuum and they are intrinsically linked with responsibilities. The linkage between rights and responsibilities helps to foster solidarity and cooperation among the members of a society and it helps individuals to gain political exposure by giving them a platform to voice themselves.³⁸ This concept of rights and obligation as congruent with citizenship is also encompassed in the 2013 Constitution of Zimbabwe. Section 35(3) provides as follows:

All Zimbabwean citizens are entitled to the following rights and benefits in addition to any others granted to them by law-

- (a) To the protection of the State wherever they may be;
- (b) To passport and other travel documents; and
- (c) To birth certificates and other identity documents issued by the State.

Clearly these are rights given to all Zimbabweans equally. Subsection (4) of the same section (4) imposes obligations on the citizens and it provides as follows:

Zimbabwean citizens have the following duties, in addition to any others imposed upon them by law-

- (a) to be loyal to Zimbabwe
- (b) to observe this Constitution and to respect its ideals and institutions;
- (c) To respect the national flag and the national anthem; and
- (d) To the best of their ability, to defend Zimbabwe and its Sovereignty.

³⁴ Barbalet (n 12 above) at 16.

³⁵ Barbalet (n 12 above) at 18.

³⁶ Barbalet (n 12 above) at 16.

³⁷ K Faulks *Citizenship* (2000) 108.

³⁸ Faulks (n 37 above) at 108.

In as much as the citizens may have the opportunity and responsibility to participate politically, they also need necessary resources for that. The state has a duty to provide basic needs to its citizens.

The citizenship discourse must also include issues of socio-economic rights. Socio-economic rights are rights to the conditions and resources necessary for the material well-being of people.³⁹ These include rights to food, water, housing, health care, social assistance, education and a safe, clean and healthy environment.⁴⁰ They are also called social rights. Social rights, according to Marshall give citizenship real meaning in as far as they advocate for citizenship activism sponsored by publicly funded resources.⁴¹

The idea of basing citizenship on social rights does not go unchallenged however. Barbalet disregards the role that social rights play in citizenship.⁴² According to him, social rights cannot be regarded as rights of citizenship because by nature and definition they are not universal. Social rights are bureaucratic and pecuniary and as such they are regarded as conditional opportunities as opposed to rights.⁴³ In contradistinction Faulks argues that social rights have a negative contribution to citizenship since they perpetuate divisions between active citizens ‘who are able to exercise their market rights through employment and passive citizens who are constantly labelled as ‘undeserving or members of an underclass.’⁴⁴

Citizenship is also about vertical and horizontal accountability.⁴⁵ Reduced voter turnout and party membership are very much vertical concerns while for communities and their residents, the concerns are more horizontal with issues like crime, drugs, poverty, health and ineffective and inefficient delivery of public goods and services being of greater concern.⁴⁶ While vertical issues are important and the government should address them, horizontal issues involve citizens’

³⁹ P. De Vos & W Freedman *South African Constitutional law In Context* (2017) 667.

⁴⁰ De Vos & Freedman (n 39 above) at 667.

⁴¹ Faulks (n 37 above) at 116.

⁴² Barbalet (n 12 above) at 67.

⁴³ Barbalet (n 12 above) at 67.

⁴⁴ Faulks (n 37 above) at 116.

⁴⁵ Research Advocacy Unit ‘Active Citizenship and Women in Zimbabwe’ (2017) available at www.researchandadvocacyunit.org/.../Active%20Citizenship%20. (accessed on 24 August 2018) 9.

⁴⁶ RAU May 2017 (n 45 above) at 9.

concerns derived directly from their day to day lives. Issues that involve citizens should be able to at least come together in two inter-related features namely voice and participation.⁴⁷ Citizenship as agency means that individuals are seen as having the power to speak and act, but in domains outside of politics.⁴⁸

Observance of international law by states has helped to curtail differentiation between the rights of non-citizens and those of citizens. Citizenship thus transcends the boundaries of a specific nation. At the Human Rights World Conference that was held in Vienna in 1993, it was reported that 171 states supported the view that economic, social and cultural rights are universal, indivisible, interdependent and interrelated.⁴⁹ However universality of political rights is problematic precisely because they are by their nature relative.⁵⁰

4.2.2. WOMEN'S ACCESS TO CITIZENSHIP IN ZIMBABWE

Citizenship is conceptualized in Zimbabwe in its two-dimensional forms of being a status and as a participatory gesture. The difference between the two is that the former is being accorded through laws and policies yet the latter calls for the actual realization of those rights in a participatory form. A closer analysis is being done hereunder, on Zimbabwean women's access to citizenship as a status and as participatory.

4.2.2.1. Citizenship Status for Women in Zimbabwe

After the war through which Zimbabwe gained its independence, gender classification persisted with regards to citizenship rights. For instance, while those who were outside the country were encouraged to reunite with their families back home,⁵¹ only men were allowed to bring foreign spouses and their wives were immediately entitled to residence in Zimbabwe and could be selected to become citizens.⁵² Women were on the contrary not given the same right. They could not bring

⁴⁷ RAU May 2017 (n 45 above) at 9.

⁴⁸ RAU May 2017 (n 45 above) at 9.

⁴⁹ Faulks (n 37 above) at 140.

⁵⁰ Faulks (n 37 above) at 140.

⁵¹ R Gaidzamwa 'Citizenship, Nationality, Gender and Class in Southern Africa' (1993) 18 *Alternatives* 42.

⁵² Gaidzamwa (n 51 above) at 45.

their foreign spouses and their spouses could not automatically be entitled to residence and citizenship in Zimbabwe.⁵³

Gaidzanwa gave an example of a woman whose father was from the Karanga tribe in Zimbabwe while the mother was from the Ndebele tribe in Zimbabwe. The woman went to Australia and became actively involved in politics, representing the ruling party (ZANU (PF)).⁵⁴ When she brought her Australian spouse back to Zimbabwe after independence, he was not granted residence and citizenship in Zimbabwe on the basis of him being a spouse to a Zimbabwean. Such a position was not unique to Zimbabwe. Botswana's constitution as well in 1982 contained inequalities in citizenship status of women.⁵⁵ The Citizen Act of 1982 bars women from passing on citizenship to children born of foreign fathers.⁵⁶

In the Zimbabwean context, citizenship laws are apparently biased considering the status given to foreign spouses of Zimbabwean women.⁵⁷ Foreign spouses were usually treated as aliens if they did not have a work permit prior to entry into Zimbabwe. In order to obtain a work permit, they would have to apply for it while in the country of their origin. The Minister for Foreign Affairs had the discretion to determine which spouse would be allowed to stay and which will be treated as an alien and thereby grant a visa for six months. the possibility of deportation if the ministry so decides was also high.⁵⁸ Resultantly marriages between Zimbabwean women and foreign men are fraught with structurally-induced conflict and tension causing marital instability and breakup or the emigration of couples and their children.⁵⁹ According to Gaidzanwa, state machineries in Southern Africa are controlled by a bourgeoisie class who often discredit claims of middle-class women that they are disadvantaged by nationality and citizenship laws.⁶⁰

⁵³ Gaidzamwa (n 51 above) at 45.

⁵⁴ Gaidzamwa (n 51 above) at 45.

⁵⁵ Gaidzamwa (n 51 above) at 45.

⁵⁶ Gaidzamwa (n 51 above) at 45.

⁵⁷ Gaidzamwa (n 51 above) at 45.

⁵⁸ Gaidzamwa (n 51 above) at 45.

⁵⁹ Gaidzamwa (n 51 above) at 45.

⁶⁰ Gaidzamwa (n 51 above) at 45.

Currently, the Zimbabwe Constitution has a Citizenship Act which was amended on many occasions to put women at par with their male counterparts.⁶¹ Section 15 gives married women equal rights to men to deal with and decide on their citizenship status as they see fit. Women's citizenship is not affected by marriage. With regards to women's citizenship in Zimbabwe, a distinction has to be made between passive citizenship and active citizenship. The 2013 Constitution has accorded citizenship to Zimbabweans through birth⁶², by descent⁶³ and registration⁶⁴. The acquisition of citizenship is gender neutral which basically means that both men and women are supposed to be treated the same in that regard. Once citizenship has been acquired there are certain protections of the same that follow⁶⁵ and these can only be revoked under strict circumstances provided that the person would not be rendered stateless.⁶⁶ From the foregoing discussion on citizenship it can be gathered that citizenship includes rights and obligations. The 2013 Constitution bestows such on all citizens of Zimbabwe without any discrimination. Section 35 of the 2013 Constitution provides that:

- (1) Persons are Zimbabwean citizens by birth, descent or registration
- (2) All Zimbabwean citizens are equally entitled to the rights, privileges and benefits of citizenship and are equally subject to the duties and obligations of citizenship.
- (3) All Zimbabwean citizens are entitled to the following rights and benefits, in addition to any others granted to them by law-
 - (a) To the protection of the State wherever they may be;
 - (b) To passports and other travel documents; and
 - (c) to birth certificates and other identity documents issued by the State
- (4) Zimbabwean citizens have the following duties, in addition to any others imposed upon them by law-
 - (a) to be loyal to Zimbabwe;
 - (b) to observe the Constitution and to respect its ideals and institutions
 - (c) to respect the national flag and the national anthem; and
 - (d) to the best of their ability, to defend Zimbabwe and its sovereignty

⁶¹ Citizenship of Zimbabwe Act 23 of 1984.

⁶² Section 36 of the 2013 Constitution of Zimbabwe.

⁶³ Section 37 of the 2013 Constitution of Zimbabwe.

⁶⁴ Section 38 of the 2013 Constitution of Zimbabwe.

⁶⁵ Section 40 of the 2013 Constitution of Zimbabwe.

⁶⁶ Section 39 of the 2013 Constitution of Zimbabwe.

However, the 2013 Constitution does not define the term citizenship, neither does the Citizenship Act of the country provide for such a definition. This is a shortcoming that cannot be overlooked considering the importance of the term. However, from the reading of section 35 it can be deduced that citizenship in Zimbabwe is all about the right to belong to a state and enjoy its privileges while also fulfilling obligations. This definition has to be understood in light of the fact that there are other sets of rights that may be enjoyed even by non-citizens. We may take judicial notice of the fact that Chapter 4 of the Constitution, that is, the Declaration of Rights, gives rights to every person and not to citizens only. This is with the exception of freedom of movement and residence and political rights that are reserved for Zimbabwean citizens only.⁶⁷

Admittedly, the 2013 Constitutional provisions for citizenship do not discriminate against women directly. This is because the Constitution makes no distinction between men and women with regards to the status of citizenship and in that sense, it is gender neutral when it comes to citizenship. However full clarification of what citizenship entails will require future legislation to shine light on some of the ambiguities created by previous limitations placed on citizenship.⁶⁸ The main challenge with citizenship is not status but its participation as is discussed hereunder. The broader examination of citizenship in Zimbabwe requires a further interrogation of active citizenship especially in the political arena and social capital. The main contestation around the concept of citizenship in Zimbabwe has been that it is increasingly being based on politics of patronage for men who hold direct allegiance to the ruling party ZANU (PF).⁶⁹ This has resulted in many Zimbabwean citizens, mostly women, showing very low levels of interest in socio-political participation and very high levels of apprehension over participation.⁷⁰

4.2.2.2. Citizenship Participation for Women in Zimbabwe

In colonial Zimbabwe, women suffered discrimination on the basis of race and gender and the social status of black Africans during this era, which was a fate suffered by both men and women. The discrimination and injustice they, along with their communities, faced inspired them to join

⁶⁷ Section 66 and 67 of the 2013 Constitution of Zimbabwe.

⁶⁸ RAU May 2017 (n 45 above) at 3.

⁶⁹ RAU May 2017 (n 45 above) at 3.

⁷⁰ RAU May 2017 (n 45 above) at 4.

the struggle for the liberation of the country, which was carried out both from outside and within the country itself.⁷¹ Apart from the more traditional supportive functions, such as *Chimbwidos* (liberation war helpers), some women served political and military functions. Some were fortunate enough to benefit from opportunities for professional training in emergent skills, such as engineering, telecommunications and hotel management.⁷² Women, it would appear, worked hand in hand with men during the nationalist struggle. Yet, after the initial euphoria demonstrated during the liberation struggle of the country, the women's emancipation agenda was abandoned. Some women who had been included in the new post – independence government were quickly kicked to the curb of political-life and policy making.⁷³

Pledges made by ZANU (PF) and other liberation movements and the experiences of equality by female combatants during the war, were all short lived.⁷⁴ At the end of the war, women were met with great disappointment. Female ex-combatants, the group of women who had the highest expectations for more equality in terms of access to public offices, education and jobs, found themselves structurally marginalized in demobilization policies.⁷⁵ Moreover women's war efforts, from their roles in official army positions they held to the voluntary and coerced involvement of young civilian women known as *Chimbwidos* were met with widespread social disapproval and contempt.⁷⁶ Although formally praised for their commitment to the liberation war, people questioned whether these women would make proper wives.⁷⁷ As described by Geisler most female ex-combatants felt betrayed by the post war society that had reverted to its old virtue systems, in which the women's emancipation project seemed unwelcome.⁷⁸

In Zimbabwe, citizenship participation has since 1980 become a privilege rather than a right, increasingly reserved for those that have direct allegiance to the ruling party of ZANU PF.⁷⁹ Furthermore active citizenship has been increasingly diminished by the political violence of the

⁷¹ UNESCO Report (n 1 above) at 12.

⁷² UNESCO Report (n 1 above) at 12.

⁷³ UNESCO Report (n 1 above) at 14.

⁷⁴ S Schotting 'Women and Democratization in Zimbabwe: A Gendered Analysis of Transition Politics in Zimbabwe' Unpublished Bachelors Thesis Utrecht University 2013 6.

⁷⁵ Schotting (n 74 above) at 6.

⁷⁶ Schotting (n 74 above) at 6.

⁷⁷ Schotting (n 74 above) at 6.

⁷⁸ Schotting (n 74 above) at 6.

⁷⁹ RAU May 2017 (n 45 above) at 3.

past.⁸⁰ Many Zimbabwean women show very low levels of participation in socio-political life apart from voting. Of note also are very high levels of terror and apprehension over participation. Even the citizen voice which is an important component of active citizenship has been dramatically silenced since the political violence of the 2000 general elections.⁸¹

Moreover, ideological initiatives to challenge gender inequality were often defied by other ZANU (PF) leaders and most importantly by a critical section of Zimbabwean society.⁸² This was illustrated by the adverse reaction to attempts by the Ministry of Community Development and Women Affairs (MCDWA) leaders had made about plans to challenge the *lobola* payment custom of marriage. Since the Ministers believed that only changes in the traditional patriarchal context of women would allow for full realization of women's aspirations, abolition of *lobola* was a priority on their feminist agenda. A heated debate in parliament and the media emerged within months. The intense reactions expressed reservations by pundits that Zimbabwean society would crumble if traditional sociocultural relations would be abandoned and ZANU (PF) leaders and other commentators called these 'Western ideas' of Feminism a new form of cultural imperialism⁸³. The MCDWA was faced with such vehement opposition that it began to lower its tone and within four years, the ministry had changed from challenging existing patriarchal ideologies towards seeking improvements within the framework of existing gender relations.⁸⁴ This presents a classic example of how culture is used to stifle women's political expression in Zimbabwe.

Many Zimbabweans protested the condemnation of women for the simple reason that they showed some independence, but most mainly objected to the indiscriminate harassment of women. The chauvinistic assumption that unmarried or unemployed women are probably prostituting went on unchallenged, in a country whose leadership once claimed it hoped to emancipate women from old-fashioned confines based on gender hierarchies.⁸⁵

⁸⁰ RAU May 2017 (n 45 above) at 3.

⁸¹ RAU May 2017 (n 45 above) at 9.

⁸² Schotting (n 74 above) at 7.

⁸³ Schotting (n 74 above) at 7.

⁸⁴ Schotting (n 74 above) at 7.

⁸⁵ Schotting (n 74 above) at 7.

The question of why women were engaged during the liberation struggle could be explained by the fact that the liberation movements were eager to recruit women for the struggle and used feminist rhetoric to bait women.⁸⁶ ZANU (PF), the liberation party that came to power at independence, owed its conquest for a large part to its female supporters and could not afford to leave the path it had chosen abruptly to win their support soon after independence.⁸⁷ This resulted in a rather inclusive opportunity structure politically, in terms of relative openness of the institutionalized political system to women. In reality it meant that the newly installed ZANU (PF) government took rather expedient, but superficial attempts to show its dedication to the female agenda of women's emancipation. The creation of a weak Ministry for Women's Affairs was merely an empty gesture.⁸⁸

Although the ministry was constrained in many ways and turned out to be a great disappointment for both its leaders and its supporters, it did, in a very short time, create a legal ground for women to openly discuss their grievances and opened a public debate over women's position in society; something that had been inconceivable in pre-war times.⁸⁹ Moreover the incorporation of a ministry for women's affairs in the government, despite its weaknesses, represented the official politicization of women's affairs meaning such issues had officially moved from the private domain to the public sphere.⁹⁰ This inevitably led to a conviction among women that they had the right to organize themselves and demand change, which has in effect promoted women's rights to participate as citizens.⁹¹

Human society is built upon customs that help create a culture of clearly defined boundaries that help assure society that the world is predictable and they are in control.⁹² In this context it is not unanticipated that Zimbabwean society failed to embrace the feminist agenda as it meant a great departure from the 'known' and thus it presented a sense of insecurity. ZANU (PF) could not ignore this important aspect of women, being considered as gatekeepers of traditional life in the

⁸⁶ Schotting (n 74 above) at 8.

⁸⁷ Schotting (n 74 above) at 8.

⁸⁸ Schotting (n 74 above) at 8.

⁸⁹ Schotting (n 74 above) at 8.

⁹⁰ Schotting (n 74 above) at 8.

⁹¹ Schotting (n 74 above) at 8.

⁹² Schotting (n 74 above) at 18.

party's ruthless quest for popular support. Apparently, disappointing a dedicated group of women was a small price to pay for the gains that could be made with nationalist rhetoric.⁹³

Since Zimbabwe is a predatory state, the existing political power structure as far as gender is considered will not be easily transformed. Active citizenship will not be promoted without some resistance from the state or less likely, the encouragement of the state.⁹⁴ Examined in the lens of liberal theory, citizenship is a status entitling each individual to the same formal rights that are enshrined in law.⁹⁵ It is thus conceptualized at the level of the nation-state. It seeks to achieve equality and uphold the rule of law. The communitarian definition of citizenship considers citizenship as arising from an individual's sense of identity and belonging to a certain group.⁹⁶ In this perspective, citizenship has more to do with group identity and group rights and the common good rather than the pursuit of individual interests.⁹⁷ The civic republican approach views citizenships as an overarching civic identity shaped by a common public culture and produced by a sense of belonging to a particular nation-state.⁹⁸

As noted elsewhere in this chapter, the major debate on citizenship involves two views of citizenship, 'citizenship as legal status and citizenship as desirable activity'.⁹⁹ In Zimbabwe the liberal concept of citizenship is found in the national objectives and is enshrined in the Bill of Rights - this enshrines the concept of citizenship as legal status.¹⁰⁰ The participation of citizenship is legally binding.¹⁰¹ There seems to be confusion in Zimbabwe concerning citizenship as the ruling ZANU (PF) continuously argues for maintaining the legitimacy of its rule and monopolizes political power.¹⁰² The right to govern is denied for those who did not participate in the liberation war and ZANU (PF)'s electoral victories ostensibly are derived from the recognition by citizens that the role of the party in the liberation war gives ZANU (PF) special legitimacy.¹⁰³ Thus, even

⁹³ Schotting (n 74 above) at 18.

⁹⁴ RAU May 2017 (n 45 above) at 4.

⁹⁵ RAU May 2017 (n 45 above) at 5.

⁹⁶ RAU May 2017 (n 45 above) at 5.

⁹⁷ RAU May 2017 (n 45 above) at 5.

⁹⁸ RAU May 2017 (n 45 above) at 5.

⁹⁹ RAU May 2017 (n 45 above) at 6.

¹⁰⁰ RAU May 2017 (n 45 above) at 6.

¹⁰¹ RAU May 2017 (n 45 above) at 6.

¹⁰² RAU May 2017 (n 45 above) at 7.

¹⁰³ RAU May 2017 (n 45 above) at 7.

suffrage has become an uncertain right for Zimbabwe citizens, as they have pointed out continuously in all public opinion surveys.¹⁰⁴ Various surveys done through Afro barometer proved that Zimbabweans hold strongly liberal views of citizenship - they value democracy but are pessimistic that they have it. This is apparent from the Afro barometer surveys on Zimbabwe which reflected the following:¹⁰⁵

In Round four (2009) of the Afro barometer survey on Zimbabwe, 72% still rejected one-party rule, 81% rejected military rule, 85% rejected one-man rule, and 83% preferred democracy to any other kind of government, but only 6% felt that Zimbabwe was a proper democracy (MP01, 2010). In Round six (2014) 69% rejected one-party rule, 75% rejected military rule, 80% rejected one-man rule, 73% preferred democracy to any other form of government, and 11% felt that Zimbabwe was a proper democracy.

Citizenship, whether legally or theoretically deferred, can create a wholly passive relationship between an individual and the state.¹⁰⁶ There is an endless discussion in Zimbabwe about rights and responsibilities although considerably less attention is given to the issue of responsibilities and such discussions seem to point out the attitude of civil society which appears to assume that Zimbabwean citizens do not know their rights.¹⁰⁷ This is despite the fact that they participated in two national constitutional reform processes.¹⁰⁸

To participate without having a voice for political expression by for example merely voting is a passive exercise, as is having a political voice without the capacity to participate and act.¹⁰⁹ In Zimbabwe, these aspects of agency seem disconnected. Participation is confined to voting and mostly voting in elections with pre-determined outcomes. Furthermore, voices of citizens are minimized by state propaganda as was pointed earlier.¹¹⁰

Women generally face multiple disadvantages in concretizing their citizenship and in political participation. Obstacles posed to women's participation as full citizens in the Zimbabwean society

¹⁰⁴ RAU May 2017 (n 45 above) at 7.

¹⁰⁵ RAU May 2017 (n 45 above) at 8.

¹⁰⁶ RAU May 2017 (n 45 above) at 9.

¹⁰⁷ RAU May 2017 (n 45 above) at 9.

¹⁰⁸ RAU May 2017 (n 45 above) at 9.

¹⁰⁹ RAU May 2017 (n 45 above) at 11.

¹¹⁰ RAU May 2017 (n 45 above) at 11.

include high levels of illiteracy, especially among women, as well as the persistence of age-old images and stereotypes which influence the attitudes and behaviors of women and men. All this contributes to maintaining an unequal gender balance within societies.¹¹¹ Primary amongst these are legal disadvantages encountered in obtaining legal documents. More so, women have to seek consent from their husband before obtaining certain documents and this problem is occasioned by a dominant patriarchal social structure.¹¹²

It is worth pointing out here that the global average proportion of women in parliaments worldwide, in 2000, was only 16%, and it was calculated that, at the current rate of improvement, parity of males and females in legislatures would only be achieved before the end of the 21st century.¹¹³ In the Seventh parliament of Zimbabwe, representation by women was 16% in the National Assembly and 25% in the senate.¹¹⁴ The percentage of women in the new (Eighth) Parliament has increased to 34% of the National Assembly and 48% of the Senate. This increase has subsisted courtesy of the new quota system.¹¹⁵ In reality, the number of women directly elected declined markedly in the 2013 elections and also, few women candidates contested the elections.¹¹⁶

According to a UNESCO report on the status of women, lack of a full appreciation of the chronological, economic and social fundamentals which contribute to the advancement of such stereotypes that blur our perception and understanding of the real roles of women in a society in evolution is a main challenge.¹¹⁷ Of note, prospects for full involvement as citizens opened up for many African women through the national liberation struggle and ensuing independence of their countries.¹¹⁸

Constraints of poverty, family tasks, agricultural activities and other economic responsibilities, level of education, and lack of time, exclude or discourage women from taking on active roles in

¹¹¹ UNESCO Report (n 1 above) at 9.

¹¹² RAU May 2017 (n 45 above) at 11.

¹¹³ RAU May 2017 (n 45 above) at 11.

¹¹⁴ RAU May 2017 (n 45 above) at 11.

¹¹⁵ RAU May 2017 (n 45 above) at 11.

¹¹⁶ RAU May 2017 (n 45 above) at 11.

¹¹⁷ UNESCO Report (n 1 above) at 9.

¹¹⁸ UNESCO Report (n 1 above) at 9.

political parties or in political life in general, thereby impeding their rights as citizens.¹¹⁹ Furthermore UNESCO observed that women need to take steps to have confidence in themselves and in other women's capabilities and to use their rights to vote other women into office.¹²⁰ The current situation is that women are supporting men's political activities and are voting them into political positions. For many women in particular, lacking information and education, political and public life is conducted in a language which they often do not understand, or in which they do not feel comfortable.¹²¹ Such a situation constrains their ability to participate fully in public life as citizens.

In Zimbabwe, during the nationalist period, experienced in the 1980s, women, along with other marginalized groups such as the poor and the dispossessed, were mobilized in order to win the elections.¹²² However, as pointed out earlier, afterwards, they were not needed, and in consequence they tended to be ignored by policy makers.¹²³ This reveals the fact that existing politics are prearranged along class, gender, age, and ethnic lines. The structures of representation, notably in political parties, but also in a number of Non-governmental organizations and pressure groups are likewise structured along these lines. These structures in turn have an effect on the representation of women. This illustrates how so-called democracies today can exclude women and other minorities from public life and from rights of citizens.¹²⁴ Often those advocating for change are outside the formal system of political parties and established women's organizations. The minority of women entering the political sphere is extremely visible, but often criticized and vilified, especially if they are single, divorced or non-conventional in any way.¹²⁵

Besides political participation, women face difficulty in accessing their rights as citizens of Zimbabwe in other areas of life. Apart from the obvious problems of greatly impeded access to public goods and services, women were also excluded from the land reform process, with only about 18% of land being allocated to women. This is anomalous given that women are the

¹¹⁹ UNESCO Report (n 1 above) at 14.

¹²⁰ UNESCO Report (n 1 above) at 14.

¹²¹ UNESCO Report (n 1 above) at 24.

¹²² UNESCO Report (n 1 above) at 19.

¹²³ UNESCO Report (n 1 above) at 19.

¹²⁴ UNESCO Report (n 1 above) at 19.

¹²⁵ UNESCO Report (n 1 above) at 27.

overwhelming majority in actual agricultural production.¹²⁶ The major finding was that women and children were the major casualties in the deteriorating socio-economic climate that has persisted since the late 1990s. A report of 2010 suggested the following as crucial in as far as enhancing women citizenship is concerned:¹²⁷

- a) Building women's confidence, speaking skills and knowledge of the issues under discussion in the public arena.
- b) Creating networks and linkages between women would-be political candidates and women in political office, between women in politics and women in movements and women's organizations and many women within political institutions.
- c) Addressing the barriers to women's participation in public life these include: -
 - i. The way women are treated in public when they speak out
 - ii. The way what they say is listened to and whether it is heard
 - iii. Whether women are asked to speak if they raise their hands
 - iv. Attitudes of family members and partners to women going out alone to meetings.
 - v. Cultural limitations.

It could be argued that women in Zimbabwe are considered and treated as second class citizens. The weight of traditions also manifests itself in the form of pro-natalist mentalities, so that women go through repeated pregnancies which exhaust them, and make them weaker and more vulnerable.¹²⁸ The impact of such traditions on their lives is such that sometimes they cannot react to unjust legislative provisions, for instance in the area of inheritance.¹²⁹

The Research and Advocacy Unit (RAU) emphasizes that the extremely difficult economic climate has increased the restrictions placed on women's participation in public life as citizens.¹³⁰ Women were excluded from the land reform process, with only about 18% of land being allotted to women as pointed out earlier.

¹²⁶ RAU May 2017 (n 45 above) at 15.

¹²⁷ RAU May 2017 (n 45 above) at 15.

¹²⁸ UNESCO Report (n 1 above) at 29.

¹²⁹ UNESCO Report (n 1 above) at 29.

¹³⁰ RAU May 2017 (n 45 above) at 15.

4.2.3. GENDER AND CITIZENSHIP IN ZIMBABWE

Gendered citizenship and women citizenship are concepts that are used synonymously and they are used to explain the various forms of political and economic marginalization experienced by women. In order to achieve the broad inclusion of women in citizenship participation, gender citizenship and women citizenship must be distinguished through an exploration of how one has a bearing on the other.¹³¹ Women are regarded as citizen subjects.¹³² As such, conceptualization of women's citizenship has been useful in identifying and in some cases providing a solution on how to deal with gendered aspects of the inclusion or non-inclusion of women from practices, entitlements and responsibilities of citizenship.¹³³ In the Zimbabwean context, although gender citizenship has to some extent been embraced it has not been inclusive of the different categories or identities of women. There is a certain class of women which has benefited through efforts to enhance gender citizenship at the expense of the rest.

Lister, in support of the notion of individual inclusion of women argues that 'equality and differences are misrepresented as opposites yet it is difference and sameness that are opposite', the opposite of equality is inequality and to pose it as difference disguises relations of subordination and hierarchy.¹³⁴ Ignoring women's differences with men reinforces gender bias into the concept of citizenship.¹³⁵ On this point Siim's view is that citizenship becomes a central problem for the analysis of discourses about gender in modern democracies because it expresses a contradiction between the universal principles of equality of men and the particularity or difference of women and other excluded groups.¹³⁶

The United Nations measures contributions to gendered citizenship using protocols of state-related practices such as quota systems, the establishment of women's units' gender policy and programs

¹³¹ L Manicom 'Constituting Women's as Citizens: - Ambiguities in the making of Gendered Political Subjects in Post-apartheid South Africa' in Gouws A. (ed) *(UN)Thinking Citizenship Feminist Debates In Contemporary South Africa* (2005) 29.

¹³² Manicom (n 131 above) at 27.

¹³³ Manicom (n 131 above) at 28.

¹³⁴ R Lister *Citizenship: Feminist Perspectives* (1997) 70.

¹³⁵ Lister (n 134 above) at 70.

¹³⁶ B Siim *Gender and Citizenship* (2000) 3.

for gender training.¹³⁷ These practices have produced favorable results in the improvement of women's political involvement and having their impact on policy-making.¹³⁸ The concept of citizenship has been characterized as a combination of various elements such as equality, social justice, anti-discrimination and reconciliation.¹³⁹ These elements are embodied in many recent African Constitutions including those of Zimbabwe, South Africa and Kenya. This basically demonstrates a preoccupation with the entitlements of citizenship and with access to public goods on the part of these societies. In the South African context Manicom notes the incompatibility between the gender relations characteristic of the anti-apartheid struggle and gender equality as postulated in the South African Constitution.¹⁴⁰ in the Zimbabwean context, linking citizenship and its participation to constitutionally enshrined values and rights may be an ideal route to establishing a balanced society and enhancing women status for now since the country has not yet attained gendered citizenship.

For them to gain parity with men, women have to be represented in large numbers in political and economic structures. Their entry into positions of political authority needs to be facilitated by mechanisms such as quotas or special representation, barring the difficulty of changing existing structural relations of power as well as prejudicial attitudes of voters.¹⁴¹ Representation alone is not enough but the exercise of influence while in the representative positions is of paramount importance. Representation must be at both local and national level, and at both levels it requires influence. Although citizenship is not limited to politics, as Siim opines it would be difficult to understand women's citizenship without understanding how it is constructed through political discourse.¹⁴² According to Siim, equal citizenship includes the dynamic relationship between agency, political institutions and political discourse.¹⁴³

Although gender citizenship is integral to broader political projects it however limits the analysis of citizenship as it focuses on women as its object.¹⁴⁴ At the same time, feminist conceptions and

¹³⁷ Manicom (n 133 above) at 33.

¹³⁸ Manicom (n 131 above) at 33.

¹³⁹ Manicom (n 131 above) at 34.

¹⁴⁰ Manicom (n 131 above) at 34.

¹⁴¹ Gouws (n 3 above) at 6.

¹⁴² Gouws (n 3 above) at 6.

¹⁴³ Siim (n 136 above) at 8.

¹⁴⁴ Manicom (n 131 above) at 30.

politics of citizenship have been increasingly challenged for their own exclusionary tendencies, for their implicit normativity, their complicity in radicalized subject-making and for their limited nation-state orientation.¹⁴⁵

According to Gouws gendered citizenship tends to have the effect of stabilizing and reiterating women as inherently and uniformly disadvantaged within discourses of citizenship and of reproducing gender as binary and heteronormative.¹⁴⁶ While Gouws accepts the universalism of rights, due to the lived realities of their exclusion from citizenship, many groups of women assert their individual identities and make political claims as individual groups.¹⁴⁷ Fragmentation of women groups is embraced in this perspective because differences among women are acknowledged.¹⁴⁸ Categorizing women in accordance with their differences in actual fact is key to citizenship because ignoring the differences could lead to another form of exclusion through which non-dominant groups such as black women are excluded as subjects within the feminist citizenship debate.¹⁴⁹

Pursuing the identity theory of citizenship, however, has within it the problem of having to juggle multiple identities.¹⁵⁰ Applying this concept, we would find one woman benefiting from membership in all the available categories of women yet some women would only benefit from one or less.¹⁵¹ Feminist pluralistic citizenship has been suggested to be the solution to multiple identities.¹⁵² It is through feminist pluralistic citizenship that differences between women as well as the different sites of their participation are recognized.¹⁵³

What all this indicates is that women do not constitute a universally uniform group because they are divided along lines of race, class, ethnicity, region, religion, sexuality and generation.¹⁵⁴ Citizenship participation for women in the United Kingdom context for example is seen as being

¹⁴⁵ Manicom (n 131t above) at 22.

¹⁴⁶ Manicom (n 131 above) at 28.

¹⁴⁷ Gouws (n 3 above) at 4.

¹⁴⁸ Gouws (n 3 above) at 4.

¹⁴⁹ Gouws (n 3 above) at 4.

¹⁵⁰ Gouws (n 3 above) at 5.

¹⁵¹ Gouws (n 3 above) at 5

¹⁵² W Sarvasy & B Siim 'Gender, Transition to Democracy and Citizenship' (1994) 1 *Social Politics* 249

¹⁵³ Gouws (n 3 above) at 5.

¹⁵⁴ Manicom (n 131 above) at 27.

attached to the value of a social group.¹⁵⁵ Royal women yield authority on the basis of their role in reproducing important lineages.

Categorizing women as an identity for citizenship participation has perpetuated divisions even under the cultural norms of the Zimbabwean society.¹⁵⁶ Maphosa claims that most women who have made it to the class of the political elite have managed this because of their connections with male political elites.¹⁵⁷ For instance in the 1980 and 1985 general elections some of the female MPs were Julia Zvobgo wife to Edison Zvobgo a senior official of ZANU-PF; Joice Mujuru, wife to Solomon Mujuru, the first black post-independence general of the Zimbabwe National army; then prime minister of Zimbabwe, Robert Mugabe's sister, Sabina and Josiah Chinamano's wife Ruth Chinamano, the deputy president in the Patriotic Front- Zimbabwe African People's Union (PF-ZAPU) political party¹⁵⁸.

This trend persisted up to the executive, where out of the three women who were either Ministers or Deputy Ministers, two were associated with influential male officials. The first ever Minister of Youth, Sport and Recreation, Joyce Mujuru, was, as stated, wife to Solomon Mujuru, while the Deputy Minister of Education and Culture was former ZANU PF leader Herbert Chitepo's widow, Victoria Chitepo with Naomi Nhwatiwa, the only woman with no direct link to a male figure then, being appointed deputy minister in the Ministry of Post and Telecommunications.¹⁵⁹ These nominations lend credence to the argument that politically, women's roles are an extension of expressive roles that women are accustomed to in the domestic sphere. Women's exploits are hardly recognized unless they have an influential male mentor or sponsor supporting them. Similar trends are apparent where the conferment of hero/heroine status is concerned. Goredema and Chigora (2009) as cited by Maphosa argue that the heroines that lie at the National Heroes Acre were recognized mainly because of their husbands' political clout rather than their own influence. In this sense, it appears political status is ascribed rather than achieved.¹⁶⁰

¹⁵⁵ Gouws (n 17 above) at 84.

¹⁵⁶ Gaidzamwa (n 51 above) at 42.

¹⁵⁷ M Maphosa; N Tshuma & G Ncube 'Participation of Women in Zimbabwean Politics and Mirage of Gender Equity' (2015) 4 *Ubuntu: Journal of Conflict and Social Transformation* 138.

¹⁵⁸ Maphosa *et al* (n 157 above) at 138.

¹⁵⁹ Maphosa *et al* (n 157 above) at 138.

¹⁶⁰ Maphosa *et al* (n 157 above) at 138.

This brings out another limitation of gender citizenship that is apparent in Manicom's words when she says:¹⁶¹

An analytic focus on gender implies not only a diminished attention to race or class but the possibility of producing women as an exclusionary racialized and class category.

Formal citizenship, according to Manicom is acquired through the operation of law by means of being born to a citizen or permanent resident in the territory or by being naturalized, that is, by subscribing to and being legitimized by a natural identity.¹⁶² These forms of citizenship only allude to an ideal type of non-discriminatory relationship between women and the nation.¹⁶³

4.2.4. FEMINISM AND GENDERED CITIZENSHIP

Feminist theories differ in their conception of citizenship. Of the two reviewed by the researcher, one feminist political theory upholds the relationship between the universal claims of citizenship and the acknowledgement of difference.¹⁶⁴ The other considers women as subjects of political citizenship. A close analysis of the two feminist theories described above offers significant insights towards women's inclusion in citizenship participation.¹⁶⁵ It can be argued that the two feminist theories build up on each other in their evolving nature. In this regard the position that a stable category of women based on gender difference was foundational and necessary to the feminist project is significant.¹⁶⁶ Before a state looks into the type or class or race women are in, it is supposed to consider women's inclusion in the first place, that is gender citizenship. Once women are in power, gender citizenship need to be deconstructed as women's citizenship requires looking into the different identities of women and the need to include all identities in citizenship participation.¹⁶⁷

¹⁶¹ Manicom (n 131 above) at 30.

¹⁶² Manicom (n 131 above) at 30.

¹⁶³ Manicom (n 131 above) at 30.

¹⁶⁴ Manicom (n 131 above) at 29.

¹⁶⁵ Manicom (n 131 above) at 29.

¹⁶⁶ Manicom (n 131 above) at 29.

¹⁶⁷ Manicom (n 131 above) at 29.

Contemporary feminism has been reflected to be historically positioned in ways which require it to have a more complex relationship with what we may see as the modern project of citizenship; self-government for individual as citizens and the national citizen community.¹⁶⁸ Feminism has of course played a significant role in bringing about transformations in the modern citizenship project.¹⁶⁹ It has exposed the masculinity and class-privileged normative subject of earlier versions of liberal citizenship; it has questioned and re-drawn the gendered designation of the public sphere, making visible and contestable the political regulations of the private sphere.¹⁷⁰ It has promoted ‘women’ as an identity of gender differences, pushing the boundaries of inclusion in both the concept and practice of citizenship.

Much of the discussion about empowering women has focused on increasing women’s representation in political bodies, both nationally and locally, but strong criticism has been raised over the limited scope of such a perspective.¹⁷¹ Feminist researchers have consistently argued that facilitating women’s agency requires far more attention to be directed at the nature of patriarchy, the limited platform available for women where they can exert their agency, and importantly, their exclusion from the larger debates about development.¹⁷² Representation, though it is important, may be an insufficient condition for the empowerment of women to be achieved.¹⁷³

From a feminist perspective one of the reasons why citizenship is a contested concept is its gendered nature.¹⁷⁴ Because of its gendered nature citizenship becomes inevitably linked to equality principles. Feminists concern themselves with the exclusion of women from citizenship due to their status within the private sphere and the problematization of their inclusion in the public sphere.¹⁷⁵ For example, without the right to vote, women cannot be considered as citizens but when they gain the right to vote without gaining access to water, electricity or housing, are they truly

¹⁶⁸ Manicom (n 131 above) at 28.

¹⁶⁹ Manicom (n 131 above) at 22.

¹⁷⁰ Manicom (n 131 above) at 22.

¹⁷¹ RAU May 2017 (n 45 above) at 11.

¹⁷² RAU May 2017 (n 45 above) at 11.

¹⁷³ RAU May 2017 (n 45 above) at 11.

¹⁷⁴ Gouws (n 3 above) at 3.

¹⁷⁵ Gouws (n 3 above) at 3.

citizens.¹⁷⁶ The discourse of citizenship itself is gendered and feminists want to provide an alternative discourse through the inclusion of embodied citizenship into the public sphere.¹⁷⁷

According to Lister, feminists find the universalism of citizenship to be false. Universalism of citizenship treats all citizens as ungendered, abstract and disembodied individuals.¹⁷⁸ While the ungendered political subject's rationality is linked to liberal equality not embeddedness, it ignores the differences between women and men and among women.¹⁷⁹ Thus the main concern of the feminists is whether the inclusion of women into citizenship should be related to their differences from or their suaveness with men.¹⁸⁰ To this effect, various views are given by different scholars. While Lister postulates that the inclusion of women into citizenship, especially their entry into the public sphere always takes place at individual levels and suggests that women should be incorporated as women.¹⁸¹ Young buttresses Voet's view of including women into citizenship not as individuals only but as a group or class. In her own words this is called the 'politics of group assertion' which postulates that members of the disadvantaged groups organize themselves separately in accordance with their own interests.¹⁸²

4.2.4. STATE'S ROLE IN ENHANCING WOMEN'S CITIZENSHIP

The State is supposed to put in place structures that are supposed to open spaces for the women's movement to negotiate its rights and to create platforms for policy interventions for women.¹⁸³ Very often the state fails women because it is inaccessible or the policy processes are imposed. When the State provides platforms, the women's movement can engage the state and extract gains which are not attainable merely through participation in voting or civil society politics.¹⁸⁴ These gains are however dependent on how the discourse in the State shapes women's citizenship. The

¹⁷⁶ Gouws (n 3 above) at 3.

¹⁷⁷ Gouws (n 3 above) at 3.

¹⁷⁸ Lister (n 134 above) at 15.

¹⁷⁹ Gouws (n 3 above) at 4.

¹⁸⁰ Gouws (n 3 above) at 4.

¹⁸¹ Gouws (n 3 above) at 4.

¹⁸² Gouws (n 3 above) at 4 See also IM Young 'Polity and Group Difference: A Critique of the Ideal of Universal Citizenship' (1989) 99 *Ethics* 250.

¹⁸³ Gouws (n 17 above) at 72.

¹⁸⁴ Gouws (n 17 above) at 72.

State has been criticized for not being liberal or democratic in its failure to recognize the citizenship of women as a result mainly of unintended consequences of state action.¹⁸⁵

Generally, the state has been accepted as the medium through which change towards equality will take place. However the state has not always been viewed as a women friendly space.¹⁸⁶ Nonetheless according to Taylor, the state is viewed as an arbiter of democracy and therefore its role in public policy cannot be ignored.¹⁸⁷ Through the politics of state feminism, entrance of women into state structures, at the State can create an enabling environment for gendered policy-making.¹⁸⁸ Once women gain access to state structures based on membership to a political party however, they often have to choose between their party interests and their gender interests, compromising the true and pure existence of state feminism.¹⁸⁹ State feminism consists of two dimensions, which are firstly the influence exercised in policy-making through femocracy (women in the state) and secondly the access it provides to the women's movement.¹⁹⁰ These two dimensions are however linked to each other as what happens on the one dimension constitutes change in the other. National machineries are often accused of being co-opted by the state and of being insensitive to women's demands or completely inaccessible for women themselves.¹⁹¹ The fragility of national machineries is heightened when governments spearhead their inception merely to use them as vehicles for sourcing donor funding.¹⁹²

State feminism has, at least in part, been adopted by the Zimbabwean government. The creation of the new Department of Women's Affairs in 1981 pioneered the establishment of one of the first new governmental structures set up by the new government to address the plight of women in the country.¹⁹³ This expedient move by the ruling ZANU PF to create a women's division, and the outstanding level at which government officials seemed to back women's political empowerment made for a promising jolt for women's emancipation. In the first five years of independence some

¹⁸⁵ Gouws (n 17 above) at 73.

¹⁸⁶ Gouws (n 17 above) at 73.

¹⁸⁷ Gouws (n 17 above) at 73.

¹⁸⁸ Gouws (n 17 above) at 73.

¹⁸⁹ Gouws (n 17 above) at 73.

¹⁹⁰ Gouws (n 17 above) at 73.

¹⁹¹ Gouws (n 17 above) at 73.

¹⁹² Gouws (n 17 above) at 75.

¹⁹³ Schotting (n 74 above) at 13.

noteworthy headway was made by the MCDWA in association with women's organizations and the Ministry of Justice for women's welfare.¹⁹⁴

A number of momentous legal reforms were introduced that guaranteed gains to women in areas of child custody, inheritance and marriage and divorce. For instance, the Legal Age of Majority Act¹⁹⁵ gave legal status to all Zimbabweans at the age of eighteen, the Matrimonial Causes Act¹⁹⁶ gave rights to women in terms of property and children's custody in marriage and the Labour Relations Act¹⁹⁷ allowed for equal payment for jobs for both men and women with the same credentials. In this respect, the status of women as citizens improved pointedly. In the first post-independence parliament, some parliamentarians were women. Although their number was relatively low especially considering that women constitute 52% of the population,¹⁹⁸ this represented a great step forward from no representation at all.¹⁹⁹

However, as the patriotism and anti-Western rhetoric by the ruling government amplified in the 1990s, it frustrated the feminist agenda.²⁰⁰ Society already perceived matters that proposed a retreat from traditional values such as *lobola* and female independence with fervent opposition. Female egalitarianism meant a departure from traditional customs and values, and 'feminism' was thus viewed as an epitome of Western culture. Nationalism lionized the non-Western, traditional Zimbabwean culture and precluded all that fell outside this gamut.²⁰¹ Thus female independence and equality became issues that no longer fit into ZANU (PF)'s agenda. Moreover the lust for popular support intensified the need for ZANU (PF) to dispense of the feminist rhetoric, as the feminist issues they had supported, had morphed into a controversial topic that met with intense reactions and widespread opposition from traditional leaders, who formed the crux of ZANU (PF)'s support base.²⁰² What needs to be emphasized with regards to Zimbabwe as a state, and its

¹⁹⁴ Schotting (n 74 above) at 13.

¹⁹⁵ Schotting (n 74 above) at 13.

¹⁹⁶ Schotting (n 74 above) at 13.

¹⁹⁷ Schotting (n 74 above) at 13.

¹⁹⁸ Schotting (n 74 above) at 13.

¹⁹⁹ Schotting (n 74 above) at 13.

²⁰⁰ Schotting (n 74 above) at 18.

²⁰¹ Schotting (n 74 above) at 18.

²⁰² Schotting (n 74 above) at 18.

role in putting up structures to enhance women participation in citizenship is that although structures are there they are serving the interest of the ruling party and not those of women.

4.3. DEMOCRACY

4.3.1. DEFINING DEMOCRACY

The concept of democracy has been written about widely and numerous and varied definitions have been submitted in an attempt to conceptualize what it really means. In the last half century, democracy has been conceived in a number of ways. These include the rule of the people, rule by the people's representatives, rule of the people's party, majority rule, dictatorship of the proletariat, maximum political participation, elite competition for the popular vote, multi-partism, political and social pluralism, equal citizenship rights, civil and political liberties, a free society, a civil society and a free market economy'.²⁰³ A glance at these phrases indicates that some of them overlap yet some are inconsistent with each other. This therefore suggests that democracy is by and large a contested concept especially with regards to its definition.

Despite differing opinions on what democracy means, there appears to be some consensus on what it entails, that is, there seems to be consensus that certain features of democracy are universal.²⁰⁴ One of these key elements is participation and the other is contestation. Democracy can therefore be defined as a type of governance based on some form of popular sovereignty and collective decision-making.²⁰⁵ It presumes the legitimacy of the opposition, the right to challenge officeholders along with their ideological inclinations and socio-economic policies as well as guaranteeing the indistinguishable freedoms of expression and association. It also encompasses participation in open and impartial elections.²⁰⁶

For UNESCO, democracy is a system of government which integrates the totality of the people of a country, particularly through representatives whom they select.²⁰⁷ Democracy stresses on equal

²⁰³ Beetham (n 8 above) at 1.

²⁰⁴ UNESCO Report (n 1 above) at 22.

²⁰⁵ UNESCO Report (n 1 above) at 22.

²⁰⁶ UNESCO Report (n 1 above) at 22.

²⁰⁷ UNESCO Report (n 1 above) at 22.

treatment of all citizens. The process of democracy is dynamic and ever-changing meaning it is a process rather than an event. The democracy project in a number of African countries, Zimbabwe included, remains incomplete, in particular as far as women and their involvement in political life are concerned.²⁰⁸ This is true especially if one considers that although they constitute a majority in most African countries, women in politics are barely visible. Yet, ideally, democracy, which celebrates equality and representative government, should involve the participation of as many people and groups as possible in decision making and sharing resources. The picture in Zimbabwe is far from ideal since politics and governance issues are mostly exclusionary of women.

UNESCO avers that it is more accurate to consider democracy as a process whereby diverse groups are struggling to be involved in power distribution.²⁰⁹ Women fall in this bracket of diverse groups. They most often lack independence and self-sufficiency in a number of fields which include the family, the workplace and the field of politics. For UNESCO, it is a mistake to confine democracy simply to the political arena as a means of choosing leaders and multiparty politics. Democracy and democratic practices should be an essential fragment of social life.²¹⁰

Democracy has become a universally accepted form of governance and is the dominant political system in the world. As such Lamounier argues that national problems in most countries today have diverged from those of war versus peace or dictatorship versus democracy to those of how to improve governance and quality of life.²¹¹ This perspective is however debatable and needs to be interrogated and the starting point should be to try and define democracy. The most prominent feature of a democratic government is its endeavor to have a government that is accountable by establishing the separation of powers between the Legislator, Judiciary and the Executive.²¹²

²⁰⁸ UNESCO Report (n 1 above) at 22.

²⁰⁹ UNESCO Report (n 1 above) at 22.

²¹⁰ UNESCO Report (n 1 above) at 23.

²¹¹ B Lamounier 'Introduction to Globalization, Social Inequality and Democracy', in Tuichin J.S. & Brown A. (ed) *Democratic Governance and Inequality* (2002) 1.

²¹² Lamounier (n 211 above) at 2.

For one to understand a democratic government two key words here require a definition, that is, democracy and governance. Giya and Mukotsanjera- Kawayi further expound the definition of governance to include:²¹³

The process whereby governments are selected, monitored and replaced; the capacity of the government to effectively formulate and implement sound policies and the respect of citizens and the state for the institutions that govern economic and social interactions among them.

Whereas governance simply refers to the traditions and institutions by which authority in the country is exercised, democracy is, as pointed out earlier, a much complex concept that, in defining it, raises a number of contested issues.²¹⁴ Governance is in simple terms a process whereby the governed are being managed. Democracy is all about the principles canvassed in the process of choosing an authority and that authority must be vested in people.²¹⁵

The other contested dimension of democracy is its categorization. Various descriptions have been developed which include democracy as a descriptive or as a prescriptive concept; democracy as institutional procedure or as normative ideal; direct versus representative democracy; elite versus participatory democracy; liberal versus non-liberal democracy; majoritarian versus consensual democracy, democracy as individual rights or the collective good; democracy as the realization of equality or the negotiation of difference.²¹⁶

In this endeavor to frame democracy it is worthy to consider Joseph Schumpeter's proposed definition. He recorded that democracy²¹⁷

Is that institutional arrangement for arriving at political decisions in which individuals acquire the power to decide by means of a competitive struggle for the people's vote.

²¹³ G Giya & V Mukotsanjera-Kawayi *Key Concepts in Budget Analysis and Resource Tracking* (2009) 17.

²¹⁴ Giya & Mukotsanjera-Kawayi (n 213 above) at 17.

²¹⁵ Giya & Mukotsanjera-Kawayi (n 213 above) at 17.

²¹⁶ Beetham (n 8 above) at 1.

²¹⁷ Beetham (n 8 above) at 2.

This definition has two key aspects that he asserts to be key components of democracy. The first is that it is institutionally based and the second is that once individuals are elected to be in power they are left to do as they please. While it is acknowledged that institutions are important in achieving a democratic society it has been argued that they serve as a means and not so much as the end. An institution that is supposedly democratic may also be serving other purposes or might as well fail to effectively produce democracy.²¹⁸ Institutions do however stand for democracy in practice yet they cannot be regarded as the underlying principle of democracy.

The other flaw in Schumpeter's definition of democracy is that it gives too much independence to the elected to make and be responsible for their decisions without them being accountable to the electorate. This in political terms is called 'Democratic self-control' and it implies that once people have elected an individual, political action is his business and not theirs.²¹⁹ Essentially this aspect is contested mainly on the basis that it compromises public participation and it limits the extent of democracy to the process (elections) and excludes the practice (participation).²²⁰ As a matter of principle democracy cannot be limited in the context of institutions and elections because these are largely mere means to achieving democracy.

Democracy needs to be defined in terms of its underlying principles and in terms of the institutions that embody it. What needs to be noted is that institutions are quite important because the principles of democracy cannot be achieved in an 'imperfect world'.²²¹ They also serve to establish the degree to which democracy has been attained. In discussing the basic principles that constitute democracy, Beetham started by discussing the sphere of democracy.²²² He describes the sphere of democracy to be the sphere of collectively binding rules and policies for any group as opposed to individual decisions and personal choices. A society that provides room for individuals to make their choices is a free society but a democratic society is all about the manner in which collective decisions are arrived at.²²³

²¹⁸ Beetham (n 8 above) at 3.

²¹⁹ Beetham (n 8 above) at 3.

²²⁰ Beetham (n 8 above) at 3.

²²¹ Beetham (n 8 above) at 4.

²²² Beetham (n 8 above) at 4.

²²³ Beetham (n 8 above) at 4.

Related and linked to the fact that democracy is practiced in the sphere of political and collective decision-making is the fact that this system of collective decision making is subject to control by all members of the collective and they must be considered as equals. Thus, core principles of democracy are largely popular control and political equality.²²⁴ Popular control in larger societies where there are elected representatives, is exercised not over the decision-making process itself but over the decision makers. That control is mediated rather than immediate.²²⁵ The principles of popular control and political equality may be applied to the decision-making process of any group or association. In as far as political equality is concerned; a democratic society is enjoined to provide the socio-economic conditions for political equality to be realized in practice.²²⁶

In justifying the two important pillars (popular control and political equality) of democracy Beetham postulates that the idea and core value of human worth or dignity is that of human self-determination or autonomy, being in control of decisions about one's life rather than subject to another.²²⁷ These two principles of democracy do not go unchallenged in the political discourse. The first criticism postulated is the fact that they give everyone a chance to air their voice without assessing the people's capacity to effectively deliberate on the issues concerning their lives.²²⁸ They also ignore the fact that some people naturally lack that capacity to participate in a democratic government. This is the same ground on which children are regarded as minors in as far as voting and other legal rights is concerned. Age is just but one limiting factor for equal opportunity to participate in decision making in a democratic society. Yet all are given this opportunity whether capable or not, regardless of the complexity of the decision-making process in the public sphere or whether one has been exposed to it.²²⁹

Another loophole apparent in these two principles of democracy, as indicated by Beetham is their inability to provide a definitive timeframe for deliberation before a decision is made.²³⁰ Developing his criticism further, Beetham alleges that the knowledge available to people is a

²²⁴ Beetham (n 8 above) at 5.

²²⁵ Beetham (n 8 above) at 5.

²²⁶ Beetham (n 8 above) at 5.

²²⁷ Beetham (n 8 above) at 7.

²²⁸ Beetham (n 8 above) at 7.

²²⁹ Beetham (n 8 above) at 8.

²³⁰ Beetham (n 8 above) at 9.

crucial factor in their capacity to make public decisions within whatever time available to them.²³¹ However experts who are more knowledgeable are in a better position to make a certain decision and may not need as much time as may be needed by those with less knowledge.²³²

Knowledge is a very broad concept. However, in this discussion the assumption is made that people must have the requisite knowledge for them to be able to make an informed decision in any political and democratic society.²³³ While knowledge is key and relevant to the decision-making process, the real challenge is accessibility of such knowledge. People need to have an appreciation of any gaps in knowledge they may have and a democratic society must provide awareness to the public so that the public can effectively participate in democracy.

Once access to knowledge is given to the public, it may still remain a challenge for the public to be willing to utilize that access and empower themselves for public participation.²³⁴ This can be illustrated with an example. There can be workshops launched to discuss certain provisions of the Constitution and people are called in to attend for free but the organizers cannot coerce people to attend such a workshop. It will be entirely up to the individual whether to attend or not. Yet when a collective decision is being made, it is assumed that equal opportunity is to be given to both those who attend and those who do not attend. The same is true with the practice of popular control. It would be undemocratic to exclude any group in the society for reasons of ignorance or lack of awareness.

A more convincing argument in the case of democracy assumes of universal self-interest or self-preference. In accordance with this assumption, the individuals concerned are in a better position to safeguard and promote their own interests. By being the best judges of their own interests, they then know what is good for themselves or for the members of the collective group. According to Beetham, democracy in that context becomes a means to realize the public good and this is only achievable when people can control the process and practice of democracy.²³⁵

²³¹ Beetham (n 8 above) at 9.

²³² Beetham (n 8 above) at 9.

²³³ Beetham (n 8 above) at 10.

²³⁴ Beetham (n 8 above) at 10.

²³⁵ Beetham (n 8 above) at 13.

The pursuit of public good through democratic principles has however been criticized for its procedural flaws.²³⁶ Simply put, the procedure that is followed in coming up with individual choices is that of majority vote. This procedure cannot be regarded as a perfect way of arriving at a collective decision.²³⁷ More so, even if these principles of democracy are practiced through representation, procedural objection can be raised based on the fact that the principle of political equality is infringed by privileging the autonomy of the few at the expense of the rest.²³⁸

Both the majoritarian and representative rule lack in achieving political equality because they totally exclude the views of other groups.²³⁹ In the majoritarian perspective, the majority view is taken as a true position yet the minority rule is totally disregarded. In the representative rule only the few representative views are then upheld at the expense of the represented. Certain measures may however be taken to mitigate the above-mentioned procedural flaws. Such measures may include wide consultation and extensive and all-inclusive debate.²⁴⁰ Additionally, an impartial or a neutral person can be appointed to preside over debates and negotiations.

Beetham also suggests marrying consensual and majoritarian forms of democracy by ensuring that the former precedes the later in every decision-making process.²⁴¹ Exploring consensual forms of democracy first and foremost before the majority vote assists in giving everyone a chance in the deliberation before the majority decides for the minority. Majority vote must thus be adopted as a last resort. In this scenario however, the willingness of the majority to compromise is not guaranteed. Moreover, political equality is not a one-time event but is a dynamic process where those who were in the minority at some stage and had their views undermined may as well be in the majority at another stage of a political discourse and have a decisive vote. This principle of reciprocity however lacks the guarantee of compensating for previous decisions on a different future decision or concept and that may result in the minority losing on issues of vital interest.²⁴²

²³⁶ Beetham (n 8 above) at 18.

²³⁷ Beetham (n 8 above) at 18.

²³⁸ Beetham (n 8 above) at 18.

²³⁹ Beetham (n 8 above) at 18.

²⁴⁰ Beetham (n 8 above) at 18.

²⁴¹ Beetham (n 8 above) at 20.

²⁴² Beetham (n 8 above) at 20.

Beetham summarizes the process of realizing the collective good by insisting that it includes consensus-based procedures for the framing and deliberation of legislative proposals and majoritarian ones for deciding them.²⁴³ Even in this process, the timeframe must allow for certain conditions to be followed. Such conditions include the inclusion of all citizens, accountability through universal equal suffrage, must be representative of the electorate, must be responsive to public opinion and citizens must freely participate through political parties, voluntary associations or any other politically enabling forum.²⁴⁴

The original meaning of democracy is the rule or power of the people.²⁴⁵ The opposite is true where people do not play any role in the rule of a regime. Having discussed the definition and the principles that underlie democracy, what needs to be unpacked now is the extent to which people should be involved in politics for a government to qualify as a democratic government. What then needs to be ascertained is the amount of power people should possess in a democratic government. Concern arises as to whether attention must be given to the original Greek meaning of democracy as linked to power. Power in the democratic sense to the ancient Greek meant citizens exercise control over policy by direct acts of will in the assembly.²⁴⁶ Citizens were chosen, by lot, to perform executive functions of government. This by far is different from the modern democracy that now includes institutionalized popular influence and procedures of accountability.²⁴⁷

It is appreciated that in modern democracies, participation as opposed to power serves is an indicator of democracy. However, participation cannot be a standalone indicator.²⁴⁸ Liberalization is equally important. It is argued that the decisive test of a democracy is its capacity to encourage its population to play an active role in its government.²⁴⁹ In contradistinction however, other contemporary writers postulate that democracy is the by-product of a competitive method of leadership recruitment. Thus, there must be a competition between leaders and the leaders can only win the competition by appealing to the people. Hence democracy comes about as a result of the

²⁴³ Beetham (n 8 above) at 22.

²⁴⁴ Beetham (n 8 above) at 23.

²⁴⁵ G Moyser & G Pamy 'More Participation, More Democracy' in R Blaug & J Schwarzmantel (ed) *Democracy A Reader* (2016) 442.

²⁴⁶ Moyser & Pamy (n 245 above) 442.

²⁴⁷ Moyser & Pamy (n 245 above) 442.

²⁴⁸ Moyser & Pamy (n 245 above) 442.

²⁴⁹ Moyser & Pamy (n 245 above) 442.

responsiveness of the leaders to the followers. In this regard, representation or responsiveness would be more relevant. Participation in a democratic society is thus demonstrated through elections. However, voting cannot be treated as a distinct indicator of democracy because there are various modes of political participation apart from voting that include party campaigning, group activity, contacting representatives and officials and protesting and activism.²⁵⁰

Some scholars, like Barber, are of the view that strong democracy is the way to go on the road to achieving true democracy in a country. Strong democracy is defined by politics in the participatory mode; it is self-government by citizens rather than representative government in the name of citizens.²⁵¹ In the case of strong democracy, citizens govern themselves directly. Barber puts down the following as the definition of strong democracy:²⁵²

Strong democracy in the participatory mode resolves conflict in the absence of an independent ground through a participatory process of ongoing, proximate self-legislation and the creation of a political community capable of transforming dependent private individuals into free citizens and partial and private interests into public good.

Key elements in this definition are activity, process, self-legislation, creation and transformation.

Strong democracy requires everybody to encounter every other man without the intermediary of expertise and every citizen is his own politician. Thus, there is an all-inclusive participation.²⁵³ By its operation, strong democracy mandates a permanent confrontation and dialogue among citizens enabling them to think and act in common.²⁵⁴ Because of its form of participation, strong democracy allows citizens to define themselves. In defining strong democracy, Barber distinguishes citizenry from masses.²⁵⁵ His emphasis is on the fact that strong democracy is not government by the masses or people but by citizens and only citizens can truly participate in strong democracy.

²⁵⁰ Moyser & Pamy (n 245 above) 442.

²⁵¹ BR Barber 'Strong Democracy' in R Blaug & J Schwarzmantel (ed) *Democracy A Reader* (2016) 447.

²⁵² Barber (n 251 above) at 447.

²⁵³ Barber (n 251 above) at 448.

²⁵⁴ Barber (n 251 above) at 448.

²⁵⁵ Barber (n 251 above) at 448.

4.3.2. DEMOCRACY AND CONSTITUTIONALISM IN ZIMBABWE

Basically, we have established that democracy is the rule by people that can be achieved either directly or through representation. Two key principles that were discussed were that of popular control and political equality. These two principles are hinged on the adherence to the rule of law in a particular country or nation. Zimbabwe is described in Section 1 of the Constitution of 2013 as a 'unitary, democratic and sovereign republic'. It being described as a democratic republic is of great relevance to this discussion.

The 2013 Constitution is different from the 1980 Constitution in that the former contains a wider spectrum of the principles of democracy. In its founding values, the 2013 Constitution in section 3(2), has good governance as one of the founding principles. Good governance is then defined in that section to include a multi-party democratic political system, orderly transfer of power following elections, respect of all political rights, observance of the principle of separation of powers and transparency, justice, accountability and responsiveness.

The 2013 Constitution further provides for democratic rights. In section 61 it provides for freedom of expression, section 62 gives everyone access to information and in section 67 it provides for a whole lot of political rights to every citizen of Zimbabwe, be it a man or a woman. Section 238 establishes the Zimbabwe Electoral Commission and in section 239 it provides for the functions of the Zimbabwe Electoral Commission that include the conducting of elections at all levels, referendum, voter education and delimiting of constituencies. Those are major highlights of how the Constitution has embraced the principle of democracy.

In contradistinction however the major flaw of the 2013 Constitution, in as far as the concept of democracy is concerned, is its perpetual support of presidential power and monopoly especially with regards to appointment and dismissal of top government officials. It is the president who appoints ministers and deputy ministers. Since the attainment of independence in 1980, the president has been running the country with a male dominated cabinet and the 2013 Constitution did not seek to rectify this position, at least in practical terms. Section 104(3) of the 2013 Constitution provides as follows:

Minister and Deputy Minister are appointed from among senators and members of the National Assembly, but up to five, chosen for their professional skills and competence may be appointed from outside Parliament.

Reserving the majority of cabinet positions for senators and parliamentarians is on its own exclusionary of women who have been struggling to get parliamentary seats.

The government has put in place no mechanism to enhance women's penetration into parliament and the senate. The quota system has been left to the discretion of political parties. Further the qualification for parliament²⁵⁶ and the senate²⁵⁷ does not necessarily mean one has the required expertise to run the government. This in actual fact enjoins the president to take into cabinet non-experts leaving out experts who may not be politicians and so cannot easily find a way to penetrate into government. Further if the cabinet is chosen from the parliament and senate the issues of accountability and checks and balance are then compromised.

Although the 2013 Constitution in section 92 provides for the election of vice presidents this section has been put in abeyance for ten years from 2013.²⁵⁸ Currently the president can hire any person to the position of the vice president and dismisses them as he or she pleases in accordance with section 14 (2) of the sixth schedule of the 2013 Constitution that provides as follows:

Without delay the person elected to President in any election referred to in subparagraph (1) must appoint not more than two Vice-Presidents, who hold office at his or her pleasure.

The application of this provision by the former President Robert Mugabe has seen the former Vice President Dr. Joyce Mujuru being fired from the position of the first vice president and being

²⁵⁶ Section 125 (1) provides that A person is qualified for election as a member of the national Assembly if he or she

- (a) Is a registered voter; and
- (b) Is at least twenty-one years of age.

²⁵⁷ Section 121 (1) provides as that:

A person is qualified as a Senator referred to in section 120(1) if he or she –

- (a) Is a registered as a voter; and
- (b) Is at least forty years of age.

²⁵⁸ Section 92 of the 2013 Constitution provides that

- (1) The election of a President and two Vice Presidents must take place within the period specified in section 158.
- (2) Every candidate for election as President must nominate two persons to stand for elections jointly with him or her as Vice Presidents, and must designate one of those persons as his or her candidate for first Vice-President and the other as his or her candidate for second Vice-President.

replaced by His Excellency Emmerson Mnangagwa who was then fired again using the same provision. The fact that the vice presidents are to hold office at the president's pleasure has been interpreted to mean that the president can hire and fire as he pleases, whether there is misconduct or not. That alone is a threat to democracy as it turns vice presidents into puppets who live in fear of being removed if they criticize the president. Thus, the vice president is likely to be in a compromised position where by they would have to advance the interests of the president even if it is at the cost of democracy to secure their tenure in office. Accountability then suffers at the expense of loyalty.

This provision is open to abuse by the president who may choose to relieve a vice-president from duty for his own personal reasons that are related in any way to the development of the country. The application of this section sparked a lot of controversies around the Mugabe administration when he fired His Excellency Emmerson Mnangagwa with the intention of making his wife his successor.²⁵⁹ This however brought about his downfall when the military intervened and caused him to resign. The military intervention, although it assisted in ending the Mugabe era, was carried out without any direct constitutional provision enabling it. That is why the British Prime Minister named it a 'soft coup'.²⁶⁰ Although the intervention helped to block usurpation of power by the then first lady Dr. Grace Mugabe, the military showed bias in supporting or rather sympathizing with a man as opposed to woman. When Dr. Joyce Mujuru was removed from office there was no military intervention.

Another controversial provision in the 2013 Constitution is the one that deals with situations where a president dies or resigns and there is no vice president to immediately take over the position of the president. In that scenario section 14 (4) (b) provides that:

The vacancy in the office of the President must be filled by a nominee of the political party that the President represented when he or she stood for elections.

²⁵⁹ 'Mugabe Fires Mnangagwa' *Newsday* 7 November 2017.

²⁶⁰ 'Britain Offers Help For Zimbabwe After Mugabe' *News24* 21 November 2017.

Cognizant of the fact that democracy requires direct participation of citizens in electing their president, this section poses a great threat to democracy. It deprives Zimbabweans of their right to elect a president of their choice and they would be forced to accept the one chosen by a political party. In practical terms it would not be every member of said party who participates in the election of the president but rather those in leadership positions. This provision is quite ironic especially considering the fact that the president of country is elected in a fashion that excludes the majority of Zimbabwe, whom he is supposed to lead. This is quite contrary to a scenario where a member of parliament dies or resigns and by-elections are called for and the vacancy is filled through elections.²⁶¹

Whereas citizenship is invoked in defense of rights it is equally important to note that there exist corresponding duties to such rights.²⁶² Rights generally have to be subordinate to duties. Political rights are essentially an important aspect of citizenship. Political rights include voting and political participation. In Zimbabwe, since independence, remarkable electoral and political reforms have been put in place. However, with regards to women, such reforms have largely increased their number in voting and not in political representation. In 1980 there are a number of electoral reforms that took place in favour of women and this commenced with their emancipation from their status as minors to enable them to vote.²⁶³ Initiatives for electoral reforms are normally introduced by the government and the ruling party ZANU (PF), but the ruling party's main motive is not necessarily the inclusion of women but to mobilize votes for the party's votes. Thus, electoral reforms, although they can contribute towards the inclusion of women as citizenship are also being used to advance the interests of a political party that is dominated by male figures.

²⁶¹ Section 158 (3) of the 2013 Constitution provides that Polling in by-elections to Parliament and local authorities must take place within ninety days after the vacancies occurred unless the vacancies occur within ninety days before a general election is due to be held, in that event the vacancies may remain unfilled until the general elections.

²⁶² Barbalet (n 12 above) at 82.

²⁶³ Legal Age of Majority Act 15 Of 1982.

4.3.3. WOMEN AND DEMOCRACY IN ZIMBABWE

At some point in the history in most countries of the world, women have been excluded from every government and more generally politics.²⁶⁴ During the colonial era there was no democracy for black Zimbabweans. The democracy that existed then could be defined as the ‘rule of the whites, by the whites and for the whites.’²⁶⁵ This was described by Masipula Sithole as ‘intra-white democracy’.²⁶⁶ In terms of this intra-white democracy, elections were held regularly as per the provision of the enabling laws but these elections were essentially for whites. One of the Prime Ministers of the colonial era Mr. Ian Smith was on record as having said that there would be ‘no majority rule, not in a thousand years.’²⁶⁷ This obviously portrays an anti-democratic attitude that was even perpetuated by the fact that white politics was biased towards a one-party rule tendency. The multi-party politics emerged during the Second Chimurenga with two main opposition parties The Zimbabwe African Peoples Union ZAPU under the leadership of Joshua Nkomo and ZANU (PF) under Robert Mugabe.²⁶⁸

Although nowadays women political participation has improved it has not been achieved easily. Zimbabwe’s 1980 Constitution is based on the West Minister model which came out of the Lancaster House negotiations. The 1980 Constitution as part of its transitional process promised whites 100 seats in parliament for at least seven years after independence and no promise was made to women with regards to any number of seats in Parliament.²⁶⁹

Traditionally, democracy was defined in such a way that it excluded other social groups who were deemed as irrelevant, including women, slaves and non-nationals.²⁷⁰ Even early liberal democracies were open only for those who met qualifications of property ownership. Present day democracies in Africa such as those of Zimbabwe have perpetuated this practice of eliminating

²⁶⁴ S R Sandusky ‘Women’s Political Participation In Developing And Democratizing Countries: Focus On Zimbabwe’ (1999) 5 *Buffalo Human Rights Law Review* 253.

²⁶⁵ AB Chikwanha-Dzenga; E Musunungure & N Madzingira ‘Democracy and National Governance in Zimbabwe’ A Country Survey Report’(1999) *Institute for Democracy In South Africa* available at www.afrobarometer.org (accessed on 15 November 2017) 9.

²⁶⁶ Chikwanha-Dzenga; Musunungure & Madzingira (n 265 above) at 9.

²⁶⁷ Chikwanha-Dzenga; Musunungure & Madzingira (n 265 above) at 9.

²⁶⁸ Chikwanha-Dzenga; Musunungure & Madzingira (n 265 above) at 10.

²⁶⁹ Sandusky (n 264 above) at 288.

²⁷⁰ UNESCO Report (n 1 above) at 24.

certain groups, including women and those with little education.²⁷¹ Incidentally, more often than not, women fill both such criteria, being a woman and a number of them being of low educational attainment.²⁷² Thus for example one is required to be familiar with a specific political language and belong to a political party in order to have actual access to political life.²⁷³ Since women are deprived in this regard, their access to their democratic rights in the Zimbabwean context is also compromised.

After independence, Zimbabwe inherited the one-party tendency with ZANU (PF) as the dominant political party of the day. In the same way that the white settlers tried to eliminate black politics by criminalizing it, ZANU (PF) tried to eliminate opposition through various means that also included criminalizing opposition politics. The 1980 Constitution provided for a parliamentary system of government with a prime minister as a head of government and a non-executive president as head of state. This however was changed through a Constitutional amendment in 1987 whereby the powers of the prime minister and of the president were fused hence the executive president became both the head of the state and the head of the government. In 1986, a Presidential Powers Act was enacted and it had the effect of allowing the president to legislate unilaterally. This shows a gradual shift in Zimbabwean politics from being a one-party state to a one-man state with an executive president who was not accountable to anyone. This had the effect of undermining the democratic foundations of the political system.²⁷⁴

The process of democratization in Zimbabwe started in 1980 at independence.²⁷⁵ For black women in Zimbabwe it was their first time to participate in elections. In the electoral sense Zimbabwe has been struggling to fit into the parameters of a universally accepted framework of democracy. Its elections are widely alleged to be fraudulent and fraught with irregularities.²⁷⁶ The electoral institution and the process are seen as defective and there have been allegations of rigging after every election. This might have contributed towards the decline in voter turn-out from 94% in 1980 to 57% in parliamentary elections and from 53% in 1990 to 33% in 1996 for the presidential

²⁷¹ UNESCO Report (n 1 above) at 24.

²⁷² UNESCO Report (n 1 above) at 24.

²⁷³ UNESCO Report (n 1 above) at 24.

²⁷⁴ Chikwanha-Dzenga *et al* (n 265 above) at 11.

²⁷⁵ Schotting (n 74 above) at 29.

²⁷⁶ Chikwanha-Dzenga *et al* (n 265 above) at 11.

elections.²⁷⁷ Furthermore elections are only a fraction of the lived experiences of women, although in Zimbabwe they can be overwhelming at times.²⁷⁸ A qualitative research by RAU in (2016) on women's political participation reflected the following:²⁷⁹

- a) Political participation has been reduced to a polarized contest between two main political parties.
- b) Political participation is associated with men and particular types of woman
- c) Political participation is risk and violence too frequently a part of the political contest.
- d) Politics are strongly associated with corruption and nepotism.
- e) Middle class women are not motivated to participate in elections, as registration is unnecessarily difficult.
- f) Leadership is a major problem and most current leaders do not inspire confidence, apart from the mendable influence of patriarchy in choosing leaders.
- g) The active participation of women in politics is very difficult, women that do frequently become labeled in disparaging ways and requires making disadvantageous compromise.
- h) Overall, patriarchy was seen as the greatest stumbling block to women exercising agency, affecting their participation in politics business, community, church and family.

Prior to independence, nationalist politics in Zimbabwe were focused on the struggle against white colonial power then thereafter the struggle became internal, based on ethnic conflict within Zimbabwe.²⁸⁰ This culminated in the Gukurahundi massacre which pitted the Shona against the Ndebele and which was pacified by the Unity Accord of 1987 bringing together the two political parties of the time. The government however soon faced another challenge from the Movement for Democratic Change, a new opposition political party. Within these struggles' women were seen as outsiders. Thus, they faced obstacles to political participation in Zimbabwe. Interesting to note is that democracy requires the inclusion of the marginal section of the population of Zimbabwe. It becomes a cause of concern when women's political participation is not at par with their male counterparts.

²⁷⁷ Chikwanha-Dzenga *et al* (n 265 above) at 11.

²⁷⁸ RAU May 2017 (n 45 above) at 15.

²⁷⁹ RAU May 2017 (n 45 above) at 14.

²⁸⁰ Sandusky (n 264 above) at 253.

Another research by RAU in 2010 (c) echoed that there are social limitations on women's political involvement.²⁸¹ Women who venture into 'male domains' such as politics are considered impertinent and of low morals and are labeled as deviants in a community that has gotten used to men dominating political processes.²⁸² These perceptions are rooted in conservative cultural norms of patriarchy. Further it was also discovered that women in politics discriminate and degrade one another. They are overcome by jealousy and do not like other women to be promoted.²⁸³ Lack of information and education on politics is also a huge problem. When talking to women, one finds out that there is a lot they are not aware of although they are eager to learn. Most women profess that they are forced into positions of disadvantage because they lack awareness.²⁸⁴ Women are marginalized from the political arena due to the dominance of patriarchy in political structures in the country.

Reeler argues that women face multiple disadvantages in the actualization of their citizenship which include legal setbacks in trying to obtain legal documents and other problems occasioned by a dominant patriarchy.²⁸⁵ Efforts have been made so far to increase women's representation in political bodies but this has been criticized as being too little, too late.²⁸⁶ Representation has proved to be inconsistent and unreliable in Zimbabwe and it has proved to be a very small, though important, part of active citizenship for women.²⁸⁷ In the last 7th Parliament representation of women was 16% in the National Assembly and 25% in the Senate. Although the current percentage increased to 34% in the National Assembly and 48% in the Senate due to quota systems and other state interventions in actual fact the number of women directly elected declined in the 2013 elections. There is a genuine fear that if the quota system is eventually removed in 2023 after the ten-year transitional period women's representation may decline further.²⁸⁸

²⁸¹ RAU May 2017 (n 45 above) at 14.

²⁸² RAU May 2017 (n 45 above) at 14.

²⁸³ RAU May 2017 (n 45 above) at 14.

²⁸⁴ RAU May 2017 (n 45 above) at 14.

²⁸⁵ RAU May 2017 (n 45 above) at 11.

²⁸⁶ RAU May 2017 (n 45 above) at 11.

²⁸⁷ RAU May 2017 (n 45 above) at 11.

²⁸⁸ RAU May 2017 (n 45 above) at 11.

Zimbabwe is a patriarchal society meaning it is a society based on structured and institutionalized male hegemony over females.²⁸⁹ Male supremacy in the domestic sphere has contributed to women being marginalized politically and in the democratic process as a whole.²⁹⁰ Because Zimbabwe is a patriarchal society, women in Zimbabwe are principally confined to the domestic sphere, which is associated with expressive gender roles such as reproduction and caregiving.²⁹¹ Women cannot aspire to influential political offices because they lack the time needed to interact with voters in campaigning because of them being confined to domestic tasks in the home and therefore mainly economically dependent on patriarchy.

The profound implications of caregiving roles on women's exclusion in citizenship have been demonstrated by Sevenhuijsen.²⁹² Sevenhuijsen accepts that women perform most care works in society. In this regard 'care work often relies on time as a resource and determines the amount of time and energy women have to spend on political participation and other types of political involvement.'²⁹³ The main problem is not the existence of caregiving duties, but however the fact that its values such as attentiveness, responsiveness and responsibility are not included in citizenship such that its social value is not acknowledged. Although feminists such as Ruddick and Elshtain encompass care as a dimension of citizenship by acknowledging motherhood as a basis for citizenship, this has been heavily criticized.²⁹⁴ It is the argument of feminists that values of mothering such as care, nurturance and morality should be projected into political life.²⁹⁵

This has however been viewed by Dietz as distortion of the meaning of politics and political life. According to Dietz politics is about engaging other citizens in order to determine individual and common interests in relation to public good.²⁹⁶ There is more to women than just being mothers. They need to realize that they share a common political situation but still they can participate in politics regardless of whether they are mothers or not.²⁹⁷ The inclusion of women into the public

²⁸⁹ M Zungura & EZ Nyemba 'The Implications of the Quota System in Promoting Gender Equality in Zimbabwean Politics' (2013) 3 *International Journal of Humanities and Social Science*.209.

²⁹⁰ Zungura M. & Nyemba EZ. (n 289 above) at 209.

²⁹¹ Zungura M. & Nyemba EZ. (n 289 above) at 209.

²⁹² S Sevenhuijsen *Citizenship And The Ethics Of Care* (1998) 5.

²⁹³ Sevenhuijsen (n 292 above) at 5.

²⁹⁴ Gouws (n 3 above) at 5.

²⁹⁵ Gouws (n 3 above) at 5.

²⁹⁶ Gouws (n 3 above) at 5.

²⁹⁷ Gouws (n 3 above) at 5.

sphere enables them to negotiate inequalities in power hierarchies in the political and labour sectors.²⁹⁸ The political arena is mainly reserved for men since it is associated with masculine attributes such as assertiveness, boldness and audacity. Women's social station compromises their access to democracy because women roles within the household or the family leave them with little time to participate in democratic practices in fields such as politics.²⁹⁹

Male, aspiring political candidates in contradistinction have enough time to spend at beer halls for example chatting with potential voters even up to late hours and very few female candidates can do the same since they have other duties they are expected to fulfil in their households.³⁰⁰ Zungura and Nyemba³⁰¹ note that approximately 90% of female politicians are divorced and single. This suggests that it is difficult for a married woman to pursue a political career unencumbered.³⁰² The impression created here is that women have to choose between democracy and participation in matters related to the governance of their country and their social careers as wives and mothers, and they cannot have it both ways. Female politicians are in some instance stereotyped as prostitutes³⁰³. Hence women who are dedicated to be politicians end up divorcing their spouses which might be caused by social prejudice and pressure which they experience from their spouses, family and the society at large to quit politics because of its depraved image and the nature of politics in Zimbabwe.³⁰⁴

Of note, a culture of democracy had not taken sound root in Zimbabwe. The government has been intolerant of political opposition and on the whole discourages active political participation of the population at large.³⁰⁵ This has led to insistent demands from advocacy groups who have not been able to benefit from the fruits of independence for political change. This in part led to attempts by the government to try out liberal democracy and multipartism.³⁰⁶ Women joined the new, blooming political groups that consequently formed and managed to attain a voice as citizens. However,

²⁹⁸ Gouws (n 3 above) at 6.

²⁹⁹ Gouws (n 3 above) at 6.

³⁰⁰ Zungura & Nyemba (n 286 above) at 209.

³⁰¹ Zungura & Nyemba (n 286 above) at 209.

³⁰² Zungura & Nyemba (n 286 above) at 209.

³⁰³ Zungura & Nyemba (n 286 above) at 209.

³⁰⁴ Zungura & Nyemba (n 286 above) at 209.

³⁰⁵ UNESCO (n 1 above) at 14.

³⁰⁶ UNESCO (n 1 above) at 14.

even in democratic states, women are for the most part excluded from decision-making, at household, community and national levels.³⁰⁷ Some political parties have nonetheless made strides towards attaining democratic participation of women. For instance, ZANU PF at some point gave women grinding mills to help them improve their livelihoods and to be economically emancipated. More needs to be done however. Female politicians have proposed amendments to the Political Finance Act so that it addresses the gender dimension to help women acquire funding to aid them in political activities. Others have advocated for more funding for political parties with more women since the increase in the number of women in political positions is predicated on the number of women in political parties.³⁰⁸

For UNESCO one complication in the road of democratization is that political parties by and large remain undemocratic in their behavior and practices. Instead of innovating ideas and making proposals for nation building, they become tangled in nepotism, personalization of power, and politics of patronage.³⁰⁹ Examples from several countries, including Zimbabwe show that, the existence of a multiparty system is not a guarantee of democracy.³¹⁰ Interestingly, most political parties do not embrace any specific plans concerning women's progression and participation in their policy platforms, despite the existence of women's branches in their party organizational structures.³¹¹

In fact, there are no organizations reachable and close enough to women to be of aid to them. This is caused mainly by the centralization of government services. The mechanisms and programs put into place by government and other institutions to assist women, such as the Ministry of Women and Gender Affairs are too inflexible and thus most of the funds made available are taken away by intermediary bodies before reaching women at the bottom of the ladder.³¹²

Women's participation in the process of democracy and political life has always been considered challenging, since they are defied with the encumbrance of a socialization process which

³⁰⁷ UNESCO (n 1 above) at 14.

³⁰⁸ Zungura & Nyemba (n 289 above) at 209

³⁰⁹ UNESCO Report (n 1 above) at 17.

³¹⁰ UNESCO Report (n 1 above) at 17.

³¹¹ UNESCO Report (n 1 above) at 17.

³¹² UNESCO Report (n 1 above) at 30.

disheartens them from taking up a public role and they are also faced with problems of the selective nature of political life and political practices themselves.³¹³ Women's lack of self-confidence and belief in themselves often leads them to consider male contestants as more competent and to vote for these male candidates, rather than uniting as a front to make their own demands. Women might also be hesitant to run for office, especially at national level, since this would mean dislodgment from their place of residence and families.³¹⁴

While on paper women enjoy democracy in Zimbabwe, there exist impediments to the full realization of these rights. One such hurdle, which is yet to be crossed, is political violence. Political violence creates a situation un conducive of the full realization of the democracy and citizenship rights of women. For Zungura and Nyemba, violence is a disempowering force, which decays women's dignity, their potential and aptitude to enjoy the full spectrum of their human rights as full citizens of a country, including their ability to participate in public life and politics.³¹⁵ The environment of politics in Africa, Zimbabwe inclusive, is characterized by acts of violence, which comprise torture, killings and coercion and intimidation. This is especially observed in the period just before the elections.

According to Zungura and Nyemba, women become fatalities of the forms of violence mentioned above mainly because of their reproductive roles and the burden of caregiving since they are responsible for children, the sick, and the elderly whom they live with and this confines them to the domestic sphere.³¹⁶ This constrains their mobility in the event of a threat or danger at the first sign of danger unlike their male counterparts.³¹⁷ As such, they are unwilling to risk the safety of their families by participating in politics and being vocal about any other democratic rights they are entitled to.

According to some scholars, the perceived gender sensitivity of political elites in Zimbabwe is a premeditated manoeuvre to open up the political space for female citizens only when essential and

³¹³ UNESCO Report (n 1 above) at 24.

³¹⁴ UNESCO Report (n 1 above) at 24.

³¹⁵ Zungura & Nyemba (n 289 above) at 208.

³¹⁶ Zungura & Nyemba (n 289 above) at 208.

³¹⁷ Zungura & Nyemba (n 289 above) at 208.

convenient for them.³¹⁸ Citizens' perceptions are shaped by the images and gestures projected by the ruling male elite on issues of gender equality in politics. These elites have for a long time projected an image of being gender sensitive by mainly signing and domesticating a number of international and regional gender related legal instruments. However, Maphosa raises a compelling argument that at a closer look, male politicians have been expending and maltreating women as a means to a political end.³¹⁹ These sentiments of gender sensitivity have been nothing but a mirage since in spite of signing the various legal instruments no significant progress in gender equality in politics has been achieved. Their true intentions are betrayed by the fact that they are simultaneously putting a glass ceiling in women's road towards greater political participation in the country.³²⁰

Notably, political parties outmaneuver women by manipulating the women's quota system through fielding female candidates in constituencies where they are least popular and therefore least likely to succeed.³²¹ There is evidence of such practices cited by Maphosa, who claims that in the 2008 polls, the opposition MDC fielded nine female candidates in rural constituencies where it is least popular and does not have a strong presence, whereas ZANU-PF fielded 10 in urban areas, where similarly, it does not enjoy popular support.³²² In some cases, the quota system is used to settle political scores. For instance, in 2003 in the Tsholotsho constituency, incumbent MP, Jonathan Moyo's application to stand on a ZANU-PF ticket was rejected ostensibly because the constituency was reserved for a woman. The real reason was Moyo had fallen out of favour with party elites and so was being punished³²³.

In Zimbabwe, although the government has been accused of becoming increasingly authoritarian, it has never formally renounced democracy. Zimbabwe has subsequently worked on establishing democratic institutions such as pluralist media, an independent court system, political parties, parliament and elections.³²⁴ These democratic institutions are always limited by the government

³¹⁸ Maphosa *et al* (n 157 above) at 128.

³¹⁹ Maphosa *et al* (n 157 above) at 129.

³²⁰ Maphosa *et al* (n 157 above) at 129.

³²¹ Maphosa *et al* (n 157 above) at 142.

³²² Maphosa *et al* (n 157 above) at 142.

³²³ Maphosa *et al* (n 157 above) at 142.

³²⁴ Constitution of Zimbabwe Amendment (N.20) ACT 2013 (2013 Constitution).

in one way or the other however and more so when it comes to women's participation in these domains.³²⁵

In the liberal rights-based democracy of Zimbabwe people only know their rights on paper. But as Gouws puts it, in the Southern African context, when the implementation of rights or the state's effectiveness of championing rights is explored one becomes increasingly aware of restrictions on rights.³²⁶ A case in point is the Zimbabwean government's treatment of the media in 2000 when some media houses were shut down and the Daily News, an anti-government newspaper was banned.³²⁷ There is also a monopoly in the media industry by the State broadcaster which is only used by the ruling party and especially in times of election campaigns.³²⁸ Opposition parties would only have limited access to the state media. More often than not, the only coverage opposition parties receive serves to tarnish their image or for spreading bad publicity.³²⁹ In terms of the judiciary the government had the tendency of removing judges who would have ruled against the government thereby compromising the independence of the judiciary.

However, Maphosa notes that in practice, democratic structures and practices have become destabilized structurally by State-sponsored electoral violence and intimidation.³³⁰ Instead of consolidating the system of democracy ushered in after independence, the democratic system has been paralyzed. Yet because of the threats activism and lobbying for democratic rights poses to the welfare and safety of women, women in civil society and in politics have largely renounced the country's political system as a vehicle for influence and change.³³¹

Interesting to note however, is that despite women's increased participation in political life, they still tend to be stuck at the lower echelons of power.³³² When they reach higher positions, such as posts of ministers and permanent secretaries, they are more often than not assigned to specific

³²⁵ Chikwanha-Dzenga *et al* (n 265 above) at 11.

³²⁶ Gouws (n 17 above) at 76.

³²⁷ Chikwanha-Dzenga *et al* (n 265 above) at 11.

³²⁸ Chikwanha-Dzenga *et al* (n 265 above) at 11.

³²⁹ Chikwanha-Dzenga *et al* (n 265 above) at 12.

³³⁰ Chikwanha-Dzenga *et al* (n 265 above) at 12.

³³¹ Chikwanha-Dzenga *et al* (n 265 above) at 12.

³³² UNESCO Report (n 1 above) at 8.

areas related to their socially ascribed roles in fields such as education, health and social welfare³³³. In concurrence, Maphosa argues that in terms of appointments to government, women are assigned soft positions.³³⁴ These positions include ministerial posts in portfolios on women's affairs, sports, youth, social welfare, and small businesses amongst others. Key ministerial positions in portfolios such as Finance, Defence, Foreign Affairs and National Security amongst others are still reserved for men. As such one is bound to question the government's commitment to gender equality and equity and this casts aspersions on any claims that women enjoy their democratic rights as much as men.³³⁵ The Zimbabwean situation is unlike that of South Africa where in its short post-apartheid history women have on a number of occasions assumed influential portfolios such as those of Defence, Foreign Affairs, International Relations, Speaker of the House of Assembly, Speaker of the National Council of Provinces and the Deputy Presidency amongst others.³³⁶

The few women in Parliament are in a position to represent and speak for other women but they are prevented by a patriarchal political system bent on silencing them.³³⁷ In the current multi-party system, despite political parties' announced intentions to consider women's needs and demands, few women are actually being included on the list of candidates³³⁸. A case in point is the hounding out of MDC – T Vice President, Thokozani Khupe from the party in 2018 as a strategy to prevent her ascension to the position of party president. Similarly, ZANU (PF), at their last Congress, only selected one woman, Oppah Muchinguri-Kashiri, into the presidium of the party. She serves along with three male members of the executive branch of that party.

During the current wave of democratisation, women are still being marginalised. UNESCO points out that women are being left by the wayside of the democratization process, since inequality within the family remains, and patriarchal structures and institutions, in which the society operates, notably in the political arena, are still intact.³³⁹ Political parties have not yet fully espoused practices of gender equality. Furthermore, their women's branches are most often used as a place

³³³ UNESCO Report (n 1 above) at 8.

³³⁴ Maphosa *et al* (n 157 above) at 138.

³³⁵ Maphosa *et al* (n 157 above) at 139.

³³⁶ Maphosa *et al* (n 157 above) at 139.

³³⁷ UNESCO Report (n 1 above) at 14.

³³⁸ UNESCO Report (n 1 above) at 14.

³³⁹ UNESCO Report (n 1 above) at 16.

to confine women's issues, and to make sure the gender equality rhetoric can be controlled and does not get out of hand.³⁴⁰

Interviews with some female legislators conducted by Zungura and Nyemba have suggested that there exists a strong correlation between political violence and women's participation in politics.³⁴¹ This implies that an increase in incidences of political violence likely translates to a decrease in women's participation in politics and governance, thereby crippling the full realisation of the rights and citizenship of Zimbabwean women. There have also been reports of rape and other forms of violent sexual assault being used as a weapon of political intimidation. Some cases of women being raped in the 2013 election surfaced and subsequently some the victims were infected with HIV and were left with unwanted pregnancies in areas like Kapiripiri in Mount Darwin and other areas in Buhera. This culture of violence associated with politics in Zimbabwe inculcates a sense of apprehension and trepidation in female candidates and other women who may wish to indirectly exercise their democratic rights as citizens.

According to UNESCO, for the practice of democracy to be practical and functional, it first has to be tested at the level of the household.³⁴² For instance the case of domestic violence must be brought into the political arena, as a violation of basic human rights. Women must be part of the law making and decision-making process. Women learn the art of negotiation within their families, and should be encouraged to further develop these skills as part of their training for political participation. Yet, regrettably, those women who have managed to acquire an education and high levels of training often meet roadblocks in form of the glass ceiling. The concept of the glass ceiling implies that women are prevented from any further promotion prospects after reaching a certain level in their career. This affects their ability to become independent and to assert their democratic rights, whether in the family or in the society at large³⁴³.

Women's situation is compounded by the fact that women in politics have consistently failed to put up a united front in furthering the feminist agenda in the progression of democracy in

³⁴⁰ UNESCO Report (n 1 above) at 16.

³⁴¹ Zungura & Nyemba (n 289 above) at 208.

³⁴² UNESCO Report (n 1 above) at 16.

³⁴³ UNESCO Report (n 1 above) at 20.

Zimbabwe. Because women in politics do not support each other, very few women remain at the highest decision-making positions. This has been amplified by research by Zungura and Nyemba which has revealed that female politicians fight each other in the press and even in Parliament, rather than supporting each other to jointly further the interests of women.³⁴⁴ Zungura and Nyemba claim that female politicians are even divided over the 50/50 representation in parliament and this is part of the reason why they failed to achieve it by 2015.³⁴⁵

On the regional scene, the SADC Gender Protocol's Article 12, in paragraph 1 stipulates that there should be a 50% threshold of women in decision making positions.³⁴⁶ The SADC Gender and Development Index indicates that Zimbabwe is at a 41% threshold of achieving set targets relating to the participation of women in governance, nine percent off the mark. There have been efforts towards this by the Government of Zimbabwe (GoZ) however, which is reflective of the visibility of women as far as the democracy project is concerned in Zimbabwe.

Because of the social structure in which they grow under, most women in Zimbabwe view politics as amoral and dishonorable, a field reserved for men. Politics in Zimbabwe is associated with risk and threats to safety for both the individuals involved and their family members. This culture has even become institutionalized. This is true especially considering observations by Zungura and Nyemba that male parliamentarians disrespect female parliamentarians in the Zimbabwean Parliament.³⁴⁷ Women are verbally abused during official parliamentary proceedings. Female parliamentarians from across the political divide in studies by some scholars concurred that there exists a lot of sexual harassment in the Zimbabwean Parliament.³⁴⁸

Men use vulgar language to control and silence women who become too vocal and active in Parliament.³⁴⁹ In some extreme cases, male Members of Parliament divert from official Parliament business and start to verbally abuse and sexually harass women by using coarse language to describe women's private parts just to frustrate women who in the end become discouraged to

³⁴⁴ Zungura & Nyemba (n 289 above) at 209.

³⁴⁵ Zungura & Nyemba (n 289 above) at 209.

³⁴⁶ Maphosa *et al* (n 157 above) at 128.

³⁴⁷ Zungura & Nyemba (n 289 above) at 208.

³⁴⁸ Zungura & Nyemba (n 289 above) at 208.

³⁴⁹ Zungura & Nyemba (n 289 above) at 208.

meaningfully contribute to Parliamentary proceedings. In some instances, in a classic show of bullying and intimidation, when divorced female MPs try to contribute to Parliamentary proceedings, male parliamentarians shout demeaning and denigrating comments so as to cow them into submission. According to Zungura and Nyemba³⁵⁰ this has affected female legislators negatively.³⁵¹ Given the verbal abuse female MPs encounter in Parliament, women are not confident enough to contribute as much as men in parliament. Men perpetrate this behavior to induce women into silence and the stereotype that women politicians are useless as they make no contributions in debates becomes a self – fulfilling prophesy. The fact that this behavior is allowed to stand in Parliament is indicative of the second – class citizen status of women in Zimbabwean society and the extent to which they have been deprived of their democratic rights, despite the fact that they are fully entitled to these rights according to the constitution.

Because of this state of affairs in the domain of politics, sections of women, particularly married women are unlikely to join politics demonstrating that any claim that democracy applies to Zimbabwean women just as much as to men is a myth. To indicate the depth of this institutional rot, Zungura and Nyemba³⁵² cite a cabinet minister who, in response to allegations of sexism and verbal abuse against women in parliament stated bluntly that women who wish to be politicians must be brave enough to fight back with vulgar language. Such statement by a serving Minister are a signpost of a lack of political will to mainstream gender issues with respect to democratic practices and to accommodate women as fellow politicians, treating them as equals.

Without changes in patriarchal perceptions and attitudes male domination in politics remains. Instead of being apologetic for such behaviours demonstrated in the country's law-making body, the Minister actually urged women to be like Mahofa, a female Parliamentarian who used vulgar language to silence men too. This chauvinistic attitude permeates the political divide and affects women from a number of political parties in the county. One can therefore put forth that the political situation on the ground is not conducive for women to fully access and enjoy their democratic rights.

³⁵⁰ Zungura & Nyemba (n 289 above) at 208.

³⁵¹ Zungura & Nyemba (n 289 above) at 208.

³⁵² Zungura & Nyemba (n 289 above) at 208.

There are a number of differences that emerge between rural and urban women in as much as their access to democracy is concerned.³⁵³ Rural women are much more supportive of traditional leaders as a whole and they are in favor of a one-party state and are mostly indifferent towards one-man rule.³⁵⁴ The effects of patriarchy are greater in rural areas than in urban areas. However, although urban women are more alive to democracy and have greater support for multi-party democracy, a study by RAU of 2014 discovered that urban women found it harder to register as voters.³⁵⁵

Due to the current quota system in place representation by women has increased in the two Houses of Parliament. However, this will disappear in 2023 when the quota system expires. Anyhow, representation is only a very small component of active citizenship for women as mentioned earlier.³⁵⁶

4.3.4. WOMEN'S ACCESS TO DEMOCRACY IN TRADITIONAL LEADERSHIP IN ZIMBABWE

Section II of the 1980 Constitution provides for the negotiation and appointment of traditional leaders by the President giving due consideration to the customary principles of succession of the tribes' people over whom the chief will preside. The constitution also provides for a council of chiefs consisting of chiefs elected by other chiefs in communal land areas. Like in Namibia and other African countries, traditional leaders in Zimbabwe were downgraded at independence on the grounds of their real or perceived collaboration with colonial oppressors.³⁵⁷ In Zimbabwe before independence, chiefs were a resource for the Rhodesian government and were used to identify and handover suspected freedom fighters.³⁵⁸ In this way they lost much of their legitimacy and respect among the people whom they administered.

³⁵³ RAU May 2017 (n 45 above) at 14.

³⁵⁴ RAU May 2017 (n 45 above) at 14.

³⁵⁵ RAU May 2017 (n 45 above) at 15.

³⁵⁶ RAU May 2017 (n 45 above) at 11.

³⁵⁷ S Rugege 'Traditional Leadership and Its Future Role in Local Government' (2014) 7 *Democracy and Development* 171.

³⁵⁸ Rugege (n 357 above) at 171.

Traditional democratic structures have been formalized and modernised in postcolonial Zimbabwe nonetheless.³⁵⁹ The Traditional Leaders Act provides for the existence of village assemblies also known as dare or inkudla, consisting of all the inhabitants of the village concerned who are above the age of 18 years.³⁶⁰ The assemblies thus include women and youth, unlike traditional assemblies in many African countries in which women and unmarried young men have not been allowed to participate. Village assemblies are presided over by village heads nominated by headmen, approved by the chief and appointed by the secretary of the Ministry of Local Government and Housing. The functions of the village heads are outlined in Traditional Leaders Act.³⁶¹

The Ward Assembly is headed by the headman and it has a number of villages under it. Like the village assembly it gives the Traditional leaders an important say in the formulation of policies affecting their communities. However, such bodies have no authority to implement policy. Such powers rest with the elected rural district councils.³⁶² Any development project must ultimately be approved by the district council before implementation. At the highest level of traditional leadership there is a Council of chiefs established by the Constitution to advise the President on the control and utilization of communal land.³⁶³

Although women are not excluded from participation in the traditional councils or assemblies, what needs to be pointed out is that women's inclusion in traditional leadership at the level of chiefs, headmen and village heads is not the same as that of men. The chieftainship succession custom in most parts of Zimbabwe favours male succession and their term expires at the death of the incumbent. This procedure promotes dictatorship and autocratic rulership which is in direct opposition to the principles of democracy. Traditional leaders ascend to the throne using customary law as justification and not through any democratic process. Customary law is traditionally exclusive of women and so accords women little chance of becoming village leaders or chiefs.

³⁵⁹ Rugege (n 357 above) at 193.

³⁶⁰ Traditional Leaders Act 25 of 1998.

³⁶¹ Section 286 of the 2013 Constitution of Zimbabwe provides for the functions of national Council and Provincial Assemblies of Chiefs.

³⁶² Rugege (n 357 above) at 194.

³⁶³ Section 285 of the 2013 Constitution of Zimbabwe provides for the National Council and Provincial Assemblies of Chiefs.

4.4. LINKING DEMOCRACY AND CITIZENSHIP

Faulks recognizes the link between democracy and citizenship as one that is obvious in that it is a democratic system of governance that gives rights and responsibilities to its citizens.³⁶⁴ He contends that democracy involves the idea of equal rights to participate as well as civil rights such as free speech, association and protest. Thus, democracy plays a significant role in transforming a member of a community from being a mere subject into becoming a citizen. Democracy is important in the establishment of a stable government upon which citizenship can be practiced. Further the nature of rights and responsibilities must always be negotiated democratically.

Generally, there is a link between elections and democracy. Bratton contends that democracy is secured by high quality elections and the opposite is true about poor quality election. They uphold autocracy in a country.³⁶⁵ Thus holding elections does not necessarily guarantee democracy to the citizens of a particular state. Democracy therefore requires more than mere voting. Citizenship is all about political rights and responsibilities that people of a particular nation partake in in the political process of their country.³⁶⁶ Elections are a necessary ingredient of a representative democracy.

A very critical aspect in the discourse of citizenship is its link to the state. Muller's argument with regards to this is that 'citizenship is an empty idea without its association with its nation'.³⁶⁷ This link between the nation and the status and practice of citizenship is unavoidable and logical. Practically it is the State that grants citizen rights and obligations and it is within that State that such rights are practiced.

However modern citizenship is limited by the fact that within the same society there are different classes of people that may not necessarily access their rights equally.³⁶⁸ In this regard Barbalet follows Marx's idea that political emancipation is not enough for citizenship participation; there

³⁶⁴ Faulks (n 37 above) at 111.

³⁶⁵ Bratton M. *Voting and Democratic Citizenship In Africa* (2013) 1.

³⁶⁶ Bratton (n 365 above) at 32.

³⁶⁷ Faulks (n 37 above) at 29.

³⁶⁸ Barbalet (n 12 above) at 2.

is a need for a social revolution targeted at removing social inequalities.³⁶⁹ This however would be hampered by the fact that social structures are resistant to change. The matter of citizenship is not only about rights but is also about obligations.³⁷⁰

4.5. LINKING CITIZENSHIP AND WOMEN'S POLITICAL RIGHTS

Feminist debates on citizenship are heavily steeped in the language of rights because although human rights are common place, a huge proportion of women lacked legal personhood.³⁷¹ According to Wilson, rights have become the 'archetypal' language of democratic transition globally. The notion of equality as phrased in section 56 of the 2013 constitution must be a focus for feminist citizenship studies in Zimbabwe. Macon states that feminist have a great concern for the status of African women living under customary law and their citizenship participation.³⁷² Apparently the tension between customary law and gender equality has transformed into judicial contradiction between equality rights and cultural rights. Customary law is deeply cultural, patriarchal and contradictory to principles of equality, perpetuating male domination and women subordination. In Zimbabwe though, culture can only be applied only if it does not violate any other right in the constitution.³⁷³

According to Ahmed,³⁷⁴

Rights not only bring into being the category of women as their subject but also stabilize and delimit the meaning of women' within that process, in the structural relations and institutional settings that are involved in rights claims.

The main contention on addressing citizenship through rights is centered on the fact that the concept of women's rights assumes that the lives of females are organized primarily by gender

³⁶⁹ Barbalet (n 12 above) at 3.

³⁷⁰ Barbalet (n 12 above) at 5.

³⁷¹ Manicom (n 131 above) at 35

³⁷² Manicom (n 131 above) at 35.

³⁷³ Section 63 of the 2013 Constitution of Zimbabwe.

³⁷⁴ Manicom (n 131 above) at 36.

expectations that they live under.³⁷⁵ A lot of forms of specific discrimination such as those experienced by traditional or working class women are banned within that generic notion of women's rights.³⁷⁶ Women's rights have within them a universalistic notion of women that takes women to be the same.³⁷⁷ Applying a generic identity to all women can exacerbate the oppression of some women while producing inequalities amongst different women groups.³⁷⁸

Furthermore women's equality rights do not distinguish gender and sexuality such that it reinforces norms of heterosexuality when it defines the ways in which women are vulnerable to men.³⁷⁹ What needs to be acknowledged however that in as much as there are rights claims for different identities such as women, disabled and blacks, there are also different kinds of rights, classes often conflated under the singular ambit of women's rights.³⁸⁰ Manicom appreciates that the language of rights addresses and promises equality to a universal subject and appeals broadly to a universal or human morality, but rights cannot in themselves transform the conditions of inequality.³⁸¹

Feminists strongly object to assumptions that citizenship is universal which ignore the fact that citizenship is regarded as an ungendered and abstract concept.³⁸² Feminists contend that this tendency of universalizing citizenship is in itself a root of inequality.³⁸³ The inclusion of women into citizenship has two contested dimensions.³⁸⁴ The first dimension involves inclusion of women in the liberal model, on grounds of equality and sameness as men. The second is involves incorporation of women without ignoring differences between women and men. It is the latter position that Gouws favours over the former.³⁸⁵ Gouws follows the work of Young who advocates for a form of citizenship inclusion that considers people as members of groups such as women and minorities.

³⁷⁵ Manicom (n 131 above) at 36.

³⁷⁶ Manicom (n 131 above) at 37.

³⁷⁷ Manicom (n 131 above) at 37.

³⁷⁸ Manicom (n 131 above) at 37.

³⁷⁹ Manicom (n 131 above) at 37.

³⁸⁰ Manicom (n 131 above) at 37.

³⁸¹ Manicom (n 131 above) at 38.

³⁸² R Lister *Radical Democracy* (1994) 70.

³⁸³ Gouws (n 3 above) at 4.

³⁸⁴ Gouws (n 3 above) at 4.

³⁸⁵ Gouws (n 3 above) at 4.

Gouws, drawing on Lister, concludes that ‘ignoring women’s difference from men reinforces or reintroduces inequality into the concept of citizenship’.³⁸⁶ In the same vein differences among women themselves need not be ignored otherwise it would culminate into another form of inequality.³⁸⁷

The private sphere is one arena where women suffers oppression. While there is a divide between the private and the public sphere ignoring the interrelatedness and interconnection of the two would counter the drive to create a more egalitarian citizenship.³⁸⁸ Inevitably the interrelatedness of the public arena and the private arenas has profound implications for women’s citizenship. The private life often determines to what extent women are free to exercise their rights as a matter of practice.

The concept of caregiving as a dimension of citizenship has generated debate surrounding the consideration of motherhood as a basis for citizenship.³⁸⁹ Gouws contends that women are not just mothers but they also contribute towards political stability.³⁹⁰ The consequences of excluding women as mothers from citizenship is that they would not find a way of transforming political conditions that undermine their maternal values. However, it is contended that while it is appreciated that motherhood helped in political activism especially in developing countries, for women to enter into political institutions there is a need to adopt other strategies unrelated to this concept. Such strategies may include quotas and special representation.³⁹¹ Women need to represent their own interests in the public sphere and they must be involved in decision-making processes. Siim argues that equal citizenship embodies the relationship between agency, political institutions and political discourse.³⁹²

Faulks accepts the fact that citizenship has great potential to challenge the injustices and inequalities within and across societies.³⁹³ In this regard the liberal approach to citizenship through

³⁸⁶ Gouws (n 3 above) at 4. See also Lister (n 379 above) at 96.

³⁸⁷ Gouws (n 3 above) at 4.

³⁸⁸ Gouws (n 3 above) at 5.

³⁸⁹ Gouws (n 3 above) at 5.

³⁹⁰ Gouws (n 3 above) at 6.

³⁹¹ Gouws (n 3 above) at 6.

³⁹² Siim (n 136 above) at 9.

³⁹³ Faulks (n 37 above) at 105.

defense of equality and individual rights becomes the starting point. Radical approaches that reconstruct citizenship to transcend the limits of liberalism may significantly help further entrench citizenship.³⁹⁴ Citizenship is also regarded by Faulks as a status that mediates the relationship between the individual and the political community.³⁹⁵ It also enhances the interaction between individual citizens within a society.³⁹⁶ Modern citizenship, as opposed to the ancient citizenship that was confined to the ruling group, recognizes that all persons are equal before the law and there are legal privileges given to any group in the community.³⁹⁷

Another crucial aspect of the scope of citizenship is whether it includes or excludes intimate citizenship. Intimate citizenship is all about the application of the principles of citizenship to interpersonal relationships. This however has been challenged by feminists on the basis that the divide between private and public is itself a political construct that favours men's interests.³⁹⁸ It has the effect of hiding from public gaze the violence against women and children that includes both private and public life.³⁹⁹ Consequently this would create a framework that can work towards eliminating violence from all human relationships.

4.6. LINKING DEMOCRACY AND EQUALITY

Lamounier contends that the link between democracy and equality rests in the fact that social inequality is a threat to democracy both in theory and in practice.⁴⁰⁰ The former is linked to the quality of democracy and the latter ensures its stability. He explains this contention by differentiating an opportunity to participate in the political system and the capacity to reduce social inequalities. For states to fully qualify as democracies the elected authorities must be fully accountable and laws must be equitably enforced without being at sharp variance with social behavior.

³⁹⁴ Faulks (n 37 above) at 105.

³⁹⁵ Faulks (n 37 above) at 107.

³⁹⁶ Gouws (n 17 above) at 83.

³⁹⁷ Barbalet (n 12 above) at 2.

³⁹⁸ Faulks (n 37 above) at 124.

³⁹⁹ Faulks (n 37 above) at 124.

⁴⁰⁰ Lamounier (n 211 above) at 3.

There is a significant difference between providing opportunities to participate in the political system and having the capacity to satisfy expectations of social well-being and to reduce social inequalities.⁴⁰¹ Although it has been concluded that social inequality has a much stronger bearing on the quality of democracy than on its stability, in some cases both can be affected by one activity. Giving an example of a high crime rate in a country, if the escalation of crime rate is not prevented the quality of democracy is compromised as well as its stability.⁴⁰² In a nutshell social inequality can undermine democratic governance and in the long run if they are not attended to they can ultimately erode the democratic rule of law.

Democracy by definition should include a redistributive dimension. This is an appreciation of the fact that political science is now moving towards the kind of democracy that acknowledges the connection between socioeconomic issues of inequality and the strength of civil society in political democracy issues.⁴⁰³ Democracy begins with the right to choose a leader but it does not end there. Those leaders must be seen to be delivering the mandate of the people as they represent the interests of the electorate. Otherwise an unwanted scenario, such as the one observed by Fredman, whereby people gain the right to choose their leaders yet their choices become irrelevant, will subsist.⁴⁰⁴ Citizens would vote and not be able to make demands on their governments or the demands they make would remain unaddressed.

Formal democracy has been criticized for its failure to deal with inequality.⁴⁰⁵ Formal democracy can survive in the context of continued albeit narrowing inequality. This inability of democracies to address inequality questions its capacity to deal with the problem of inequitable distribution of wealth.⁴⁰⁶ However it is argued that ‘hollowed out’ democracy is better than no democracy at all.⁴⁰⁷ This position accepts the fact that democracy can exist alongside inequalities. However, although it is granted that having a democratic government does not guarantee the eradication of inequalities

⁴⁰¹ Lamounier (n 211 above) at 4.

⁴⁰² Lamounier (n 211 above) at 4.

⁴⁰³ Lamounier (n 211 above) at 127.

⁴⁰⁴ Lamounier (n 211 above) at 5.

⁴⁰⁵ Lamounier (n 211 above) at 13.

⁴⁰⁶ Lamounier (n 211 above) at 13.

⁴⁰⁷ Lamounier (n 211 above) at 15.

in a society, if that persistent inequality is based on gender and it affects women it presents a great cause for concern.

4.7. LINKING DEMOCRACY, CITIZENSHIP AND EQUALITY

Democracy, as previously alluded to, simply means authority in or rule by the people. According to human rights theorists, democracy is a necessary precondition for the promotion of human rights practices.⁴⁰⁸ One component of democratic theory, however, the idea that propounds that everyone should receive equal treatment before the law, is central to any examination of women's rights. Constitutionalism, in contrast, implies that there are limits on government power and thus the government should exercise its power within set confines of the constitution.⁴⁰⁹ These limits can provide protection against human rights violations by governments, even those governments whose actions reflect the will of the majority. The two most common constitutionally specified rights that relate to women directly are suffrage and equal rights guarantees. Suffrage rights indicate that women should participate in the political process while equal rights provisions are indicative of a formal commitment to support equal treatment.⁴¹⁰

Although the 2013 Constitution guarantees equality between men and women in terms of their access to democracy and citizenship rights, the situation on the ground is the opposite. Women do not participate in governance and public life as citizens as much as they would want to or on equal terms with men. There are restrictions on the rights and freedoms of women stemming from the arrangement of Zimbabwean society. As a result, women are treated as second class citizens. Women's social status improved owing to their participation in the liberation struggle of Zimbabwe. As a reward, the ruling ZANU PF made some pledges and concessions in an attempt to elevate the social position of women. However, ZANU PF later abandoned this agenda in favor of populist rhetoric. Women in Zimbabwe do not feel comfortable pursuing their democratic rights because of the nature of politics in the country. Because of their traditional domestic roles, they

⁴⁰⁸ PM Crotty 'Legislating Equality' (1996) 10 *International Journal of Law, Policy and the Family* 321.

⁴⁰⁹ Crotty (n 408 above) at 321.

⁴¹⁰ Crotty (n 408 above) at 321.

also do not have the time or the resources to fully devote themselves to the pursuit of democracy. Thus, the democracy project in Zimbabwe has left them behind.

While it is appreciated that democracy and citizenship are contested concepts with regards to their definitions as well as their application and the extent of their application in the modern society, it is uncontested that they have a bearing on the status of women. Democracy provides a platform whereby rights are developed and citizenship enjoins the participation of such rights in a given community that individuals belong to.⁴¹¹ Both democracy and citizenship have liberal notions and, in their implementation, equality is key.⁴¹² In Zimbabwe, women are failing to embrace active citizenship due to a number of factors that include weak democracy in the country. Certain measures need to be taken to improve women's participation which include building women's confidence, skills and knowledge and creating networks and linkages between women would-be political candidates and women in political office while also committing to the economic empowerment of women.⁴¹³

What is required for Zimbabwe to improve women's participation in citizenship is to attain and promote civil and socio-economic rights as enshrined in the 2013 constitution. As time passes by the forms of equality derived from the independence struggle no longer have any place in the modern society of Zimbabwe. Various platforms for fostering conceptions of citizenship and enhancement of women's capacity to engage in citizenly activities are, as suggested by Enslin, national education curriculum, gender policy, gender mainstreaming strategies, women's empowerment programs, voter education, gender training and gender development schemes.⁴¹⁴

In accordance with the liberal democracy perspective, citizenship is viewed as equal access to rights and opportunities. Thus, liberal democracy advances formal and not substantive equality.⁴¹⁵ According to Phillips 'Inequality is therefore intrinsic to the politics of liberal democracy'.⁴¹⁶ There is an inherent drawback experienced by women associated with their location in the private

⁴¹¹ RAU May 2017 (n 45 above) at 6.

⁴¹² RAU May 2017 (n 45 above) at 6.

⁴¹³ RAU May 2017 (n 45 above) at 15.

⁴¹⁴ Manicom (n 131 above) at 34.

⁴¹⁵ Gouws (n 3 above) at 3.

⁴¹⁶ Gouws (n 3 above) at 3 See also Phillips a *Engendering Democracy* (1991).

sphere where they lack rights. This needs to be accounted for in any conceptualization of citizenship. But rights in the public sphere alone are not enough to deal with politico-economic issues that undermine the exercise of citizenship such as the gendered nature of poverty, violence and a lack of health care. To complement these inequalities, feminist scholars have tried to extend the concept of citizenship to make it more comprehensive and to give meaning to the idea of substantive equality. According to Gouws citizenship is a status and a practice.⁴¹⁷

Citizenship as a status refers to the relationship between the individual and the state and among individual citizens regulated through rights.⁴¹⁸ With regards to status the focus is on the individual.⁴¹⁹ Citizenship as a practice is hinged on the civic republican tradition of participation and relates citizenship to the wider society.⁴²⁰ Unlike the citizenship as status concept, the practice of citizenship focuses on civil, political and social rights, as conceptualized by Marshall.⁴²¹ The challenge in the inclusion of women in democracy and citizenship is to transform the practice of citizenship from an isolated practice of judicially defined individual with rights to the recognition of participation as a local level.⁴²² The concept of citizenship has also been extended by Kathleen Jones to include issues of identity and locale.⁴²³ According to her, citizenship requires citizens to share a common identity in relation to the state within boundaries.⁴²⁴

Citizenship is defined as a right to belong to a state and enjoy its rights while also fulfilling obligations.⁴²⁵ Citizenship has a direct link to democracy because without citizenship a person can neither vote nor be voted into public office.⁴²⁶ Furthermore these rights must be exercised on an equal basis by men and women. The fight for citizenship is basically the struggle against marginalization and inequalities.⁴²⁷ Although there is existence of democratic citizenship in most

⁴¹⁷ Gouws (n 3 above) at 3.

⁴¹⁸ Gouws (n 3 above) at 3.

⁴¹⁹ Lister (n 382 above) at 14-15.

⁴²⁰ Gouws (n 3 above) at 3.

⁴²¹ Gouws (n 3 above) at 3.

⁴²² Gouws (n 3 above) at 3.

⁴²³ Gouws (n 3 above) at 3.

⁴²⁴ Gouws (n 3 above) at 3.

⁴²⁵ EV Masunungure 'Zimbabwe's Mostly Talented Views on Citizenship' (2013) 116 *Afro barometer Briefing Paper* 4.

⁴²⁶ Masunungure (n 425 above) at 9.

⁴²⁷ Barbalet (n 12 above) at 44.

African countries like Zimbabwe, it can be argued that this has not ended the inequalities between men and women. Democratic citizenship has strived to produce spheres of equal participation that are being enjoyed by the elite only.⁴²⁸ While it is appreciated that citizenship rights are universal a great concern arises from social institutions' exclusionary nature and hence the persistent inequality it fails to address.⁴²⁹ However patterns of inequality may be altered through the further development of citizenship.⁴³⁰

Nonetheless, the livelihood and living conditions of the disadvantaged may be improved through social transformation without dealing directly with the causes of inequalities.⁴³¹ This would however simply mitigate the harm caused by socioeconomic inequalities without affecting the actual structure of class inequalities. It is also argued that rights to social goods and services legitimize class privilege and advantage.⁴³² This contribution though welcome does not assist much in the concept of democratic citizenship. What equal citizenship values most is the equality of status as opposed to the equality of income. In this regard Barbalet quotes Marshall who says: 'Equality of status is more important than equality of income.'⁴³³

What is inherent in citizenship rights is the equality of status. Marshall as quoted by Barbalet embraces the notion of substantive equality in his discussion of citizenship rights. He contends that the inequality of the social class system may be accepted provided the equality of citizenship is recognized.⁴³⁴ However he denies the fact that citizenship can be a cure to social inequality because it all depends on the interaction between citizenship and class and that interaction can never end.

Although the development of citizenship rights is key in the modification of patterns of inequality, there are also other forces that play a significant role in the process. The significance of citizenship integration in participation of social life cannot be underestimated. This integration is threefold. The first one as Barbalet, records, is whereby citizenship as civil rights creates a class system in

⁴²⁸ Barbalet (n 12 above) at 44.

⁴²⁹ Barbalet (n 12 above) at 44.

⁴³⁰ Barbalet (n 12 above) at 45.

⁴³¹ Barbalet (n 12 above) at 29.

⁴³² Barbalet (n 12 above) at 29.

⁴³³ Barbalet (n 12 above) at 49.

⁴³⁴ Barbalet (n 12 above) at 87.

which distinct class cultures diminish.⁴³⁵ Secondly the integration of citizenship through social rights deals with class inequalities. And lastly civilization through for example mass production enhances citizenship demand. However, the concept of civilization as a means of social integration has been criticized on the basis that it is too narrow.⁴³⁶ Thus, it can be concluded that social rights cannot change the class structure because they focus on distributional arrangements without addressing economic and political institutions and social power.⁴³⁷

It has been established that citizenship is a dynamic concept that develops in stages across time and as it develops it reduces inequalities between men and women as it provides equal status that reduces class inequalities.⁴³⁸ However citizenship cannot develop in a vacuum but within a State. As such the role of the State in the whole process is important. Furthermore, it is within the State that rights are promulgated, interpreted, applied and enforced. The State therefore holds the political power in national societies to create and enforce rules or laws.⁴³⁹

Citizenship is directly linked to political units within which civil rights and civic participation are provided for in the Constitutions. Bulmer and Rees, like other scholars support the fact that citizenship is all about rights and obligations of the members of a given society or nation or state.⁴⁴⁰ This means that citizenship provides entitlements and entitlements are rights such as right to vote, right to equality and right to association and right against discrimination.⁴⁴¹ Obligations and citizenship are related to compliance with the law. Citizenship also includes civility, activity and competence, thus both social and political obligations are quite pertinent. Both rights and obligations are not static they change with time. The relationship between citizenship and equality is hinged on the fact that all members of society are citizens and they are equal before the law.⁴⁴²

⁴³⁵ Barbalet (n 12 above) at 92.

⁴³⁶ Barbalet (n 12 above) at 92.

⁴³⁷ Barbalet (n 12 above) at 58.

⁴³⁸ Barbalet (n 12 above) at 95.

⁴³⁹ Barbalet (n 12 above) at 109.

⁴⁴⁰ M Bulmer & AM Rees *Citizenship Today: The Contemporary relevance of T.H. Marshall* (1996) 31.

⁴⁴¹ Bulmer & Rees (n 440 above) at 32.

⁴⁴² Bulmer & Rees (n 440 above) at 37.

Political rights are a necessary supplement to civil rights in the packaging of citizenship rights. Political rights include suffrage, freedom of association and freedom of speech.⁴⁴³ Voters and citizens have a significant role to play in the building of democratic institutions. The building of a democratic institution involves more than just crafting constitutions. Whereas elections are an important democratic ingredient, what matters is the type of elections each democratic government holds.⁴⁴⁴ However democratic citizenship need more than just voting even if the elections are free and fair. There is a need for people to have full appreciation of their rights and responsibilities through participation as individuals and as a collective and also the issue of accountability of leaders comes into play.⁴⁴⁵

According to Faulk, citizenship is both individualistic and collectivist.⁴⁴⁶ From the liberal perspective, citizenship bestows rights on individuals and these rights, specifically political rights, enable individuals to contribute towards the shaping of government. In as much as citizenship bestows rights to individuals it also entails duties and obligations, as noted elsewhere in this chapter.⁴⁴⁷ Feminists however insist that gendered citizenship is the root of women's oppression and not just inaccessible rights and duties. This has helped to broaden citizenship from only rights and duties to include the community within which citizenship is exercised.⁴⁴⁸

The citizenship discourse is gendered and hence it has a bearing on women's status and equality with men in the society.⁴⁴⁹ Liberal democracy regards citizenship as mere equal access to rights and opportunities and it disallows unequal treatment and infringements of basic rights upon which their human rights and dignity rests.⁴⁵⁰ Thus it offers formal rather than substantive equality. This would not address inequality effectively because, as Philips argues, inequality is intrinsic to the

⁴⁴³ Bulmer & Rees (n 440 above) at 38.

⁴⁴⁴ Bratton (n 365 above) at 277

⁴⁴⁵ Bratton (n 365 above) at 277.

⁴⁴⁶ Faulks (n 37 above) at 1.

⁴⁴⁷ Faulks gave an example of how obligations are considered to be part of citizenship by at looking the Unites State of America. She said even 'a state like the USA that is often said to place too little significance upon responsibilities, has an oath of allegiance that includes such duties as supporting the constitution, undertaking military service and even to perform work of natural importance when required by law.' at 2.

⁴⁴⁸ Faulks (n 37 above) at 2.

⁴⁴⁹ Gouws (n 3 above) at 3.

⁴⁵⁰ Faulks (n 37 above) at 2.

politics of liberal democracy'.⁴⁵¹ There is therefore a need to extend the concept of citizenship for it to be comprehensive and inclusive of substantive equality. It is trite and has been settled by various scholars that citizenship is, as noted elsewhere in this chapter, both a status and a practice.⁴⁵² The aspect of citizenship as status concerns itself mainly with the relationship between the individual and the State and among individuals and how they relate to each other. Citizenship as a practice relates to the participation of rights by individuals in the wider society.⁴⁵³

Major contentions in the discussion and analysis of citizenship are the status it entails, the kind of community that best promotes citizenship and whether the status is inherently exclusive.⁴⁵⁴ Citizenship is a concept that has been developing through different forms of societal contexts that the world offers. Faulks records that campaigns for the extension of citizenship can be traced from as far back as the eighteenth century during the anti-slavery moments in Britain.⁴⁵⁵ It was then engaged by the women's movement demanding the right to vote in the early twentieth century and in the 1960s African-American women used citizenship to campaign for basic civil rights. Gay activists immensely contributed towards the development of citizenship in the 1990s' by protesting that age of consent be the same as that of heterosexuals.⁴⁵⁶

Citizenship also acknowledges the inclusion of individuals into the wider community without taking away their ability to make judgments about their own lives.⁴⁵⁷ It thus recognizes the contribution a particular individual makes to the community, while at the same time granting him or her individual autonomy. This autonomy is reflected in a set of rights that individuals can exercise on their own. Participation is a key defining phenomena of citizenship. Citizenship is thus an active as opposed to passive status.⁴⁵⁸

⁴⁵¹ Faulks (n 37 above) at 2.

⁴⁵² Lister (n 382 above) & Gouws (n 3 above).

⁴⁵³ Gouws (n 3 above) at 3.

⁴⁵⁴ Faulks (n 37 above) at 2.

⁴⁵⁵ Faulks (n 37 above) at 3.

⁴⁵⁶ Faulks (n 37 above) at 3.

⁴⁵⁷ Faulks (n 37 above) at 3.

⁴⁵⁸ Faulks (n 37 above) at 3.

The appeal of citizenship, however, is not just the benefit it gives to the individual.⁴⁵⁹ There is a need to recognize the reciprocal nature of citizenship because it is not purely a set of rights that an individual can enjoy without obligations. By their nature rights require frameworks, institutions and mechanisms through which they can be fulfilled. These modern means through which rights are to be fulfilled include courts, schools, hospitals and parliaments and they need to be maintained by citizens. This obligatory nature is inherent in the principles of democracy and equality. With regards to democracy once, for instance parliamentarians are elected through exercising their rights it becomes incumbent on them to deliver the services to their constituency. Equal treatment should be reciprocal; once one is treated equally one ought to treat others equally as well.

While it is an uncontested position that citizenship implies duties and obligations, as well as rights what needs to be addressed is the fact that citizens are not always in a position to perform the related obligations attached to their rights. An example that may be given in this scenario is a situation whereby everyone has a right to education but there is an accompanying obligation of paying school fees.⁴⁶⁰ One citizen can afford to pay the school fees and the other cannot. To the one who cannot pay the school fees the obligation has become a limiting factor to exercise her right as a full citizen. Although obligations are necessary components as they install a sense of responsibility in citizens they may in some circumstances limit the citizens' access to their rights. Faulks contributes to this view when she says that the institutions through which obligations are exercised are discriminatory in one way or the other.⁴⁶¹ These institutions must not favor one group over the other or be deterrent to one group.⁴⁶²

Citizenship is dynamic and it is not a static concept as it continues to be developed by individuals through the exercise of their rights and duties.⁴⁶³ Faulks assents to the development of citizenship and puts it in the following way.⁴⁶⁴

⁴⁵⁹ Faulks (n 37 above) at 3.

⁴⁶⁰Section 75 of the 2013 Constitution of Zimbabwe provides for the right to education for everyone.

⁴⁶¹ Faulks (n 37 above) at 2.

⁴⁶² Faulks (n 37 above) at 7.

⁴⁶³ Faulks (n 37 above) at 6.

⁴⁶⁴ Faulks (n 37 above) at 6.

As creative agents, citizens will always find new ways to express their citizenship, and new rights, duties and institutions will need to be constructed to give form to the changing needs aspirations of the citizen and community.

It is believed that citizenship's evolutionary nature may bring about a just and well governed society. This assumes that in its evolutionary process citizenship becomes better and more responsive to society's needs and inclusive of all social classes. As long as the practice of citizenship enhances society, then a society might find itself drawing closer being just and well governed.

Another intrinsic dimension of citizenship is its relation to power and economy. The consideration of power in the discourse of citizenship becomes unavoidable in as far as citizenship rights include the distribution of resources and obligations are exercised in the social context.⁴⁶⁵ According to Faulks when defining citizenship three aspects are pertinent: self-interest, power and conflict.⁴⁶⁶ Citizenship is also linked to market and state systems. Considering this nexus, economic crisis may result in the reduction of rights. On the same token social conflicts within a state may also radically change the meaning of citizenship.⁴⁶⁷ Considering that states use immigration laws to impose controls over who can become resident and under what conditions, citizenship is closely linked to nationality. Some States have constitutionally enshrined the right to citizenship as a fundamental human right upon which the protection of other entitlements is promised.

⁴⁶⁵ Faulks (n 37 above) at 6.

⁴⁶⁶ Faulks (n 37 above) at 7.

⁴⁶⁷ Faulks (n 37 above) at 7.

4.8. GENDER MAINSTREAMING AND WOMEN'S INCLUSION

Gender mainstreaming is one of the common frameworks through which women's interests are conceptualized within the State.⁴⁶⁸ Gender mainstreaming requires the integration of gender equality concerns into the analyses and formulation of all policies, programs and projects.⁴⁶⁹ According to the USAID Gender Analysis Report gender mainstreaming is:⁴⁷⁰

The process of assessing the implications for women and men of any planned action, including legislation, policies or programs, in any area and at all levels. It is a strategy for making the concerns and experiences of women as well as of men an integral part of the design, implementation, monitoring and evaluation of policies and programs in all political, economic and societal spheres, so that women and men benefit equally, and inequality is not perpetuated. The ultimate goal of mainstreaming is to achieve gender equality

The ultimate goal of gender mainstreaming is gender equality. It seeks to transform institutional practices of state governance to be inclusive of women.

According to Gouws gender mainstreaming recognizes or assumes that most institutions consciously serve the interest of men. It therefore encourages institutions to adopt a gendered perspective in transforming themselves by also taking interest in the plight of women.⁴⁷¹ Hassim defines gender mainstreaming as a concept which attempts to integrate gender concerns in the everyday work of government procedures, policy-making and service delivery in order to create a women-friendly state.⁴⁷² Factors that have been identified to have made gender mainstreaming an agenda of the State are:⁴⁷³

- a) The language of promoting women's rights and gender equality
- b) The proliferation of women's networks and transitional/ linkages and

⁴⁶⁸ Gouws (n 17 above) at 76.

⁴⁶⁹ Gouws (n 17 above) at 76.

⁴⁷⁰ USAID Gender Analysis Report available at <https://www.care.org/.../ENSURE%20Gender%20Analysis%20Zimbabwe.pdf>. (accessed on 31 August 2018).

⁴⁷¹ Gouws (n 17 above) at 77.

⁴⁷² S Hassim, 'The Gender Pact and Democratic Consolidation: Institutionalizing Gender Equality in the South African State (2003) 29 *Feminist Studies* 509.

⁴⁷³ Gouws (n 17 above) at 77.

- c) A growing number of gender sensitive women and men in foreign policy and global governance leadership positions.

Gender mainstreaming is regarded as ‘a potentially transformative project that depends on what feminist scholars, activists and policy makers collectively make of it’.⁴⁷⁴ However a great concern is lack of adequate resources to translate gender mainstreaming into fluxions.⁴⁷⁵ Origins of gender mainstreaming as a concept date back to 1985 when it was first used in reference to national machineries during the 1985 United Nations Third World Conference on women in Nairobi.⁴⁷⁶ It later on became a common featuring concept in the subsequent United Nations Conference on women. Gender mainstreaming as Gouws argues forms part of integral governance and calls for administrative intervention where gender space is not apparent.⁴⁷⁷ It is centered on the appreciation of the fact that the existing gender problem needs administrative intervention.⁴⁷⁸

In as much as Zimbabwe, like many African states, has accepted the discourse of rights and equality for women, it is now the practical implementation of gender mainstreaming policies that needs close scrutiny. Zimbabwe did not expressly include the concept of gender mainstreaming in its National Gender Policy.⁴⁷⁹ However as a country it is alive to the need to apply the tenets of gender mainstreaming. In 2007, Zimbabwe adopted the Gender Budgeting Circular which required all ministries in Zimbabwe to mainstream gender into their programs. Gender budgeting is when national budgets consider gender and endeavor to empower women and to raise their status.⁴⁸⁰ The policy further mandates Ministries to come up with gender responsive budgets which seek to promote equality, accountability and transparency in relation to public expenditure.⁴⁸¹

Zimbabwe has also adopted gender mainstreaming as a measure to address gender disparity through the setting up of the Gender Commission as provided by section 245 of the 2013

⁴⁷⁴ Gouws (n 17 above) at 77.

⁴⁷⁵ Gouws (n 17 above) at 77.

⁴⁷⁶ Gouws (n 17 above) at 77.

⁴⁷⁷ Gouws (n 17 above) at 78.

⁴⁷⁸ Gouws (n 17 above) at 78.

⁴⁷⁹ National Gender Policy for Zimbabwe 2013-2017.

⁴⁸⁰ S Hamauswa & C Manyeruke ‘Feminisation of Gender Budgeting: An uphill task for Zimbabwe’ (2013) 29 *Eastern Africa Social Science Research* 77.

⁴⁸¹ Hamauswa & Manyeruke (n 480 above).

Constitution. Over and above its functions which include the promotion of gender equality, its membership is also required by the 2013 Constitution to have proportional representation of both males and females. While having provisions which promote gender equality in the membership of the Gender Commission is a welcome development from the Government, what need to be stressed is that this only a drop of water in an ocean. Zimbabwe has about ten Commissions yet only one is alive to the proportional representation of women and men in composition while others are not mandated to do so.⁴⁸²

The USAD Gender analysis report recorded the following to be some of the measures through which gender mainstreaming is being implemented in Zimbabwe:⁴⁸³

- The Ministry of Women Affairs, Gender and Development (MWAGCD)'s gender mainstreaming activities, including awareness programs and specific women empowerment programs across all districts.
- The Women in Local Governance Forum's initiative to promote the ascendancy of women to decision making positions in local governance through advocacy, confidence building and training on assertiveness.
- The Zimbabwe Extension Support and Training in partnership with the Sustainable Agriculture Trust (SAT)'s gender mainstreaming training focusing on enlightening the community on the importance of women's participation in livestock production in Zaka district.
- The MWAGCD, Department of Social Services and ZRP's Victim Friendly Unit are holding awareness campaigns on gender inequality and gender-based violence in all districts.
- The DSS is also facilitating the formation of Family Clubs which educate men and women on parenting and budgeting skills

Gender mainstreaming is an important tool in the inclusion of women in citizenship participation. However, with the absence of clear commitment to the concept of gender mainstreaming in the

⁴⁸²These Commissions include:

- a) Judicial Service Commission
- b) Civil Service Commission
- c) Defence Forces Service Commission
- d) Police Service Commission
- e) Prisons and Correctional Service Commission
- f) Zimbabwe Electoral Commission
- g) Zimbabwe Human Rights Commission
- h) Zimbabwe Media Commission
- i) National Peace and Reconciliation Commission
- j) Zimbabwe Ant-corruption Commission.

⁴⁸³ USAID Gender Analysis Report (n 470 above).

Zimbabwe National Gender Policy which outlines the roadmap and mobilizes ministries, provinces and local government towards an integrated program of achieving gender disparity, the state's genuine commitment to women inclusion is doubtful. Local leaders, both traditional and political as well as religious leaders should be used as focal persons through which gender mainstreaming activities are introduced and eventually cascaded down to the communities.⁴⁸⁴

The aim of gender mainstreaming is to institutionalize women's equality through the depoliticization of gender issues.⁴⁸⁵ However it has been criticized on the basis that although it is a technical solution to redress women's oppression it also fails to recognize the differences among women.⁴⁸⁶ Its use of the word 'gender' reflects the 'same lack of sensitivity toward the accommodation of difference that was exercised with the essentialist use of the category women.'⁴⁸⁷ Its use does not clearly reflect whether 'gender' has replaced the category 'women' but still means women or whether it refers to the relationship between women and men.⁴⁸⁸ For this reason it has been perceived to be easy to describe theoretically but weak on implementation.⁴⁸⁹ However it was found to be very useful to appease the international community, gender agencies and the International NGOs.

4.9. CONCLUSION

In this chapter I have explored Citizenship and Democracy. Citizenship, has been conceptualized as the status and rights enjoyed by people belonging in a given community which must be exercised by both men and women on an equal basis. In Zimbabwe while it is appreciated that there is no longer a law in place which directly discriminates against women with regards to their access to citizenship and democracy, in reality, Zimbabwe is still a long way off in terms of women's participation in democracy and citizenship. It has been established in this chapter that women are still regarded as second-class citizens when it comes to the participation of democratic rights and

⁴⁸⁴ USAID Gender Analysis Report (n 470 above).

⁴⁸⁵ Gouws (n 17 above) at 78.

⁴⁸⁶ Gouws (n 17 above) at 78.

⁴⁸⁷ Gouws (n 17 above) at 78.

⁴⁸⁸ Gouws (n 17 above) at 78.

⁴⁸⁹ Gouws (n 17 above) at 78.

citizenship rights. This is evidenced by the unequal gender representation in decision making positions.

Very few women in Zimbabwe have managed to make it to the top yet still most of these have managed this through affiliation to their husbands or some well-recognized, influential male figures. This kind of women inclusion does not help to ameliorate discrimination. The loyalty and allegiance of these women would lie with the male figures who would have given them an opportunity to rise to the top. The same argument has also rendered the quota system helpless for the majority of women. When women are in power they are not able to effectively represent women developmental issues because they owe allegiance to the party. Accountability to other women is compromised by allegiance to the party. Furthermore, forms of citizenship and democracy participation measures need to be considered as Zimbabwe has currently put in place quota system which only addresses representation. While representation is important in citizenship and democratic participation what needs to be acknowledged is the fact that it is not the only way of improving citizenship participation.

In the next chapter I turn to women's equality in South Africa post 1994.

CHAPTER FIVE

WOMEN'S EQUALITY, ACCESS TO CITIZENSHIP AND DEMOCRACY IN SOUTH AFRICA

5.1. INTRODUCTION

The main research question of this chapter requires an analysis of the status of women in South Africa with the aim of drawing on some best practices for Zimbabwe. As highlighted in the previous chapter, an analysis of gendered citizenship and democracy is crucial in the context of this study because it creates a better picture of women's access to political and legal rights. As in the previous chapters, socioeconomic variables are only discussed in as far as their relationship to women's politico-legal status is concerned.

The chapter commences with an examination of Section 9 of the Constitution of the Republic of South Africa, 1996 (herein after referred to as the 1996 Constitution). Case law and legislation in as far as they shed light on the position of women in South Africa are discussed in attempt to determine the country's legal culture as far as women's rights are concerned and how these contrasts to the Zimbabwean context. The chapter addresses the position in South Africa pertaining to women's status and equality politically before the transition to democracy in the mid-nineties. Black women suffered under the scourge of Apartheid. They could not get employment and they were regarded as minors and their mobility was restricted. For instance, they were barred access to the urban areas. Civil and political rights were not accorded to black women. Gender equality was being undermined through government structures, policies and legislations.

In 1994 however, South Africa adopted a robust democratic approach for women's inclusion right from the onset of its independence negotiations. South Africa at its independence in 1994 adopted a human rights-friendly Interim Constitution, which was superseded by the 1996 Constitution.¹ The Interim Constitution that came into force in 1994 ushered in a new human rights era. The

¹ Constitution Of Republic Of South Africa, 1996 (1996 Constitution).

human rights discourse in South Africa came as a means to transform the socioeconomic inequalities of the Apartheid era.² In this new era every human being was to be treated equally and with dignity. This included the gender equality project. According to Masango and Mfere, gender equality is one of the critical issues that have been on the South African government's agenda since 1994.³ From that time, South Africa, through its policy framework, judicial and human rights institutions has demonstrated its commitment towards ensuring the elimination of all forms of discrimination against women in the workplace and in political and economic sectors.

South Africa's commitment to the eradication of gender inequality is also evidenced by the amendment of Apartheid legislations that legitimated gender discrimination such as the Black Administration of Estates Act⁴, the Bantu (Urban Area) Consolidation Act⁵, Bantu Education Act⁶ and the Bantu Homelands Citizens Act⁷. Progressive legislations in favor of gender equality were enacted upon the abolishment of Apartheid.⁸ Institutions and mechanisms were also set up for enforcing legislation on the promotion and spearheading of gender equality. These included the establishment of the Commission for Gender Equality,⁹ Ministry of Women, Children and People living with Disabilities¹⁰ and Human Rights Commission.¹¹ Over and above these established institutions, the South African courts' attitude towards the achievement of social justice and the promotion of equality has been quite remarkable. Case law germane to women's rights and equality is thus discussed in this chapter.

Given South Africa's history of apartheid, it seems extemporaneous that most discussions on democracy and citizenship have mainly emphasized the racial dynamics of democratization,

² A Rafudeen 'A South African Reflection on the Nature of Human Rights' (2016) 16 *African Human Rights Law Journal* 225.

³ R S Masango & N Mfere 'Milestones for Gender Equality in South Africa: 1994-2014' (2015) *Journal of Public Administration* 626.

⁴ Black Administration of Estates Act 38 of 1927.

⁵ Bantu (Urban Areas) Consolidation Act 25 of 1945.

⁶ Bantu Education Act 47 of 1953.

⁷ Bantu Homelands Citizens Act 26 of 1970.

⁸ Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (Equality Act).

Employment Equity Act 55 of 1998 (Employment Equity Act).

Basic Conditions of Employment Act 75 of 1997 (Basic Conditions Employment Act).

⁹ Commission for Gender Equality Annual Report (2013-2014) available at www.cge.za (accessed on 27 February 2018).

¹⁰ <http://www.dla.gov.za/about-us#.WpfPxx1uYdU>. (accessed on 22 February 2018).

¹¹ <https://www.sahrc.org.za/> (accessed on 22 February 2018).

overshadowing the gender dimensions. An analysis of women's access to citizenship and democracy in South Africa takes place in the penultimate part of this chapter. Of note, negotiations for democratic rule at the dawn of independence in South Africa incorporated women's concerns. In tackling gender inequality, South Africa has been focusing on addressing gender oppression, patriarchy, sexism, racism, ageism and structural oppression and creating an enabling environment for women to take control of their lives.¹² However women in South Africa are still underrepresented in leadership positions. For instance, statistics of the South African population shows that women and men constitute fifty one percent and forty nine percent of the total population respectively. Yet women in leadership positions are at forty three percent while men are at fifty seven percent.¹³

Discussion of citizenship and democracy shed light on the ways in which gendered identities and interests play out in the consolidation of democracy towards independence. This helps ground discussions on women's political rights in South Africa. During the country's transition to democracy, women were instrumental in democratic processes such as elections, negotiations and designing new State structures, as activists.¹⁴ Seidman argues that women's participation politically during this period inspired new approaches to policy formulation and to the creation of a new agenda of gendered citizenship in South Africa.¹⁵

Despite all this activism by South African women, the present chapter argues that while women have managed to secure democracy and citizenship in the political arena in South Africa, this has not been accompanied by similar transformations in women's socioeconomic lives. The chapter maintains that ultimately this has negative repercussions for the status of women. It also points out that as a result of this, it is mainly middleclass and upper-class women who have benefitted from open access to democratic institutions in South Africa, and the benefits are yet to trickle down to poor women in peri – urban centers and in rural areas. The very high occurrence of sexual violence

¹² L Apleni Women's Role In the Transformation of South Africa. Available at www.polityorg.za/article/women-role-in-the-transformation-of-south-africa-2010-11-02 Accessed on 25 February 2018.

¹³ Apleni (n 12 above).

¹⁴ G W Seidman 'Gendered Citizenship: South Africa's Democratic Transition and the Construction of a Gendered State' (1999) 13 *Gender and Society* 288.

¹⁵ Seidman (n 14 above) at 288.

and rape against women is another reason for concern and a manifestation of the extent to which equality for women has not been achieved fully.

South Africa has been chosen for study along with Zimbabwe because the two countries are sister nations. They share the same cultural values and customs when it comes to patriarchy, Zimbabwe has also, at periods, borrowed heavily from South African jurisprudence. Interesting to note also is that Roman-Dutch law, which makes up Zimbabwean Common Law, has its etiology in South Africa. It is therefore of interest to this study to determine the legal culture of South African jurisprudence as far as the gender equality discourse is concerned.

5.2. WOMEN'S STATUS BEFORE THE 1996 CONSTITUTION

The institutionalized inequality between men and women in South Africa emanated from the colonial epoch. Black women were never given any rights and additionally, further laws were passed to oppress them.¹⁶ South Africa had a Westminster type of constitution that had been imported from Britain in 1853 through the Cape Colony. The Cape had its first Parliament in 1854 and the membership of the Parliament was only open to males, while also being based on property ownership and then later on, educational qualifications.¹⁷ A different constitutional system existed in other parts of South Africa such as the Orange Free State and the South African Republic wherein they embraced a United States of America type of Constitution. Only white males could participate in suffrage and vote for the Legislature and the President.

5.2.1. GENDER RELATIONS DURING THE COLONIAL ERA

The creation of the Union of South Africa in 1910 united all the colonies in South Africa. Under the Union of South Africa, regular elections were held. In 1924 and 1948 South Africa had more than one political party¹⁸ as evidenced by the fact that election results were contested by opposition

¹⁶ University of South Africa Unit for Gender Research in Law 'Women and the Law in South Africa Empowerment through Enlightenment' (1998) 221.

¹⁷ C Sanders *Reflections on The Evolution of Democratic Society In South Africa* (2010) 82.

¹⁸ The Political Parties of that time were the National Party and the South African Party.

political parties.¹⁹ In the 1930 white females were allowed franchise, a right that was not extended to black females at that time.²⁰ Minorities like Coloreds and Indians were given the right to vote for the central Parliament by the Tricameral Constitution in 1984. Still, black women were left out of the equation and were not given any voting rights. On the contrary, laws were passed by the Apartheid regime to curtail their citizenship rights.

Fundamentally, Apartheid was hinged on a legal, political and economic structure that was firmly based on racial discrimination.²¹ Racial discrimination reinforced social imbalances and disparities. It perpetrated segregation that was based on skin color. White privilege and black subjugation was the order of the day. This racist ideology also reinforced the gender inequality that persisted in South Africa. Only whites were permitted to elect members of government and parliament and to be elected into government and parliament.²² Being both black and female, African women in South Africa were in a dilemma unlike that of any other social class under the Apartheid era. They suffered under the restrictive and repressive Apartheid legislations that relegated them to the position of being minors and took them as inferior to men.

Due to the repressive Bantu (Urban Areas) Consolidation Act²³ and the Bantu Laws Amendment Act²⁴ (these Acts hereafter is called Urban laws) women could not easily navigate in urban areas. These statutes regulated rights of Africans in respect of their movement into urban areas either on temporary or permanent basis. Families were separated as men would immigrate to towns for work leaving their wives in rural homelands.²⁵ Women could not easily access urban areas because they were required to obtain prior government authorization in form of a pass. In applying for such passes women were supposed to justify their reasons to travel to an urban area. Otherwise they were generally regarded as loafers in the urban areas. Conversely, those women who managed to acquire authorization to stay in urban areas were vulnerable since in most cases the wife's stay in

¹⁹ Sanders (n 17 above) at 82.

²⁰ Sanders (n 17 above) at 82.

²¹ African National Congress 'The Effects of Apartheid on the Status of Women in South Africa' (1980) available at <http://www.anc.org.za/content/effects-apartheid-status-women-SouthAfrica>, (accessed on 25 February 2018).

²² African National Congress (n 21 above).

²³ Bantu (Urban Areas) Consolidation (n 5 above).

²⁴ Native Laws Amendment Act of 1964.

²⁵ J Segar & C White 'Construction Gender:- Discrimination and the Law In South Africa' (1989) 4 *Agenda Feminist Media* 101.

the towns would strongly depend on her relationship with the husband.²⁶ Once a wife divorced her husband or if the husband deserted her or died she would lose the right to stay in an urban area.

Barring the difficulty of accessing urban areas women would always face the problem of lack of accommodation once they were admitted into towns.²⁷ Unless a woman was qualified to be a resident of an urban area in her own right, she would not be entitled to own a house in her own right. In a situation whereby, she would be staying in her husband's house if he dies or divorces or deserts her, the wife was not entitled to the property. In the event of death of a former husband, only in cases where a wife was not considered to be a guilty party in the divorce would she then qualify to retain the former husband's house.²⁸ Arguably therefore, forms of discrimination faced by women in South Africa were in part as a result of stringent urban migration regulations that restricted African residence rights in the urban areas while coercing women to dependent upon their husbands' formal employment status.²⁹

Women were also hard hit by unemployment yet the social assistance they received was so meagre that it could not make any meaningful impact on their conditions of living. Women could not easily penetrate into the labor market resulting in them forming a greater proportion of unskilled or semiskilled workers, working as domestic workers in farms and houses of whites³⁰ This was particularly disadvantageous for women because domestic workers and farm workers at that time were exempt from minimum wages guidelines and they were not entitled to any employment benefits or any form of social security. Additionally, even in a scenario where they were doing the same work as men, women would earn considerably less wages than men.³¹

High standards of health care were enjoyed by the white population yet the African population suffered under the worst conditions of health in the country.³² Africans were also affected by

²⁶ Native Laws Amendment (n 24 above).

²⁷ African National Congress (n 21 above).

²⁸ African National Congress (n 21 above).

²⁹ Segar & White (n 25 above) at 101.

³⁰ In 1970 the statistics of black women employment stood at 1, 508, 080 yet 724,020 were domestic workers and 655,040 were farm workers.

³¹ African National Congress (n 21 above).

³² A statistical example of the effects of these deplorable health conditions in the then province of Transvaal was the infant mortality rate of 216 per 1000 live births in 1980.

malnutrition and communicable diseases. Since caregiving and reproductive roles were given to women, women had to face the ordeal of watching their children and husbands fall ill without being able to afford healthcare services.³³

Women's access to education was also very restricted. The Apartheid government established a Bantu educational system for the Africans that was based on Dr H.F Verwoed's philosophy of African inferiority. In 1954 before he became the Prime Minister, Verwoed said:³⁴

There is no place for him [the bantu] in the European community above the level of certain forms of labor. For that reason, it is of no avail for him to receive a training that has as its aim absorption in the European community.

The whites saw no need for the Africans to be educated up to the same level as themselves. Revealingly, there was generally no distinction on the education of girls and boys under the so-called Bantu educational system, meaning women suffered the same restrictions as men in accessing education services.

The battle for gender equality in political rights was never won during the Apartheid Era and the true emancipation of black women was neglected.³⁵ In 1985, a leading South African anti-apartheid activist rejected feminist concerns that gender inequality should be part of the antiapartheid struggle at the Nairobi Women's Conference in 1985.³⁶ Women's issues were regarded as being subordinate to the broader struggle against colonization and apartheid.³⁷ It is important to note that women's representation in the leadership of influential political movements was still very poor in the late 1980s.

Seidman points out that at the outset, most activists regarded the democratization process as one that would resolve racial and economic inequalities rather than gender specific ones.³⁸ Even the ANC Constitutional Guidelines issued in 1988, while ostensibly incorporating the demands of

³³ African National Congress (n 21 above).

³⁴ Segar & White (n 25 above) at 101.

³⁵ University of South Africa Unit for Gender Research in Law (n 16 above) at 222.

³⁶ Seidman (n 14 above) at 287

³⁷ Segar & White (n 25 above) at 99.

³⁸ Seidman (n 14 above) at 291.

women, did so only in very restricted and ceremonial terms. This is exemplified by the fact that at that time only 3 of the 35 members of the ANC's National Executive Committee were women. In the late 1980s, prominent anti-apartheid advocates seldom sought to introduce concerns about gender in deliberations about challenging apartheid.³⁹ The early contributors in secret interfaces and dialogues with whites were almost exclusively males and gender concerns were virtually obscure.⁴⁰ Antiapartheid movement frontrunners simply underscored the upsetting effects of apartheid on women's customary domestic roles as mothers and wives.⁴¹ Yet they ignored the systemic gender discrimination existing parallel to the racial discrimination of that time. Gender discrimination was regarded as a secondary aspect to racial inequality.⁴²

Most frontrunners of the antiapartheid movement intentionally skirted dialogues on gender matters in their agendas.⁴³ Women advocates themselves disclosed that they circumvented gender issues in public because these could potentially undermine the party and ferment internal divisions.⁴⁴ Women also felt exposed as in some cases they were harassed by male activists if they raised questions about reproductive rights. Consequently, gender concerns were overshadowed by nationalist agendas. Attention was instead on the divisive nature of apartheid on families through its gendered migrant labor policy, rather than on how inequalities within family institutions were supposed to be removed. Even at family level patriarchal ideologies continued to dominate.

African cultural constructs and societal norms that promoted male domination and female subordination furthered the entrenchment of women's inequalities.⁴⁵ Women had an increased workload of inhuman proportions.⁴⁶ Because men would migrate to work for whites leaving their wives to work in the reserves, women would be faced with the unsurmountable task of balancing work in the field and their reproductive roles which involved completing their daily chores around the home and raising children all by themselves. The anti-Apartheid movement's democratic goals seemed to be at odds with the women's emancipation project and to embrace stereotypes of

³⁹ Seidman (n 14 above) at 290.

⁴⁰ Seidman (n 14 above) at 290.

⁴¹ Seidman (n 14 above) at 291.

⁴² Seidman (n 14 above) at 291.

⁴³ Seidman (n 14 above) at 291.

⁴⁴ Seidman (n 14 above) at 291.

⁴⁵ African National Congress (n 21 above).

⁴⁶ African National Congress (n 21 above).

women's domestic roles rather than calling for black women's autonomous citizenship and their political participation as gendered individuals.⁴⁷

5.2.2. WOMEN'S ROLE IN SOUTH AFRICA'S TRANSITIONAL PROCESS.

During the South African transition to democracy, women activists played a significant role in the negotiations at the independence parley, in the elections and in designing the new constitution. The new South Africa had begun to embrace gendered citizenship. Gendered citizenship requires that democratic theory must acknowledge the way gender dynamics affect both individual political participation and the differential impact of State policies on individuals and genders.⁴⁸ It was not only on franchise that women were supposed to be included but also participation in new democratic institutions.⁴⁹

Seemingly, women's involvement in the fight for gender inequalities only intensified at the transitional stage from apartheid to independence. Yet its beginning can be traced as way back as the 1980s. According to Waylen in the context of women's participation and democracy in South Africa, the 1980s were punctuated by the emergence of new structures of women's organizing in South Africa.⁵⁰ A number of community-based women's groups became active in day-to-day struggles for freedom by for example challenging domestic issues such as provision of health services and rent. The period also saw three broad regionally based women's organizations such as the United Women's Organization (UWO) in the Cape, the Natal Organization of Women (NOW) and finally the Federation of Transvaal Women (FEDTRAW) beginning to organize against the apartheid regime on a cross-class, cross-racial basis for the first time.⁵¹ At the lapse of the decade, many women activists were organized more explicitly around social issues including gender.⁵² For instance it was through the contribution of these organizations that the women's Legal Status Committee managed to bring changes to the Matrimonial Property Act of 1984.⁵³

⁴⁷ Seidman (n 14 above) at 292.

⁴⁸ Seidman (n 14 above) at 287.

⁴⁹ Seidman (n 14 above) at 287.

⁵⁰ G Waylen; K Celis; J Kantola & SL Weldon 'Introduction: Gender and Politics: A Gendered World, a Gendered Discipline' (2013) 8.

⁵¹ Waylen *et al* (n 50 above) at 8.

⁵² Waylen *et al* (n 50 above) at 8.

⁵³ Segar & White (n 24 above) at 101.

In around 1989, prominent liberation movements such as the African National Congress (ANC), Confederation of South African Trade Union (COSATU) and NECC started to make policy statements indicative of their commitment to oppose gender inequality.⁵⁴ However this ideal was only utopian and was not easily transformed into action. Racial equality was given priority while gender discrimination played a secondary role.⁵⁵ Racial discrimination was considered to be a national problem which was given priority over the gender inequality discourse.⁵⁶ This dearth of proportionate response to women's issues necessitated the need for women's organization of the day to mobilize women for the common struggle against racism while at the same time placing women's rights on the agenda.⁵⁷ The fact that South African liberals focused on the resolution of the racial discrimination as the panacea to inequality as opposed to feminism did not dissuade black women from seeing apartheid and gender inequalities as clearly intertwined social ills that had to be discarded.⁵⁸

The discussion about how apartheid had treated black women and men differently and to consider how women's needs might differ from those of men started during the transition.⁵⁹ In the 1990s when South African black political parties were unbanned in 1990, gender concerns became visible. For instance the African National Congress (ANC) included one or two women in its negotiating team but gender issues were not raised explicitly.⁶⁰ ANC slogans began to demand a non-racial, democratic and non-sexist South Africa.⁶¹ Feminists then began to argue that unless gender concerns were considered during the course of democratization, the budding political regimes would re-create and reinforce inequality.⁶² Women from different political parties then emerged to increase women's participation in the anti-apartheid movement.⁶³ This promoted a reformulation of anti-apartheid goals to include gender issues. Consequently, gender issues became prominent in the construction of a democratic South African state. Women activists were

⁵⁴ Segar & White (n 24 above) at 99.

⁵⁵ Seidman (n 14 above) at 291.

⁵⁶ Segar & White (n 24 above) at 99.

⁵⁷ Segar & White (n 24 above) at 99.

⁵⁸ Seidman (n 14 above) at 291.

⁵⁹ Seidman (n 14 above) at 291.

⁶⁰ Seidman (n 14 above) at 291.

⁶¹ Seidman (n 14 above) at 293.

⁶² Seidman (n 14 above) at 291.

⁶³ Seidman (n 14 above) at 291.

increasingly included in the negotiations and democratic aspirations began to be articulated in gendered terms.⁶⁴

Gradually the principle of gendered representation at the national negotiations for democracy became accepted by the country's political elite. Many organizations participating in the anti-apartheid movements and negotiations including Africanist Pan African Congress, Azanian People's Organization and Democratic Party Women Activists began to support the inclusion of women in the transitional stage.⁶⁵ In 1991 the ANC Women's League began developing a non-partisan Women's Charter which set demands that reflected the concerns of women across the country.⁶⁶ It was through this Women's Charter that gender-specific demands were publicized. Furthermore, it created the impression of broad public consensus regarding gender priorities. According to the South African Women's Charter (1994):⁶⁷

Democracy and human rights have been defined and interpreted in terms of men's experience. If democracy and human rights are to be meaningful for women, they must address our historical subordination and oppression. Women must participate in and shape, the nature and form of our democracy.

The involvement of women at the transitional stage marked the key foundation to gendered democracy in South Africa. The women's caucus which comprised of members from different groups influenced the inclusion of gender equality in the new constitutional framework. In 1993 the ANC Women's league demonstrated against women's exclusion from national negotiations.⁶⁸ In 1994 gender consciousness became undoubtedly one of the national priorities of South Africa. Actual women's involvement in public decisions commenced during the drafting of the Interim Constitution. It is recorded that women played a significant role in the negotiating and writing process of the Interim Constitution in their capacity as delegates as well as in their social movements.⁶⁹ It was a mandate that out of two of the representatives of each party, one was

⁶⁴ Seidman (n 14 above) at 287.

⁶⁵ Seidman (n 14 above) at 203.

⁶⁶ Seidman (n 14 above) at 295.

⁶⁷ Women's Charter 1994 available at

www.anc.org.za/content/womens-charter-effective-equality (accessed on 24 August 2018).

⁶⁸ Seidman (n 14 above) at 203.

⁶⁹ University of South Africa Unit for Gender Research in Law (n 16 above) at 221.

supposed to be a woman.⁷⁰ South African's first parliament after apartheid had 106 women (26.5%) out of 400 representatives which was a stupendous improvement from the white parliament which was male dominated.⁷¹

In 1994, for the first time, all South Africans over the age of 18 (women and men of all race) were able to exercise their right to vote. Section 21 of the Interim Constitution provided that:

- (1) Every citizen shall have the right-
 - (a) to form, to participate in the activities of and to recruit members for a political party;
 - (b) to campaign for a political party or cause; and
 - (c) freely to make political choices.
- (2) Every citizen shall have the right to vote, to do so in secret and to stand for election to public office.

Rights were therefore accorded to all South Africans without discrimination between men and women and between blacks and whites.

Another contribution of the 1994 Interim Constitution towards equality is seen in its section 8 which provides as follows:

Section 8 Equality

- (1) Every person shall have the right to equality before the law and to equal protection of the law.
- (2) No person shall be unfairly discriminated against, directly or indirectly, and, without derogating from the generality of this provision, on one or more of the following grounds in particular: race, gender, sex, ethnic or social origin, color, sexual orientation, age, disability, religion, conscience, belief, culture or language.
- (3)(a) This section shall not preclude measures designed to achieve the adequate protection and advancement of persons or groups or categories of persons disadvantaged by unfair discrimination, in order to enable their full and equal enjoyment of all rights and freedoms.
- (b) Every person or community dispossessed of rights in land before the commencement of this Constitution under any law which would have been inconsistent with Subsection (2) had that subsection been in operation at the time of the dispossession, shall be entitled to claim restitution of such rights subject to and in accordance with Sections 121, 122 and 123.

⁷⁰ University of South Africa Unit for Gender Research in Law (n 16 above) at 222.

⁷¹ Seidman (n 14 above) at 295.

(4) Prima facie proof of discrimination on any of the grounds specified in Subsection (2) shall be presumed to be sufficient proof of unfair discrimination as contemplated in that subsection, until the contrary is established.

Section 8 was acid tested in the *Prinsloo* case. In *Prinsloo vs Van de Linde*, the applicant had approached the Constitutional Court alleging that section 84 of the Forest Act 122 of 1984 is discriminatory hence it infringes upon section 8 of the Interim Constitution of South Africa of 1993. The purposes of the Act are to prevent and control veld and forest fires by creating fire-control areas where schemes of compulsory fire control are established. Owners of land situated outside of fire-control areas were not obliged to institute fire-control measures, but they were encouraged to do so by a number of means. One of these was section 84, which created a presumption of negligence by the landowner in respect of fires occurring in non-controlled areas. No such presumption applied in controlled areas. It was therefore alleged that the act discriminated against owners of land in non-fire-controlled areas by imposing a presumption of negligence.

Clearly the Act differentiated between owners of land in fire-control areas and non-fire control areas. This differentiation was not on any listed ground nor was it a differentiation on a ground based on attributes and characteristics with the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner. This was then concluded to be a mere differentiation which did not amount to unfair discrimination. The South African Constitutional Court emphasized, under the interpretation of the Interim Constitution section 8, how mere differentiation differs from discrimination in *Prinsloo vs Van de Linde*.⁷² It held that:

In regard to mere differentiation the constitutional state is expected to act in a rational manner. It should not regulate in an arbitrary manner or manifest 'naked preferences' that serve no legitimate government purpose, for that would be considered with the rule of law and the confidential premises of a constitutional state. The purpose of this aspect of equality, therefore, is to ensure that the state is bound to function in a rational manner accordingly, before it can be said that where differentiation infringes S8 it must be established that there is no rational relationship between the differentiation in question and the government purpose which is proffered to validate it. In the absence of such rational relationship the differentiation would infringe S8.

⁷² *Prinsloo vs Van de Linde* 1997 (3) SA 1012 (CC).

In as far as the Interim Constitution was concerned it did not prohibit mere differentiation yet it prohibited unfair discrimination. Unfair discrimination is discussed in detail in the next section under the 1996 Constitution. As the name indicates, the Interim Constitution was meant to serve provisionally while waiting for the final draft of the country's substantive Constitution. In 1996 South Africa adopted its Constitution of the Republic of South Africa, 1996 (henceforth the 1996 Constitution). This piece of legislation is acclaimed for its compliance with international and regional human rights instruments. Most notable is its appreciation of the concept of equality. In the succeeding section the concept of equality as provided for by the 1996 Constitution is discussed with a focus on how the constitution guarantees gender equality.

5.3. WOMEN'S EQUALITY UNDER THE 1996 CONSTITUTION

The involvement of women in the first Parliament gave women an opportunity to challenge their marginalization. It equipped these female parliamentarians with the power and the occasion to fight and advocate for inclusion of more women in democracy, governance and citizenship. For instance, Frene Ginwala, the first female Speaker of Parliament after South Africa's independence, advocated for gendered citizenship.⁷³ She insisted that South Africa's new democratic state must address gender subordination at all levels. South Africa having shown its consideration for women inclusion during the negotiation process towards independence drafted a gender-friendly Constitution. This Constitution embraces equality from two important angles, firstly as a pillar and founding principle and value of the Constitution and secondly as a right which must be accorded to everyone in the country including women. In the ensuing discussion, equality as a value and as a right in the South African Constitution shall be examined.

5.3.1. Equality as a Value

Equality is regarded as a foundational value in the 1996 Constitution. The constitution confers equality as a founding value where it provides that South Africa must be a society that is based on

⁷³ Seidman (n 14 above) at 287.

human dignity, equality and human rights and freedoms.⁷⁴ South Africa considers the achievement of equality, as one of its founding values. It is envisaged that the aim of the Constitution is to ensure that every citizen is protected equally by the law.

Furthermore, Equality is also a democratic value in the South African Constitution, which regards equality to be one of the most important values in the democratic society of South Africa. Section 7 provides that:

This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.

Interesting to note however, South Africa does not take gender equality as a founding value at par with non-racialism and non-sexism. Although South Africa has deep scars of institutionalized racial discrimination, according to Ngcukaitobi, inequality in South Africa can no longer be attributed to race relations alone.⁷⁵ A multiplicity of factors has to be considered. A distinction should be made between gender and sex at this point. Sex is a biological concept based on biological characteristics yet gender is mainly about personal, societal and cultural perceptions of sexuality.⁷⁶ Including gender equality as a founding value would have been indicative of South Africa's commitment to end gender inequality once and for all. However, this cannot be taken to mean that South Africa does not value gender equality. As long as it incorporates equality in the broader sense as a founding value, it is inclusive of all forms of equality that are to be upheld at all times including gender equality.

Of importance to note is that all rights in the 1996 Constitution have a horizontal and vertical application. The vertical protection of women by state organs was reaffirmed in *Carmichele vs Minister of Safety and Security and Another*.⁷⁷ In this matter Carmichele (the Applicant) a 28-year

⁷⁴ Section 1 –The Republic of South Africa is one sovereign, democratic state founded on the following values:-

- a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
- b) Non- racialism α non-sexism.

⁷⁵ I Currie & J De Waal *The Bill of Rights Handbook* (2017) 212.

⁷⁶ What is the difference between sex and gender? Accessed on <https://www.science.com/eyeopeners/what-is-the-difference-between-sex-and-gender.html>. accessed on September 2018.)

⁷⁷ *Carmichele vs Minister of Safety and Security and Another* 2001 (4) SA 938 (CC).

old woman victim, was brutally assaulted by a perpetrator who had previously been convicted on charges of housebreaking and indecent assault of that same woman. For that offence, he had been given a suspended five-year sentence. At the time of the attack he was in addition, facing a charge of rape. The Applicant approached the Constitutional Court alleging that the police and the prosecuting authority did not take reasonable care to protect her from the accused person who then assaulted her upon release from jail.

The Constitutional Court considered the potential liability of both police and prosecutors. As for the police, it held that the State is obliged by the 1996 South African Constitution and International law to prevent gender-based discrimination and to protect the dignity, freedom and security of women. The police's recommendation for the release of the assailant on bail gave occasion for the brutal assault of the women. The Constitutional Court further held that prosecutors, who are under a general mandate to place before a court any information relevant to the refusal or granting of bail, might reasonably be held liable for negligently failing to fulfil that obligation.

The fact that it enshrines the right to equality with horizontal and vertical application gives the 1996 Constitution a wider spectrum of protection. From every sector and/or class, all men and women must be treated equally. When individuals are dealing with women they are supposed to uphold principles of gender equality. Equally the state, institutions and parastatals are required to do the same.

The State and its organs have a duty to protect the infringement of the applicant's rights. It was held by the Constitutional Court that there was no reason in principle why a prosecutor who held all pertinent information, for example, that an accused person was violent, had a grudge against the complainant and had threatened the victim with violence if released on bail, should not be held liable for the consequences of a negligent failure to bring such information to the attention of the *court a quo*. It was held further that had bail been opposed and all relevant information placed before the magistrate, bail might have been successfully refused and this finding was sufficient to put the respondents on their defense in relation to this issue.

Section 8 (1) of the 1996 Constitution shows that the Bill of Rights binds the legislature, executive, judiciary and all organs of state equally

Section 8

- (1) The Bill of Rights applies to all law, and binds the legislative, the executive, the judiciary and all organs of state.
- (2) A provision of the Bill of Rights binds a natural or a juristic person if and to the extent that, it is applicable taking into account the nature of the right and the nature of any duty imposed by the right.
- (3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court –
 - a) In order to give effect to a right in the Bill, must apply or if necessary develop the common law to the extent that legislation does not give effect to that right:- and
 - b) may develop rules of the common law to limit the rights, provided that the limitation is in accordance with section 36 (1).

As such women are protected from violation of their rights by any state organ. An organ of state is defined in section 239 of the Constitution as:

- (a) A department of state or administration
- (b) A functionary or institution exercising a power or performing a function under the Constitution or a provincial constitution or
- (c) A functionary or institution exercising a public power or performing a public function in terms of any legislation.

A significant aspect of the last category is that it extends the concept of organ of State to other bodies that perform public functions or exercise public power. For instance, organs of State were extended to political parties in *Inkatha Freedom Party and Another vs Truth and Reconciliation Committee and others*⁷⁸ and to a microfinance company in *AAA Investments (Pty) Limited vs Microfinance Regulatory Council and another*.⁷⁹ In the latter case the Constitutional Court considered the application of the concept of State beyond the bureaucratic machinery of the State in the context of the regulation of micro- lenders. Rules that were made by the Micro- Finance Regulatory Council (MFRC) were challenged in the High Court with success, on the basis that they contravened the Constitutional principle of legality and infringed the right to privacy.⁸⁰ An

⁷⁸ *Inkatha Freedom Party and Another vs Truth and Reconciliation Committee and others* 2000 (3) SA 119 (C) 133.

⁷⁹ *AAA Investments (Pty) Limited vs Microfinance Regulatory Council and another* 2007 (1) SA 343 (CC).

⁸⁰ Section 14 of the 1996 South African Constitution provides that:

Everyone has the right to privacy, that includes the right not to have—

appeal was lodged in the Supreme Court of Appeal and it was held that MFRC is a private entity and it does not have anything to do with the Constitution that is public law but rather the rules of Company law apply.⁸¹

AAA Investments (Pty) Limited was considered by the Supreme Court to be a company that conducts business as a private business entity for individuals who choose to submit to its authority voluntarily.⁸² Du Plessis and Penfold consider this judgment to be based on a ‘formalistic reasoning’ that puts unwarranted emphasis on how companies such as MFRC operate in general, yet ignoring totally the regulatory powers it is subject to.⁸³ The matter was then taken to the Constitutional Court where it was held that the 1996 South African Constitution employs a relatively broad definition of ‘organ of State’. It was thus held that the meaning of organ of State extends to an entity that performs a public function in terms of legislation.⁸⁴ An entity does not have to be part of government or the government itself to be bound by the 1996 South African Constitution as a whole.⁸⁵ Legislation was defined in broader terms to include subordinate legislation. MFRC was consequently regarded to be an institution that exercises a public function, that is, falling in the bracket of an ‘organ of State’.

The operations of the MFRC and its regulatory duty as set out by the Minister of Finance renders it compatible with the definition of an institution that performs public functions.⁸⁶ Exigent circumstances that were laid down by Justice O’Regan, in a separate judgment, on determining whether rules made by a non- governmental body are public in character include:

- (a) Whether the rules apply generally to the public or a section of the public
- (b) Whether they are coercive in character and effect
- (c) Whether they are related to a clear legislative framework and purpose.

-
- (a) their person or home searched;
 - (b) their property searched;
 - (c) their possessions seized; or
 - (d) the privacy of their communications infringed.

⁸¹ *AAA Investments (Pty) Limited V Microfinance Regulatory Council and another* (n 79 above) para 24.

⁸² *AAA Investments (Pty) Limited V Microfinance Regulatory Council and another* (n 79 above) para 26.

⁸³ M Du Plessis & G Penfold ‘Bill of Rights Jurisprudence’ (2007) 67 *Annual Survey South African Law* 130.

⁸⁴ *AAA Investments (Pty) Limited V Microfinance Regulatory Council and another* (n 79 above) para 41.

⁸⁵ *AAA Investments (Pty) Limited V Microfinance Regulatory Council and another* (n 79 above) para 41.

⁸⁶ *AAA Investments (Pty) Limited V Microfinance Regulatory Council and another* (n 79 above) para 43.

This wider spectrum given to the definition of the organ of State reinforces the non-infringements of rights including right to equality in a wider sense.

5.3.2. EQUALITY AS A RIGHT

South Africa has an elaborate Section 9 in the 1996 Constitution (Equality Clause) that enjoins equal treatment of all people in the country. Furthermore, the South African Courts have developed equality jurisprudence in various cases. In the following, analysis of South Africa's Equality Clause is presented and relevant cases shall be the main focus. Section 9 of the 1996 Constitution provides that:

- (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
- (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons disadvantaged by unfair discrimination may be taken.
- (3) The State may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
- (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination
- (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

5.3.2.1. Formal and Substantive Equality In South Africa

Section 9(2) embraces both formal and substantive equality. While the broader spectrum of substantive and formal equality was discussed in chapter two this section discusses these concepts in the South African context. With regards to South African Substantive Equality Currie and De Waal have this to say:⁸⁷

⁸⁷ Currie and De Waal (n 75 above) at 213.

It is not sufficient simply to remove racist and sexist laws from the books and to ensure that similar laws cannot be enacted in future. That will result in a society that is formally equal but that is unequal in every other way.

Endorsement of substantive equality by the South African courts emerged in the *Hugo v President of the Republic of South Africa*.⁸⁸ In summary, facts of *Hugo v President of the Republic of South Africa* (Hugo case) are that the President of the Republic of South Africa issued a decree that among other things had the effect of releasing female prisoners who had children under the age of twelve years. Mr. Hugo who was a male prisoner with a child under the age of twelve challenged this law alleging unfair discrimination on the ground of sex. The High court ruled in favor of Mr. Hugo and yet the Constitutional Court reversed that decision on the basis that the discrimination was fair. The Constitutional Court recognized that mothers are primarily responsible for the care of young children in South Africa and their release will benefit many children.⁸⁹ Ultimately this was going to benefit the vulnerable group that has historically been disadvantaged.

In the *Hugo* case, the courts differentiated between men and women. What the upper court had to decide on was whether such differentiation was fair or not fair. On this point the Constitutional Court ruled that the discrimination was fair. The reasons for the Constitutional Court's position in rendering the law indiscriminate are nonetheless somewhat objectionable especially regarding its tacit approval of the inferior position of the women in the society versus the position that they ought to be at. While it can be granted that women are indeed primary caregivers of children, the main contestation is whether that should be the norm in this changing society or such outdated conceptions ought to change. Giving women incentives for being a primary caregiver does not justify the evil of gender oppression in the society and but only reverts women to the very conditions they wish to be emancipated from.

Although Amien and Paleker are of the view that this case has acknowledged the vulnerable position of women on South African society it can be argued that the Constitutional Court simply satisfied itself with the position of women in society at the time where they could have pioneered an ideal conception of gender roles and challenged gender stereotypes in a society that ought to be

⁸⁸ *President of the Republic of South Africa vs Hugo* 1997 (4) SA I(CC) 41.

⁸⁹ *President of the Republic of South Africa and Another v Hugo* (n 88 above) at 727 F and 732 A.

founded on democratic principles.⁹⁰ Such conservative decisions that reinforce gender stereotypes may only serve to advance traditional conceptions of women as inferior to men. In this matter the Constitutional Court held that:

We need to develop a concept of unfair discrimination which recognizes that although a society which affords each human being equal treatment on the basis of equal worth and freedom is our goal, we cannot achieve that goal by insisting upon identical treatment in all circumstances before that goal is achieved. Each case, therefore require a careful and thorough understanding of the impact of the discriminatory action upon particular people concerned to determine whether its overall impact is one which furthers the constitutional goal of equality or not. A classification which is unfair in one context may not necessarily be unfair in different context.

Another matter through which the South African Constitutional Court discussed substantive equality was *Harksen vs Lane and Others*.⁹¹ In *Harksen vs Lane and others* (Harksen case) the Constitutional Court had an opportunity to consider the constitutionality of sections 21, 64 and 65 of the Insolvency Act.⁹² Section 21 vests the property of a solvent spouse in the hands of the Master of the High court upon sequestration of an insolvent spouse. Section 64 (2) requires the solvent spouse to attend the creditor's meeting whereupon he or she would be interrogated concerning the insolvent spouse's affairs. The solvent spouse is further required by section 65 to produce all documents relating to the financial affairs of both spouses.

Following the above summarized provisions of the Insolvent Act, Mrs. Harksen (solvent spouse) approached the Court after her property was attached. She was also summoned for interrogation by the creditors and required to produce all documents relating to her financial affairs upon her husband's insolvency.⁹³ She alleged unfair discrimination on the basis of marital status and personal intimacy and approached the Constitutional Court for a reprieve. Although there were dissenting views from two judges the majority concurred that the said provisions cannot amount to unfair discrimination and it was held accordingly.

⁹⁰ W Amien & M Paleker 'Women's Rights' in *South African Human Rights Year Book* (1997) 321.

⁹¹ *Harksen vs Lane NO and others* 1997 (11) BCLR 1489 (CC).

⁹² The Insolvency Act 24 of 1936.

⁹³ *Harksen vs Lane NO and Other* (n 91 above).

In the *Harksen* case the Constitutional Court tabulated a three-point test to determine whether a conduct or law amounts to unfairness which points are as follows:

- a) Position of complainants in society and whether they have suffered from past patterns of discrimination
- b) Nature of the provision or power and the purpose sought to be achieved by it.
- c) The extent to that the discrimination has affected the rights or interests of complainants and whether it has led to an impairment of their fundamental dignity or constitutes an impairment of a comparably serious nature.

Embodied in this three-fold test is the notion of substantive equality, that is, the law is to prevent disadvantage of black women, the majority of whom suffered triple oppression on the basis of race, class and gender.⁹⁴ It is the application of this test that led the court to rule that the said provisions were not contrary to the provisions of the Constitution. The Court also held that the applicant was not from the vulnerable group for she was not previously disadvantaged.⁹⁵

Amien and Paleker state that the achievement of majority rule did not advance the cause of women's rights in as far as it failed to recognize the fact that in the past, men were the ones who enjoyed latitude in acquiring wealth and so logically were the ones who mostly ended up being insolvent such that the spouses who would be most affected by section 21 were women.⁹⁶ In this matter the Applicant asserted marital status and personal intimacy as grounds for unfair discrimination. These grounds do not have anything linked to whether a person was disadvantaged in the past or not.

The reasoning of the Court clearly diverted from the issue that was at hand. Anyone can suffer discrimination, whether they are white or black, and all deserve the protection of the law. Only an affirmative action program can call for an investigation as to whether one has benefited in the past or not as it seeks to benefit previously disadvantaged people. Yet the *Harksen* case was not based on any affirmative action measure. It can therefore be concluded that the Court did not apply the concept of equality in a manner that was fair to the applicant.

⁹⁴ Amien & Paleker (n 90 above) at 321.

⁹⁵ *Harksen vs Lane NO and Other* (n 91 above) at 1515 F-1516E, 1517A-C.

⁹⁶ Amien & Paleker (n 90 above) at 396.

Substantive equality requires the court to take into account the ongoing structural inequality in society when deciding on the unfairness of any discrimination.⁹⁷ Substantial equality is remedial in nature and according to De Vos and Freedman; it is aimed at overcoming the effects of past and ongoing prejudice and discrimination. The right to equality seeks to address the harm of the past that is basically based on the following:

- a) The cultural constructed ideology of differences based on the belief in the superiority of dominant groups and the inferiority of non-dominant groups.
- b) The economic exploitation and disempowerment of those without power because of their race, sex, gender, sexual orientation or other attributes.
- c) In the political disenfranchisement of black South Africans.

The South African Equality jurisprudence has been developed to include the aspect of restitution. In *National Coalition for Gay and Lesbian Equality vs Minister of Justice*⁹⁸ the Constitutional Court interpreted section 9(2) to aptly include the concept of restitution of the categories of people who were disadvantaged in the past to be part of substantive equality. In its very own words it said:

Particularly in a country such as South Africa, persons belonging to certain categories have suffered considerable unfair discrimination in the past. It is insufficient for the constitution merely to ensure, through its bill of rights, that statutory provision which have caused such unfair discrimination in the past are eliminated. Past unfair discrimination frequently has ongoing negative consequences, the continuation of which is not halted immediately when the initial cause thereof is eliminated, and unless remedied, may continue for a substantial time and every indefinitely. Like justice, equality delayed is equality denied ----- one could refer to such as revealed or restitutionary equality.

The idea of ‘restitutionary equality’ has been associated with radical feminism. Radical feminism, unlike liberal feminism which sponsors formal equality, upholds substantive equality.⁹⁹ According to Gouws, inequality is intrinsic in liberal democracy. Liberal feminism is based on the principle that since man and woman are the same morally and intellectually, one group should not therefore

⁹⁷ P De Vos & W Freedman *South African Constitutional Law in Context* (2017) 423.

⁹⁸ *National Coalition for Gay and Lesbian vs Minister of Justice* 1999 (1) SA (CC) 60-61.

⁹⁹ Gouws A. *(UN) thinking Citizenship: Feminist Debates in Contemporary South Africa* (2005) 3.

be placed in an inferior or less powerful position than the other.¹⁰⁰ This however only addresses the problem of women's subordination to men and is based on the principle of 'perfect equality', admitting no skewed distribution of power or privilege on the one side, or disability on the other. Radical feminism conversely focuses on the specific oppression of women and seeks to address the exploitation suffered by women because of the hegemonic control of patriarchy.¹⁰¹

In 2004 the South African Constitutional Court elaborated more on the notion of substantive equality in *Ministry of Finance and other vs Van Heerden*.¹⁰² The Court in reaching its decision explained that:-

This substantive notion of equality recognizes that besides uneven race, class and gender attributes of our society, there are other levels and forms of social differentiation and systematic under-privilege, which still persist. The constitutional enjoins us to dismantle them and to prevent the creation of new patterns of disadvantages.

With regards to women status the application and endorsement of substantive equality puts women on a better footing than that of formal equality. Substantive equality appreciates the fact that women were once exploited and disadvantaged thus the need to redress the effects of the past injustices.

5.3.2.2.Unfair Discrimination

The main purpose of the equality clause in the 1996 Constitution is to combat unfair discrimination against women. Of importance to note is that it has been submitted that the equality right does not rule out mere differentiation. Mere differentiation refers to many classifications that the law makes that have no bearing on the Constitution. According to Currie and De Waal, a State can make classifications and treat some people differently from others. Equality does not just require that everybody must be treated the same.¹⁰³ There are some forms of classifications that rarely

¹⁰⁰ G Graham 'Liberal vs Radical feminism' (1994) 2 *Revised Journal of Applied Philosophy* 156.

¹⁰¹ How is radical feminism different from liberal, Marxist and socialist feminism? Available at www.quora.com/How-is-radical-feminism-different-from-liberal-marxist-and-socialist-feminism.(accessed on 24 August 2018).

¹⁰² *Minister of Finance and other vs Van Heerden* 2004 (11) BCLR 1125 (CC).

¹⁰³ Currie & De Waal (n 75 above) at 218.

constitute discrimination. Laws by their very own nature may inextricably differentiate between persons. For example, under criminal law punishment is imposed on persons convicted of criminal offences yet no similar burdens are imposed on the innocent. Labor laws provide for maternity leave which men cannot take advantage of. Currie and De Waal postulates that law or conduct that differentiates people can be considered valid to the extent that it does not deny equal protection or benefit of the law.¹⁰⁴

It can thus be concluded that while differentiation lays at the heart of equality jurisprudence not all forms of differentiation are always problematic.¹⁰⁵ Differentiation is part and parcel of our daily lives such that private individuals or institutions differentiate daily between individuals in many ways. Accordingly, to De Vos and Freedman, those forms of differentiation by the State or by private parties which infringe on the right to equality are problematic from the constitutional law perspective.¹⁰⁶ In their own words they said:¹⁰⁷

The Constitutional Court (of South Africa) has chosen to focus its equality jurisprudence on the notion of discrimination rather than on the more complex, elusive and empty notion of equality or on all cases of differentiation. This choice stems from a need to provide a suitably structured and focused legal framework that will provide an effective and easy-to-apply legal test to determine whether the equality guarantee has been breached.

Mere differentiation is not what is constitutionally prohibited but discrimination is. Therefore, what the equality clause seeks to prohibit is not mere differentiation but unfair discrimination. According to Currie and De Waal unfair discrimination is differentiation on illegitimate grounds.¹⁰⁸ These illegitimate grounds are grounds that are listed in section 9 (3) of the 1996 Constitution or any other ground not listed but analogous to those listed.

¹⁰⁴ Currie & De Waal (n 75 above) at 219.

¹⁰⁵ De Vos & Freedman (n 97 above) at 425.

¹⁰⁶ De Vos & Freedman (n 97 above) at 425.

¹⁰⁷ De Vos & Freedman (n 97 above) at 425.

¹⁰⁸ Currie & De Waal (n 75 above) at 236.

5.3.2.3.Listed Grounds Of Discrimination

Section 9(3) of the South African Constitution has seventeen listed grounds upon which discrimination is prohibited, these being

Race, gender, sex, color, tribe, place of birth, ethnic or social origin, language, class, religious, belief, political affiliation, opinion, custom, culture, sex, gender, marital status, age, and pregnancy.

These grounds favorably uphold women's status as they call for equal treatment in almost every facet of life. Despite the fact that South Africa did not include gender equality as one of its founding values as discussed earlier on, that gap is filled by its inclusion of gender as a listed ground upon which people must not be discriminated against. This is in line with Liberal feminism which according to the Oxford Dictionary of law, regards persons as autonomous, rights-bearing agents and accentuates the values of equality, rationality and autonomy. Liberal feminism's central claim is that since women and men are equally rational beings, they ought to have the same opportunities to exercise rational choices. Grounds that have a direct bearing on the status of women are discussed hereunder.

5.3.2.3.1. Culture

The South African Constitution considers culture as a prohibited ground of discrimination. Over and above the fact that culture has been listed as a prohibited ground upon which people must not be discriminated against it has to be noted that the Constitution has further elaborated provisions which deal with the practice of culture and require that it must be practiced in a manner which does not infringe on other rights. Section 31 of the South African Constitution provides as follows:

Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community:

- a) To enjoy their culture, practice their religion and use their language and
 - b) To form, join and maintain cultural, religious and linguistic associations and other organs of civil society.
- (2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the bill of rights.

There is no case law that has so far defined culture in the context of Section 9(3). Apparently the 1996 Constitution uses the word culture and cultural life in two different ways.¹⁰⁹ In this respect Currie and De Waal defines culture to mean ‘literature, music, painting, sculpture and theatre.’¹¹⁰ Cultural life is defined to mean a particular way of life of an identifiable group of people. The latter definition ties in with the equality concept of South Africa for the reason that viewed from other grounds of discrimination rights are linked to one’s sense of self-worth and identity. This interpretation is wide enough to give women protection from inequalities based on culture. Cultural and traditional practices have been regarded as barriers to women’s advancement. African traditional customs favor males in various ways.¹¹¹ For instance, before independence there were many cultural practices which undermined the status of women. Women were regarded as perpetual minors under the guardianship of their father before marriage and of their husband upon marriage and finally of a male patrilineal relative upon the death of the husband.¹¹²

The South African Constitutional Court has recently dealt with the culture of chieftainship succession that undermined women in *Shilubana and others vs Nwatiwa* where it had to deal with the rule of male primogeniture in respect of chieftainship succession.¹¹³ This matter concerns a dispute for the right to succeed as *hosi* of the *Valoyi* Tribe in Limpopo between two cousins, Phyllia Shilubana, a woman, and Sidwell Nwatiwa, a man, whose fathers were both chiefs and brothers. The customary law of the *Valoyi* tribe did not allow females to succeed the throne of chieftainship and it could only be passed to the eldest male child in that family. Ms. Shilubana’s father became chief of the *Valoyi* tribe after he had succeeded his father when his sister could not become a chief because of her sex.

Ms. Shilubana’s father then died and she was denied chieftainship by the dictates of customary law despite the fact that she was the eldest daughter. In 1996 the royal family then resolved to appoint Ms. Shilubana as the chief’s successor based on their recognition of the constitution which allowed females to succeed to the throne of chieftainship. What needs to be appreciated is the fact

¹⁰⁹ Section 31 of the 1996 Constitution provides for the cultural rights.

¹¹⁰ Currie & De Waal (n 75 above) at 632.

¹¹¹ Masango & Mfene (n 3 above) at 628.

¹¹² Segar & White (n 25 above) at 106.

¹¹³ *Shilubana and others vs Nwamitwa* 2009 (2) SA 66 (CC).

that it was the elders of the *Valoyi* community who appreciated the gender imbalance inherent in their customary law as it violated the principle of equality for women which is a central value of the new constitutional order.¹¹⁴

Upon the death of the incumbent Chief Richard, Ms. Shilubana was duly appointed to succeed the throne of the *Valoyi* in 2001. Her inauguration ceremony was then interdicted by Mr. Nwatiwa who was the eldest son of Chief Richard. The High Court ruled against Ms. Shilubana's succession and in favor of Mr. Nwatiwa. Ms. Shilubana approached the Supreme Court of Appeal which affirmed the High Court's judgment. Its reasoning was that the issue was not gender based but lineage based and since Chief Richard had died a successor was supposed to come from his house and not from another house. Ms. Shilubana then approached the Constitutional Court on the basis that she had been prevented from being appointed as a chief on the basis of her gender. Her argument was that had she been a man, she would have succeeded her father as *hosi* of the *Valoyi* tribe and probably the chieftainship could not have moved to Chief Richard's lineage and Mr. Nwatiwa would not have been eligible to inherit in the first place. The Constitutional Court overturned the High Court's and the Supreme Court's decision because they refused to acknowledge that the decision to appoint Ms. Shilubana as chief was consistent with the statutory obligation of the traditional authorities to develop and reform customary law so as to comply with the Bill of Rights. This position, according to Pemmam, attached community traditions and practices in the service of the constitutional command to dismantle gender inequality.¹¹⁵

Although this judgment was criticized for not engaging in an in-depth discussion involving the social context of the parties and applying the threefold test of equality established in *Minister of Finance vs Van Heerden*, its decision did justice in revealing the shortcomings of cultural practices in upholding gender equality.¹¹⁶ The practice of cultural rights is limited by the provisions of the right to equality and other rights. This approach is premised on an appreciation of the fact that gender equality has been in most cases found to be at odds with the right to culture. The inclusion

¹¹⁴ DV Perumal 'Harmonising Cultural and Equality Rights under Customary Law- Some Reflections on *Shilubana and others vs Nwanitwa* 2009 (20 SA 66 (CC) (2009)' (2010) 84 *Agenda: Empowering Women For Gender Equality* 103.

¹¹⁵ Perumal (n 114 above) at 108.

¹¹⁶ Perumal (n 114 above) at 108.

of culture as a ground for discrimination in both the constitutions of Zimbabwe and South Africa is a testament to the fact that both countries still operate within the context of patriarchal social systems which promote male domination and female subordination.

5.3.2.3.2. Sex

Sex alludes to the biological and anatomical distinction between men and women.¹¹⁷ Sex is something which we are born with. Sexual inequality persisted during apartheid such that there was no anti-discrimination, equal opportunity or affirmative action legislation aimed at addressing sexual inequality in South Africa.¹¹⁸ In some cases there would be an intersection of discrimination based on sex and culture. For instance the case of *South African Human Rights Commission and Another vs President of the Republic of South Africa and Another* is a case in point.¹¹⁹ The applicants in the three cases heard together were two minor daughters born out of wedlock being prevented from inheriting from their father and a sister being prevented from inheriting from her deceased brother,¹²⁰ A class action on behalf of these three women and children prevented from inheriting was brought by the South African Human Rights Commission and the Women's Legal Trust using section 23 of the Black Administration of Estate Act. Section 23 of the Black Administration Act created a parallel system of succession for black Africans which was insensitive to their wishes and circumstances. Because of this, it breached rights to equality and dignity outlined in the 1996 Constitution. The Constitutional Court declared Section 23 of the Black Administration and its regulations to be unconstitutional. It further held that the rule of male primogeniture as it applies in the rule of African customary laws of succession, according to which black African women and minor children could not inherit from their male relatives, was also unconstitutional.¹²¹

¹¹⁷ Segar & White (n 25 above) at 99.

¹¹⁸ Segar & White (n 25 above) at 99.

¹¹⁹ *South African Human Rights Commission and Another vs President of the Republic of South Africa and Another* 2005 (1) SA 580 (CC).

¹²⁰ *Bhe and others vs Magistrate, Khayelitsha and others (Commission for Gender Equality as Amicus curie); Shibi vs Sithole and Others; South African Human Rights South African Human Rights Commission and Another vs President of the Republic of South Africa and Another* 2005 (1) SA 580 (CC).

¹²¹ Black Administration of Estates Act (n 4 above).

5.3.2.3.3. Gender

Gender is a social term that refers to ascribed social and cultural male and female roles and responsibilities.¹²² Gender refers to masculine or feminine roles that are learned in childhood and adolescence and later enforced by the social and cultural environment in which we live.¹²³ These are basically beliefs that attribute different roles and responsibilities to men and women.¹²⁴ Such roles and responsibilities then become deterministic and pervasive thereby influencing women and men's behavior.¹²⁵ Most of these stereotypes put women in a lower social position than men such that a female manager for example would have additional difficulty performing her management role compared to a man because of the conflicting attitudes and the stereotypes regarding what it means to be a manager and what it means to be a woman.¹²⁶

It is worth noting that gender roles are learned. We are not born with them and we can choose to change or reject them. The dearth of women's representation in parliament is intrinsically linked to, 'socially constructed and culturally varied roles that women and men play in their lives.'¹²⁷ Gender therefore refers to a structural relationship of inequality between men and women as manifested in labor markets and in political structures, as well as in the household. It is reinforced by custom, law and specific development policies.

Gender roles which the society has ascribed to women contribute towards their exclusion from parliamentary politics.¹²⁸ Most women are restricted to private sphere responsibilities such as childcare and domestic responsibilities thereby limiting their access to the public arena where men enjoy unconstrained access.¹²⁹ If a woman chooses to follow politics in the public arena she would be burdened by the dilemma of having to balance household responsibilities and work commitments.¹³⁰ Some household responsibilities are linked to the natural physiology of women

¹²² Currie & Waal (n 75 above) at 227.

¹²³ Segar & White (n 25 above) at 96.

¹²⁴ Masango & Mfene (n 3 above) at 628.

¹²⁵ Masango & Mfene (n 3 above) at 628.

¹²⁶ Masango & Mfene (n 3 above) at 628.

¹²⁷ T Thabane & M Buthelezi 'Bridging the Gap between De Jure and De Facto Parliamentary Representation Of Women In Africa (2008) 41 *The Comparative And International Law Journal Of Southern Africa* 179.

¹²⁸ Thabane & Buthelezi (n 127 above) at 179.

¹²⁹ Masango & Mfene (n 3 above) at 628.

¹³⁰ Masango & Mfene (n 3 above) at 629.

who by nature are supposed to get pregnant and breastfeed the baby. This requires policy makers to account for these physiological differences between men and women by for instance assessing the adequacy of maternity benefits such as maternity leave at workplaces.¹³¹ Failure to do so will amount to indirect discrimination against women.

Gender discrimination is prejudicial treatment arising out of women's reproductive roles or stereotypical views of women's capabilities in the home or the work place. An example of case law on gender discrimination is *Fraser v Children's Court, Pretoria North and Others*.¹³² This was a challenge against section 18(4) (d) of the Children's Act¹³³ that provided that the consent of both parents was required in the adoption of the child if the parents were legally married to each other but only the consent of the mother was required in the case of an extramarital child.

The Applicant, who was a father of an extramarital child, alleged unfair discrimination on the grounds of gender and marital status. Section 18 (4) (d) was deemed to be unconstitutional in that respect. However, the Constitutional Court declined to totally rule out the fact that in some instances only the consent of the mother is necessary.¹³⁴ The Constitutional Court was concerned that having a blanket rule making the consent of the fathers a prerequisite before adoption of a child might adversely affect women. Some fathers who have children out of wedlock may not be available to give consent. It therefore gave the Parliament the task to amend the legislation taking into account the existing societal features of South Africa. The respective section was then amended in 2007 and it now reads as follows:

Section 18(5) Unless a competent court orders otherwise, the consent of all the persons that have guardianship of a child is necessary in respect of matters (that include adoption) set out in subsection 3 (c).

This case raises the status of women who were being regarded as the sole fenders and providers of children born out of out of wedlock children. From the foregoing, it seems clear that gender discrimination is intrinsically linked to the roles that are ascribed to women. The amended

¹³¹ Masango & Mfene (n 3 above) 629.

¹³² *Fraser v Children's Court, Pretoria North and Others* 1997 (2) BCLR 153 (CC).

¹³³ Children's Act 38 of 2008.

¹³⁴ *Fraser v Children's Court, Pretoria North and Others* (n 132 above) at 172-173 A-B.

provision as a result of Fraser creates the possibility of women sharing the responsibility of an out of wedlock child with men.

5.3.2.3.4. Pregnancy

Pregnancy as a ground of unfair discrimination reached the South African court's attention in *Free State Province vs Welkom High School And Others*¹³⁵ This matter was an appeal to the Constitutional Court regarding the exercise of authority by a provincial head of a department of education (HOD) who instructed a principal of a public school to act in contravention of a policy adopted by the governing body of the school. Policies at Welkom High School and Harmony High School provided for the exclusion of pregnant learners from school for certain time- periods. The HOD instructed the principals of the two schools to readmit two learners who had been excluded from school for being pregnant.

The schools applied successfully to the Free State High Court for an interdict to prohibit the HOD from interfering with the implementation of their policies. The HOD appealed without success to the Supreme Court of Appeal and then to the Constitutional Court. The Constitutional Court emphasized the importance of the right to a basic education in terms of section 29 of the 1996 South African Constitution.

It was then held that school governing bodies' pregnancy policies discriminated not only on the basis of pregnancy but also on the basis of sex. Male learners were not dealt with in the same way in cases where they were responsible for paternity. The policies restricted pregnant learners' fundamental right to basic education by requiring them to repeat an entire year of schooling that many could not afford. Such application of the policy did not seem to be rationally related to the maintenance of the quality of the learning process. Additionally, the school policies on the face of them violated a pregnant learner's rights to human dignity and privacy, for example, by requiring all other learners to report to school authorities when they suspected that the fellow learner was pregnant.

¹³⁵ *Free State Province vs Welkom High School and Others* 2014 (2) SA 228 (CC).

However, on the other hand, the HOD, it was held, defied the code of conduct that was supposed to be directly applied in this matter. As a matter of legality, the Constitutional Court held, supervisory authority must be exercised lawfully in accordance with the Schools Act. Because the HOD had purported to override school policies without following the relevant procedures set out in the Schools Act, she had acted unlawfully. The interdict against the HOD had therefore been correctly granted by the court *quo*. At the same time, schools were ordered to review their policies to bring them into line with the 1996 South African Constitution and to engage meaningfully with the HOD in the process.

This judgment shows a burden being placed on women to fight for their own rights. In this case the conduct of the HOD was in line with the 1996 Constitution and in violation of the School's Act. Be that as it may the HOD was ordered to follow the procedures in the School Act despite the fact that these were against the 1996 Constitution. Basically, women have to suffer under any law or conduct that violates their constitutional rights unless and until such law or conduct has been revised or challenged in the court of law. The High Court and the Supreme Court had focused on the conduct of the HOD in line of the School's Act and ignored the aspects of the conduct of the HOD which was in line with the 1996 South African Constitution. It appears those who try to uphold constitutional values and stand for women equality may at times be crucified on a pedestal. Fighting inequality can never be an easy task and no matter how the Constitution provides articulately for the observance for women's rights, these are rights that are not given on the silver platter. In its judgment the Constitutional Court could have instead sanctioned the schools for their non-alignment with the 1996 Constitution.

5.3.2.4. Analogous Grounds

As indicated above discrimination in South Africa is prohibited both on listed and analogous grounds.¹³⁶ While listed grounds are clearly outlined in the Equality Clause, analogous grounds are not specifically listed. They are derived from the wording of section 9(3) being that 'the state may not unfairly discriminate directly or indirectly against anyone on one or more grounds including...' This also means the grounds upon which discrimination may arise are not limited to

¹³⁶ Currie & De Waal (n 75 above) at 223.

those listed therein. For a condition to classify as an analogous ground it must have the potential to impair the fundamental dignity of persons as human beings or to affect them seriously in a comparably serious manner.¹³⁷

In this regard South Africa has already developed a process to follow when determining whether a ground should be considered as an analogous one or not. According to South African equality jurisprudence, differentiation based on listed or analogous grounds is the one that amounts to unfair discrimination. Unfair discrimination is linked to the dignity of people perpetrated by the discrimination in question.¹³⁸ It is trite in South Africa that at its core the equality guarantee protects individual's human dignity. Human dignity as a value underpinning equality was established in the *President of the Republic of South Africa and Another vs Hugo*.¹³⁹ In this regard the court stated that:¹⁴⁰

The prohibition on unfair discrimination in the interim constitution seeks not only to avoid discrimination against people who are members of disadvantaged groups. It seeks more than that. At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups.

What basically determines whether discrimination on analogous ground is fair or not is its impact on the victims.¹⁴¹ De Vos and Freedman's position on the matter, where they argue that where differentiation is not based on one of specific grounds and it does not have the potential to infringe on a person's fundamental human dignity, there will be no unfair discrimination, is then justified.¹⁴² Human dignity was defined in the Hugo's case to mean the treatment of people as second-class citizens in a way that demeans them and treating them as less capable for no justifiable reason. According to De Vos and Freedman the idea of dignity is based on the notion

¹³⁷ Currie & De Waal (n 75 above) at 223.

¹³⁸ Currie & De Waal (n 75 above) at 223.

¹³⁹ *President of the Republic of South Africa and Another vs Hugo* (n 88 above) at par 40

¹⁴⁰ *President of the Republic of South Africa and Another vs Hugo* (n 88 above) par 41.

¹⁴¹ Currie & De Waal (n 75 above) at 223

¹⁴² De Vos & Freedman (n 97 above) at 427.

that all human beings have an equal moral worth and a right to be treated with concern and respect.¹⁴³

In *Prinsloo vs Van De Linder and Another*, the court stated that it is not only human dignity which is to be considered but also unfair discrimination.¹⁴⁴ It held that other forms of differentiation which in some or other way affect persons adversely in a comparably serious manner could constitute a harm prohibited by the non-discrimination provisions of the constitution. Furthermore, dignity-based equality jurisprudence has been criticized on the basis that, 'it can narrow the understanding of the right to equality to an abstract and individualized notion about the personal feelings of a litigant who feels hurt by prejudice and misrecognition.' This narrow focus on the individual and the harm suffered by him or her carries the risk of ignoring larger social and economic disadvantages as well as the system of inequality in South African society.¹⁴⁵

Currie and De Waal, suggest that for there to be unfair discrimination, there must be an unfair impact on the victims.¹⁴⁶ An assessment on the unfair impact requires the court to take into account the following factors developed in *Harksen vs Lane* which are:

1. The position of the complainants in society and whether they have been victims of past patterns of discrimination. Differential treatment that burdens people in a disadvantaged position is once likely to be unfair than burdens placed on those who are relatively well off.
2. The nature of the discriminating law or action and the purpose sought to be achieved by it. An important consideration would be whether the primary purpose of the law or action is to achieve a worthy and important societal goal.
3. The extent to which the rights of the complainant have been impaired and whether there has been an impairment of his or her fundamental dignity.

The South African courts have so far developed at least two grounds of unfair discrimination. While the window for analogous grounds has been left open in section 9(3) the South African

¹⁴³ De Vos & Freedman (n 97 above) at 427

¹⁴⁴ *Prinsloo vs Van De Linder and Another* (n 72 above) at 759.

¹⁴⁵ De Vos & Freedman (n 97 above) at 427.

¹⁴⁶ Currie & De Waal (n 75 above) at 223.

courts have so far developed more grounds of unfair discrimination that includes refugee status¹⁴⁷ and citizenship.¹⁴⁸ As long as the window of analogous grounds is left open, it can be used to the advantage of women where they suffer discrimination on unlisted grounds such as illiteracy and infertility.

5.3.2.5. Direct And Indirect Discrimination

South Africa's Equality Clause prohibits both direct and indirect discrimination.¹⁴⁹ Indirect discrimination is applied in situations whereby a differentiation, which on the face of it appears to be above reproach, has a discriminatory impact or effect.¹⁵⁰ A law may appear neutral on its face while upon close inspection, in terms of its impact when it is administered, it is unfair. An example of an indirect discrimination is that of a United States case of *Griggs vs Dube Power Co.* whereby black employees successfully challenged the power company's hiring and promotion requirements which required a high school diploma.¹⁵¹ This policy though on the surface was neutral, indirectly had the effect of restricting advancement opportunities for black people since a disproportionate few were able to meet this requirement.

A South African case dealing with indirect discrimination which the Constitutional Court had to adjudicate on is *City Council of Pretoria vs Walker*.¹⁵² In this matter the applicant alleged that the Council's actions discriminated on grounds of race. It did not expressly differentiate between white and black ratepayers but imposed more burdensome tariff structures and debt-collection policies on the suburbs of Pretoria than it did on the townships. The applicants argued that the council subjected them to a burden that black residents did not suffer. The court held that:

It is sufficient for the purposes of this judgment to say that this conduct which differentiated between the treatment of residents of townships which were historically black areas and whose residents are still

¹⁴⁷ *Union of Refugee Women vs The Director: The private security Industry Regulatory Authority* 2007 (4) SA 395 (CC).

¹⁴⁸ *Larbi-Odam and others vs MEC for Education (North-West Province) and another* 1996 (12). BCLR 1612.

¹⁴⁹ Sections 9 (3) of the 1996 South African Constitution provides that: 'The state may not unfairly discriminate directly or indirectly against anyone.'

¹⁵⁰ *Larb-Odam v MEC for education (North- West Province)* (n 148 above).

¹⁵¹ *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

¹⁵² *City Council of Pretoria vs Walker* 1998 (2) SA 363 (CC).

overwhelmingly black, and residents in municipalities which were historically white constituted indirect discrimination on the grounds of race.

The main difference between direct discrimination and indirect discrimination is that direct discrimination is evident on the surface of the law or conduct and indirect discrimination can only be perceived from the effect of the particular law or conduct.¹⁵³

5.3.2.6. Affirmative Action

Inclusive in the South African equality principle is affirmative action. Affirmative action are measures taken to correct imbalances where factual inequalities exist between two or more social groups.¹⁵⁴ It is aimed at assisting people who have been discriminated against in the past to enjoy their rights fully and equally. In its form and interpretation, the Equality clause accommodates affirmative action measures.¹⁵⁵ Affirmative action measures must also be designed to benefit women because women were disadvantaged under the Apartheid regime. While the fact that affirmative action must only be implemented to address the injustices of the past must be emphasized, it must not be forgotten that affirmative action must not perpetuate reverse discrimination.¹⁵⁶ Reverse discrimination is when those who were at an advantage in the past are being discriminated against unfairly and unjustifiably.¹⁵⁷

According to Currie and De Waal, affirmative action means giving preferential treatment to disadvantaged groups of people.¹⁵⁸ This entails that a member of a disadvantaged group, usually based on race or gender, is preferred for the distribution of some benefit over someone who is not a member of that group.¹⁵⁹ According to McGregor, non-discrimination and affirmative action, if not properly crafted, may conflict with each other.¹⁶⁰ In such a scenario, Currie and De Waal

¹⁵³ Currie & De Waal (n 75 above) at 236

¹⁵⁴ Sabinet.co.za/web/access journal archive. Accessed on 21 February 2018.

¹⁵⁵ Section 9(2) of the 1996 South African Constitution.

¹⁵⁶ University of South Africa Unit for Gender Research in Law (n 16 above) at 231.

¹⁵⁷ University of South Africa Unit for Gender Research in Law (n 16 above) at 231.

¹⁵⁸ Currie & De Waal (n 75 above) at 241.

¹⁵⁹ M McGregor 'Affirmative Action And Non-Discrimination: South African Law Evaluated Against International Law' (2006) 39 *The Comparative And International Law Journal of Southern Africa* 385.

¹⁶⁰ McGregor (n 159 above) at 390.

postulate that reverse discrimination will result.¹⁶¹ The United Nations Economic and Social Council avers that the relationship between affirmative action and non-discrimination is that both aim to reverse engineer discrimination.¹⁶² In actual fact, affirmative action must be understood as a means of achieving equality in a substantive or restitutionary sense. De Vos and Freedman state that the most debated and controversial aspect of affirmative action is its exact scope of constitutionally permissible redress measures.¹⁶³

South Africa has so far dealt with issues in the application and interpretation of Affirmative action measures in its constitution. Section 9(2) of the South African constitution states that, 'Equality includes the full and equal enjoyment of all rights and freedoms.' To promote the achievement of equality, legislative and other measures designed to protect or advance persons or categories of persons disadvantaged by unfair discrimination may be taken.

Minister of Finance v Van Heerden is one case which dealt with Affirmative Action in South Africa.¹⁶⁴ The court stated that Affirmative Action is mandated by section 9(2) as there is a 'credible and abiding process of reparation for past exclusion, dispossession, and indignity within the discipline of our constitutional framework'. Restitutionary measures are regarded, in most countries, including developed democracies like America, as an exception to the general constitutional guarantees of equality and non-discrimination.¹⁶⁵ In interpreting section 9(2) in *Van Heerden* the Constitutional Court stated that:

The text requires only the means should be designed to protect or advance. It is sufficient if the measure carries a reasonable likelihood of meeting the end. To require a sponsor of a remedial measure to establish a precise prediction of a future outcome is to set a standard not required by section 9(2). Such a test would render the remedial measure stillborn and defeat the objective of section 9(2).

¹⁶¹ Currie & De Waal (n 75 above) at 241.

¹⁶² United Nations Economic Social Cultural Organisation Final Report. Available at https://www2.ohchr.org/.../Affirmative_Action-E (accessed on 24 August 2018).

¹⁶³ De Vos & Freedman (n 97 above) at 427.

¹⁶⁴ *Minister of Finance v Van Heerden* (n 102 above) at par 107.

¹⁶⁵ De Vos & Freedman (n 97 above) at 433.

According to Currie and De Waal for a program to qualify as an affirmative action measure it must be designed to protect and advance persons disadvantaged by unfair discrimination of the past.¹⁶⁶

Affirmative action as a means to cushion and advance substantive equality lies ahead of liberal democracy and affirmative action requires positive discrimination by the state to advance those who were disadvantaged in the past. This is in cognizance of the fact that women were disadvantaged in the past on the basis of both sex and if other measures are not taken to advance women's cause then male domination will subsist and women will continue to occupy the position of second-class citizen. Although admittedly not all women may benefit from affirmative action measures, as long as some in the social category of women benefit, the disparity will be dealt with through 'class fusion'.¹⁶⁷ This form of universalism of rights has been criticized by Gouws however on the basis that it ameliorates the fact that in the social category of women, there are inherent differences which may be economic, cultural or otherwise.¹⁶⁸

Women are not all the same. Therefore, the application of gender affirmation action measures, if they are for the benefit of women as a category may end up causing discrimination among women.¹⁶⁹ Different identities amongst women must be taken into account. Lister supports this view of individual inclusion of women.¹⁷⁰ McGregor suggests that affirmative action policies must be scrutinized and controlled so as not to cause reverse discrimination.¹⁷¹ A constitution, similar to international law, prohibits unfair discrimination against anyone on a non-exhaustive list of grounds. The common factor about these grounds is that they have been used in the past to categorize marginalized and oppressed people and they have the propensity to demean a person's dignity.¹⁷²

¹⁶⁶ Currie & De Waal (n 75 above) at 241.

¹⁶⁷ D Beetham *Democracy and Human Rights* (2000) 19.

¹⁶⁸ Gouws (n 99 above) at 6

¹⁶⁹ Gouws (n 99 above) at 4.

¹⁷⁰ R Lister *Radical Democracy* (1994) 99.

¹⁷¹ Mc Gregor (n 159 above) at 390.

¹⁷² Mc Gregor (n 159 above) at 394.

5.3.2.7. Legislative Measures to Prevent Unfair Discrimination

Section 9(4) of the South African constitution provides that ‘National legislation must be enacted to prevent or prohibit unfair discrimination.’ This provision is mandatory thus the use of the word ‘must’. According to Currie and De Waal the national legislation mandated by section 9(4) is there to prevent particularly ‘private discrimination’.¹⁷³ Private discrimination is that kind of discrimination practiced by individuals or institutions other than the State and taking the form of conduct rather than the law.¹⁷⁴

5.3.2.7.1. Promotion of Equality and Prevention of Unfair Discrimination.

In compliance with this constitutional provision South Africa enacted the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (The Equality Act.) The Equality Act was promulgated within the required three years’ timeframe of item 23(1) of schedule 6 of the Constitution. The Promotion of Equality Act may actually be regarded as an extension and elaboration of Section 9 of the 1996 Constitution. In its preamble it is clearly stated that the Act is for the prevention of unfair discrimination and the promotion of Equality.¹⁷⁵ Considering that the Act was enacted in 2000 after employment discrimination has been addressed through the Basic Condition of Employment Act and Employment Equity Act, it is a tacit admission that there were still some persisting forms of discrimination against women that went beyond the employment sector.

Promotion of Equality Act was first interpreted in *Pillay v MEC Education for Kwazulu Natal and Another*.¹⁷⁶ In this case it was noted that the Equality Act does not expressly provide for, yet implies the existence of, a comparator where there is an alleged act of discrimination. For a case of discrimination to be proven, there must be someone else who would have been treated in a way more favorable than the complainant.¹⁷⁷ Significantly, the Promotion of Equality Act fulfils the

¹⁷³ Currie & De Waal (n 75 above) at 244.

¹⁷⁴ Currie & De Waal (n 75 above) at 244.

¹⁷⁵ Equality Act (n 8 above) Preamble provides that:

The consolidation of democracy in our country requires the eradication of social and economic inequalities, especially those that are systemic in nature, that were generated in our history by colonialism, apartheid and patriarchy, and that brought pain and suffering to the great majority of our people.

¹⁷⁶ *Pillay vs MEC for Education, KwaZulu-natal* 206 6 SA 363 (EQC).

¹⁷⁷ G Carpenter ‘The Equality Act in the Constitutional Court’ (2008) 23 *South African Public Law Journal* 192.

Constitutional requirement for the State to take other measures to enhance equality.¹⁷⁸ It elaborates on the right to equality by giving a much wider protection than the one in section 9 of the 1996 Constitution. For instance, the definition of discrimination given by the Equality Act, has got a wider spectrum than the one given in the 1996 Constitution.¹⁷⁹

The Equality Act is aiming at eradicating systematic social and economic inequalities which emanate from South African history of colonization, apartheid and patriarchy. Thus it seeks to:-

- a) Prohibit unfair discrimination
- b) Provide remedies for the victims of unfair discrimination
- c) Promote the achievement of substantive equality.

However, the protection it gives extends beyond certain constitutional guarantees. For example, it contains more prohibited grounds than laid out in the constitution. The Promotion of Equality Act addressed the issue of women equality in an exhaustive manner. In section 8¹⁸⁰ it prohibits unfair discrimination on the following gender related grounds, that is:¹⁸¹

- Gender-based violence

¹⁷⁸ Section 9(2) of the 1996 South African Constitution provides as follows:

Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons disadvantaged by unfair discrimination may be taken.

¹⁷⁹ Equality Act (n 8 above) Section 1(1)(viii) defines discrimination as :

any act or omission, including a policy, law, Rule, practice, condition or situation that directly or indirectly—
(a) imposes burdens, obligations or disadvantage on; or
(b) withholds benefits, opportunities or advantages from, any person on one or more of the prohibited grounds;

¹⁸⁰ Equality Act (n 8 above) Section 8 provides that:

Subject to section 6, no person may unfairly discriminate against any person on the ground of gender, including—

- (a) gender-based violence;
 - (b) female genital mutilation;
 - (c) the system of preventing women from inheriting family property;
 - (d) any practice, including traditional, customary or religious practice, that impairs the dignity of women and undermines equality between women and men, including the undermining of the dignity and well-being of the girl child;
 - (e) any policy or conduct that unfairly limits access of women to land rights, finance, and other resources;
 - (f) discrimination on the ground of pregnancy;
 - (g) limiting women's access to social services or benefits, such as health, education and social security;
 - (h) the denial of access to opportunities, including access to services or contractual opportunities for rendering services for consideration, or failing to take steps to reasonably accommodate the needs of such persons;
 - (i) systemic inequality of access to opportunities by women as a result of the sexual division of labour.
- Prohibition of unfair discrimination on ground of disability.

¹⁸¹ Masango & Mfene (n 3 above) at 24.

- Female genital mutilation
- Inheritance
- Customary and religious practices that undermine the dignity of women.
- Land ownership
- Pregnancy
- Health, education and social security
- Sexual division of labor.

With regards to analogous grounds of unfair discrimination, the Equality Act presumes them to be unfair and the onus to prove otherwise shifts to the one who alleges its fairness. The Act therefore goes further than 9(5) of the 1996 constitution considering it presumes discrimination on an analogous ground to be unfair (footnote section 13(2)). Furthermore, the Equality Act gives explanatory instances of unfair disability which would assist a complainant. The Equality Act also outlaws hate speech, harassment and the dissemination of prejudicial information. They are regarded as automatic unfair discrimination. As long as their existence can be proven, they are specifically prohibited. Currie and De Waal view the Equality Act as an extremely ambitious piece of legislation.¹⁸² It has also been criticized for being unclear and incoherent.¹⁸³ The Equality Act does not regulate equality at workplaces. This domain is being regulated under the following legislations.

5.3.2.7.2. Employment Equity Act

The Employment Equity Act basically addresses the unfair representation of women in the work place that has its roots in the apartheid epoch.¹⁸⁴ It does that in two ways. Firstly, it prohibits discrimination in the workplace through policies or practice on the nineteen grounds listed in its section 6(1).¹⁸⁵ This piece of legislation recognizes that once women are treated equally in the

¹⁸² Currie & De Waal (n 75 above) at 244.

¹⁸³ Currie & De Waal (n 75 above) at 245.

¹⁸⁴ Employment Equity Act (n 8 above).

¹⁸⁵ Employment Equity Act (n 8 above) Section 6(1) provides that:

No person may unfairly discriminate, directly or indirectly, against any employee in any employment policy or practice, on one or more grounds including race, gender, sex, pregnancy, marital status, family

recruitment process and every other practice at the workplace, it will increase their representation and improve their status.

Secondly the Employment Equity Act, through its section 6(2) encourages employers to design and implement affirmative action measures in workplaces.¹⁸⁶ Affirmative action, as indicated previously, is for those who were disadvantaged in the past. Women were disadvantaged in the past and they qualify to benefit under affirmative action measures. However, this should not be construed to mean that women should get preferential treatment even where they do not meet the minimum requirements of the job such as educational qualifications. Section 20(1) of the Employment Equity Act requires employers to prepare and implement employment equity plans that achieve reasonable progress towards employment equity in their work force.¹⁸⁷ Employers are also required to submit annual reports in that they indicate, details to progress made in implementing their employment equity plans.¹⁸⁸ It is important to note that South Africa has made some progress in the process of implementing the Employment Equity Act. For instance, South Africa has set a quota of fifty percent male and fifty percent female for senior managers in government.

responsibility, ethnic or social origin, colour, sexual orientation, age disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth.

¹⁸⁶ Employment Equity Act (n 8 above) Section 6(2) provides that:

(2) It is not unfair discrimination to-

(a) take affirmative action measures consistent with the purpose of this Act; or

(b) distinguish, exclude or prefer any person on the basis of an inherent requirement of a job.

¹⁸⁷ Employment Equity Act (n 8 above) Section 20 (1) provides that:

A designated employer must prepare and implement an employment equity plan that will achieve reasonable progress towards employment equity in that employer's workforce.

¹⁸⁸ Employment Equity Act (n8 above) Section 21(1) provides that: (1) A designated employer that employs fewer than 150 employees must:

(a) submit its first report to the Director-General within 12 months after the commencement of this Act or, if later, within 12 months after the date on that that employer became a designated employer; and

(b) thereafter, submit a report to the Director-General once every two years, on the first working day of October.

5.3.2.7.3. Basic Conditions of Employment Act

Besides the Equity Act South Africa also has the Basic Conditions of Employment Act.¹⁸⁹ At the core of the Basic Conditions of Employment Act is the governance of the conditions of the workplace and the provision of favorable conditions of employment. This has a significant contribution towards the status of women in the employment sector. Two sections in this Act expressly protect pregnant women. In its section 25(1), the Basic Conditions of Employment Act provides for at least four consecutive months of maternity leave with employment benefits.¹⁹⁰ This is an improvement from the previous position.

The provision to set apart these four months was probably included after consideration of the fact that the mothers need time to recover from giving birth and also time to nurse and breastfeed the newborn child. What is not clarified however is the issue of those mothers who might have experienced still births, with reference to whether they should continue on maternity leave for the purposes of recovering or they would have to get sick leave from the doctor. If the latter applies, then it means that the Act does not address the welfare of the mothers adequately but rather its major concern is on the reproductive role of the mother, which involves child nursing.

¹⁸⁹ Basic Conditions of Employment Act (n 8 above).

¹⁹⁰ Basic Condition of Employment Act (n 8 above) Section 25 (1) provides that:

- (1) An employee is entitled to at least four consecutive months' maternity leave.
- (2) An employee may commence maternity leave—
 - (a) at any time from four weeks before the expected date of birth, unless otherwise agreed; or
 - (b) on a date from that a medical practitioner or a midwife certifies that it is necessary for the employee's health or that of her unborn child.
- (3) No employee may work for six weeks after the birth of her child, unless a medical practitioner or midwife certifies that she is fit to do so.
- (4) An employee who has a miscarriage during the third trimester of pregnancy or bears a stillborn child is entitled to maternity leave for six weeks after the miscarriage or stillbirth, whether or not the employee had commenced maternity leave at the time of the miscarriage or stillbirth.
- (5) An employee must notify an employer in writing, unless the employee is unable to do so, of the date on that the employee intends to—
 - (a) commence maternity leave; and
 - (b) return to work after maternity leave.
- (6) Notification in terms of subsection (5) must be given—
 - (a) at least four weeks before the employee intends to commence maternity leave; or
 - (b) if it is not reasonably practicable to do so, as soon as is reasonably practicable.
- (7) The payment of maternity benefits will be determined by the Minister subject to the provisions of the Unemployment Insurance Act 30 of 1966.

Paradoxically, according to the World Health Organization standards, a child is supposed to be breast fed for at least six months without being given any other type of food.¹⁹¹ If the Basic Conditions of Employment Act provides for maternity leave in the interest of the mother in order for her to nurse the baby for four months, it is falling short of the six months required by international health standards.

Furthermore, the Basic Conditions of Employment Act in section 26(1) states that:

No person may require or permit a pregnant employee or an employee who is nursing her child to perform work that is hazardous to her health or the health of the child.

This is a commendable provision that seeks to protect both the mother and the child from harmful duties at the workplace of the mother. This significantly recognizes the different biological constructs of women and men and puts women in a position where their health is protected from workplace risks. It is also in line with the Equality Clause which has pregnancy as a prohibited ground of unfair discrimination.

5.3.2.7.4. Women Empowerment and Gender Equality Bill

Women Empowerment and Gender Equality Bill is the most recent legislation that is still in motion in South Africa meant to address gender equality.¹⁹² It is yet to be promulgated and the drafting of the Bill commenced in 2013. Its purposes are:

- To give effect to section 9 of the 1996 Constitution insofar as the empowerment of women and gender equality is concerned;
- To establish a legislative framework for the empowerment of women;
- To align all aspects of laws and implementation of laws relating to women empowerment, and the appointment and representation of women in decision making positions and structures; and to provide for matters connected therewith.

¹⁹¹ Breastfeeding available at <http://www.who.int/topics/breastfeeding/en/>. Accessed on 15 march 2018.

¹⁹² Women Empowerment and Gender Equality Bill No 50 of 2013.

Section 7 of the Act upholds the notion of improving women representation and participation. It provides as follows:

7. (1) Despite any other law, designated public bodies and designated private bodies must, within their ambit of responsibilities and available resources, develop and implement measures, in order to achieve the progressive realisation of a minimum of 50 per cent representation and meaningful participation of women in decision-making structures including Boards, which must include—
- (a) building women’s capacity to participate;
 - (b) enhancing the understanding and attitudes of communities to accept the capabilities and participation of women as their equals; and
 - (c) developing support mechanisms for women.
- (2) Despite any other law, all political parties must develop and implement measures for the progressive realisation of a minimum of 50 per cent representation and meaningful participation of women in decision-making positions and structures.
- (3) The Minister may develop guidelines to assist designated public bodies and designated private bodies to comply with subsection (1).
- (4) Designated public bodies and designated private bodies must submit to the Minister their plans and measures in compliance with subsection (1) within one year of being designated, for consideration, review and guidance.
- (5) The Minister may, at any time after the submission of the plan or measures contemplated in subsection (2), require a designated public body or a designated private body to submit to the Minister a report on its implementation of subsection (1), for consideration, review and guidance.

In terms of the Women Empowerment, Bill the Minister has the power to direct almost any public or private entity to comply with the set-out provisions on gender equality. It however does not provide the criteria to be used by the Minister in this course and this may compromise the principle of legality.¹⁹³ The Act further mandates the achievement of a minimum of fifty percent representation of women in various walks of society, a provision that was criticized by the Centre for Constitutional Rights.¹⁹⁴ Their criticism is based on the assumption the Bill calls for a ‘minimum’ of fifty percent meaning quotas can exceed this mark and they argue that anything that is above fifty percent must be considered as unequal. However, such an assumption ignores the

¹⁹³ Centre for Constitutional Rights ‘An Analysis: The Women Empowerment and Gender equality Bill’ Dube P. available at <http://www.cfcr.org.za/index.php/latest/264-article-an-analysis-the-women-empowerment-and-gender-equality-bill> (accessed on 14 March 2018).

¹⁹⁴ Centre for Constitutional Rights (n 193 above).

fact that women in terms of population constitute more than fifty percent and it is also ahistorical since it is oblivious of disadvantages women suffered in the past. Any measure or action or law done in the spirit of giving advantage to those who were disadvantaged in the past must not be regarded as discriminatory.

5.3.2.7.5. Preferential Procurement Policy Framework Act

Pursuant to the provisions of section 217(2) of the 1996 South African Constitution that allows preferential treatment in the awarding of contracts to disadvantaged groups, the Preferential Procurement Act¹⁹⁵ was enacted as a guideline for how procurement policies were to be implemented.¹⁹⁶ This Act provides opportunities for empowering those who were historically disadvantaged in the procurement sector. In accordance with Section 2(d) (i) of the Preferential Procurement Act the organs of state are enjoined to give preferential treatment to the historically disadvantaged in their awarding of contracts.¹⁹⁷ In its schedule, The Preferential Procurement Act puts black South African women in the category of those who were previously disadvantaged. Hence, women stand to benefit under this Act.

5.3.2.7.6. Broad Based Black Economic Empowerment Act.¹⁹⁸

The Act was established in 2003 and it is aimed at facilitating broad-based economic empowerment.¹⁹⁹ It is also there to increase the extent to which black women acquire and manage

¹⁹⁵ Preferential Procurement Policy Framework Act 5 of 2000.

¹⁹⁶ 1996 Constitution (n 1 above) Section 217(2) provides that: Subsection (1) does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement policy providing for—
(a) categories of preference in the allocation of contracts; and
(b) the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.

¹⁹⁷ Preferential Procurement Act (n 195 above) Section 2(1)(d) provides that:
Framework for implementation of preferential procurement policy. -(1) An organ of state must determine its preferential procurement policy and implement it within the following framework: the specific goals may include
(d) contracting with persons, or categories of persons, historically disadvantaged by unfair discrimination on the basis of race, gender or disability.

¹⁹⁸ Broad Based Black Economic Empowerment Act 53 of 2003 (Broad Based Act).

¹⁹⁹ Broad based Act (n 198 above).

existing and new enterprises while at the same time increasing their access to economic activities, infrastructure and skills training.

5.4. WOMEN'S ACCESS TO DEMOCRACY AND CITIZENSHIP UNDER THE 1996 CONSTITUTION.

Women's access to democracy and citizenship has been enhanced by the 1996 Constitutional provisions. The 1996 South African Constitution was acclaimed as one of the most liberal democratic Constitutions enacted anywhere locally, regionally and internationally.²⁰⁰ The drafting of this critically acclaimed 1996 Constitution was not an easy road. Traditional leaders delayed discussions during the drafting of the constitution insisting that the gender equality clause should be struck from the Bill of Rights, as it conflicted with their right to make decisions about land ownership and customary marriage.²⁰¹ Likewise, the African Christian Democratic Party (ACDP) voted against the adoption of the final version of the new Constitution because it enshrined women's right to make choices about abortion. However, the Constitution was ultimately passed in 1995. Of relevance to this discussion are its provisions on democracy and citizenship.

Currently democracy is strongly valued in South Africa as it is one of the founding values of the 1996 South African Constitution. Section 1 of the Constitution provides that: -

The Republic of South Africa is a sovereign, democratic state founded on the following events:

- a. Universal adult suffrage, a national common voter's roll, regular election and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.

This section endorses two important elements of democracy, these being representative and participatory democracy, all of which South Africa embraces.²⁰² Participatory democracy

²⁰⁰ Sanders (n 17 above) at 82.

²⁰¹ C De Nobrega 'South Africa: Gender equality and morality as citizenship' (2014) available at <https://www.opendemocracy.net/5050/chantelle-de-nobrega/south-africa-gender-equality-and-morality-as-citizenship> (accessed on 13 September 2018).

²⁰² P Vos 'It's my Party) and I will do what I want to): Internal party democracy and section 19 of the South African Constitution' (2015) 31 *South African Journal For Human Rights* 35.

empowers citizens to take part in decisions that affect their lives. Representative democracy is achieved through the election of members to participate freely in the activities of political parties.

Section 19 of the 1996 Constitution implicitly recognizes the importance of political parties in South Africa.²⁰³ The section guarantees every citizen the right to form a political party, to participate in the activities of, or recruit members of a political party and to campaign for a political party or cause. In *New National Party of South Africa vs Government of the Republic of South Africa* the Constitutional court held that:

The importance of the right to vote is self-evident and can never be overstated ... the right is fundamental to a democracy, for without it there can be no democracy.²⁰⁴

A year later it was stressed in *Minister of Home Affairs vs NICRO* by the Constitutional Court when it said that:²⁰⁵

The right to vote is a foundation of democracy that is a core value of our Constitution.

The laws on the exercise of voting rights are gender sensitive to an extent that they take care of pregnant women. Section 9 of the Electoral Laws Amendment Act provides as follows:²⁰⁶

(1) The Commission (a) must allow a person to apply for a special vote if that person cannot vote at a voting station in the voting district in that the person is registered as a voter, due to that person's-

²⁰³ Section 19 of the 1996 South African Constitution provides that: Every citizen is free to make political choices, that includes the right—

(a) to form a political party;

(b) to participate in the activities of, or recruit members for, a political party; and

(c) to campaign for a political party or cause.

(2) Every citizen has the right to free, fair and regular elections for any legislative body established in terms of the Constitution.

(3) Every adult citizen has the right—

(a) to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret; and

(b) to stand for public office and, if elected, to hold office.

²⁰⁴ *New National Party of South Africa vs Government of the Republic of South Africa & Others* 1999 (3) SA 191 (CC) para 11.

²⁰⁵ *Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders (NICRO) and others* 2005 (3) SA 280 (CC) para 47.

²⁰⁶ Electoral Laws Amendment Act 34 of 2003.

(i)(a) physical infirmity or disability, or pregnancy;

Section 19 of the 1996 South African Constitution also provides a right to stand for public office if elected to hold office. The right to hold office or stand for a public office can only be realized through a political party. Section 16 of the Electoral Act lays out requirements for a political party to be registered.²⁰⁷ It prohibits the use of names or symbols that portray propaganda or incite violence or hatred or that violate the equality rights in the 1996 South African Constitution or any ground listed therein. Any amendment or replacement of a constitution of a registered political party that acts oblivious to the provisions of section 16 leads to the deregistration of such a political party.

Cognizant of the fact that political parties act as a linkage between government and the electorate, these rights in section 19, though accorded to every citizen can only be realized through a political party. The Electoral Act further requires every registered party and candidate to respect the rights of women and to communicate freely with parties and candidates, to facilitate full and equal participation of women in political activities, ensure free access for women to all public meetings, marches, demonstrations, rallies and other public events and take all possible steps to ensure that women are free to engage in political activities.

With regards to citizenship the 1996 Constitution, in Section 3 provides as follows:

There is a common South African citizenship.

(2) All citizens are—

(a) equally entitled to the rights, privileges and benefits of citizenship; and

(b) equally subject to the duties and responsibilities of citizenship.

(3) National legislation must provide for the acquisition, loss and restoration of citizenship.

Furthermore, in Section 20 it provides that:

No citizen may be deprived of citizenship.

²⁰⁷ Electoral Act 73 of 1998.

These sections do not differentiate between men and women. Every right provided for in the Bill of Rights is to be enjoyed by every South African citizen equally. Owing to these Constitutional provisions women in South Africa have benefited a lot with regards to their access to democratic and citizenship rights. When the new national parliament opened in May 1994, it comprised 106 women out of 400 representatives, translating to 26, 5 percent of the seats.²⁰⁸ In the first democratic Local Government elections of post-apartheid South Africa in 1996, women made up only 20% of elected Councilors, and only 14, 4% of these were representatives of Council executives.²⁰⁹ Furthermore South Africa has already had its first female deputy president during former president Mbeki's term of office in 2009. Findings of the Business Women's Association report of 2009 reflected that the South African government was ahead of other institutions as far as the pursuit of gender equality in the workplace is concerned.²¹⁰

This was a great shift from the predominantly male Parliament existent during the apartheid era. New parliamentarians also suggested the creation of a women-friendly parliament through the establishment of a new parliamentary day care center as well as supplementary women's rooms.²¹¹ The majority of MPs challenged the new government to find ways of redefining the prevailing skewed power relations based on gender. Furthermore, owing to the struggles of the pre-independence women's alliance, the new constitution set requirements for the foundation of a commission. Additionally, by 1997, South Africa's Justice Department had revised the country's family laws to incorporate notions of gender equality. This included an appraisal of legislation on customary marriage, separation and divorce. Numerous government departments also formed a gender desk in an effort to guarantee that gender concerns were given due attention in all government initiatives.²¹²

²⁰⁸ Seidman (n 14 above) at 300

²⁰⁹ C McEwan 'Bringing Government to the People': Women, Local Governance and Community Participation in South Africa. (2003) 34 *Geo-forum* 477.

²¹⁰ Business Women's Association in South Africa available at <http://www.bwasa.co.za/>. (accessed on 15 March 2018).

²¹¹ McEwan (n 209 above) at 477.

²¹² Seidman (n 14 above) at 301.

After independence South Africa introduced a proportionate representation structure to accommodate women in politics.²¹³ South Africa has maintained an upward trend in the proportion of women parliamentarians since the first democratic elections in 1994, and in the 2014 elections emerged with close to forty three percent women in the National Assembly, one of two Houses of the bicameral Parliament. The other House is the National Council of Provinces (NCOP), which has fifty-four seats. Of these, nineteen, that is, about thirty five percent, are held by women. South Africa is second only to Seychelles in regional rankings and number seven in the global ranking in terms of the greatest proportion of women in Parliament.²¹⁴ In that regard South Africa has managed to reach the 30% of women parliamentarians in 2008 a target which was set a decade ago by the Economic and Social Council (ECOSOC) of the United Nations (UN) for women in parliaments following the 1995 Beijing Conference.²¹⁵

5.4.1. Democratic Institutions

It is recorded that South Africa by 1998, had created a number of state institutions to observe compliance with gender equity policies.²¹⁶ These institutions include the following:

5.4.1.1. Ministry of Women, Children and People Living with Disabilities

In compliance with the Beijing Platform that requires a national machinery for the advancement of women to be at the highest level in government, the South African Government established the Office on the Status of Women in 1997.²¹⁷ The Office on the Status of Women operated under the Deputy President and was headed by the Chief Executive Officer. Its functions were as follows:²¹⁸

- To advance the National Women's Empowerment Policy.
- To advise and brief the Deputy President on all matters having to do with the empowerment of women.

²¹³ J Viterna & KM Fallon 'Democratization, Women's Movements, and Gender-Equitable States: A Framework for Comparison' (2008) 73 *American Sociological Review* 675.

²¹⁴ SADC Gender and Development Monitor 2016.

²¹⁵ Thabane & Buthelezi (n 127 above) at 178.

²¹⁶ Seidman (n14 above) at 301.

²¹⁷ *Beijing Declaration & Platform for Action adopted at the 16th plenary meeting (1995)*.

²¹⁸ University of South Africa Unit for Gender Research in Law (n 16 above) at 246.

- To find ways of measuring progress to gender equality in liaison with non-governmental organisations and other stakeholders that deals with women issues.
- To facilitate training in gender analysis and gender sensitization.
- To encourage affirmative action.
- To facilitate gender mainstreaming in ministries, provinces and all public bodies.
- To initiate and promote cross-sectoral action on issues that cut across all sectors.
- To prioritise key concerns and initiate policy and action-oriented research.
- To consult and liaise with civil society and parliament on women issues.
- To assist in women's budget in government programs.

However, the Office of the Status of Women was later on replaced by the Ministry of Women, Children and People Living with Disabilities (Ministry of Women) in 2009. The establishment of the Ministry of Women in 2009 was celebrated as a major milestone in the quest for the emancipation of women and their empowerment. It is largely meant to champion the cause of women and ensure collaboration amongst government structures and also between government and social partners on matters related to the emancipation and development of women.²¹⁹ The Ministry of Women has merely carried over functions of the Office of the Status of Women except that it now has more authority.²²⁰

5.4.1.2. Commission for Gender Equality

Commission for Gender Equality (CGE) of South Africa was established in 1997 following the provisions of Section 187 of the 1996 South African Constitution²²¹ and the Commission for Gender Equality Act.²²² This commission was created as a result of women's lobbying. It was

²¹⁹ Apleni (n 12 above) at 3.

²²⁰ Masango & Mfene (n 3 above) at 630.

²²¹ Section 187 of the 1996 South African Constitution provides that:

- (1) The Commission for Gender Equality must promote respect for gender equality and the protection, development and attainment of gender equality.
- (2) The Commission for Gender Equality has the power, as regulated by national legislation, necessary to perform its functions, including the power to monitor, investigate, research, educate, lobby, advise and report on issues concerning gender equality.
- (3) The Commission for Gender Equality has the additional powers and functions prescribed by national legislation.

²²² Commission for Gender Equality Act 39 of 1996.

created to monitor and stimulate gender transformation in South African society.²²³ It is an independent institution that is only answerable to the National Assembly and subject to the 1996 Constitution and the laws of the country.²²⁴ The South African constitution gave the CGE remarkable prominence and uncommon authority in comparison to what other former nationalist movements in other countries in Africa have done after independence. These include such rights as the right to compel witnesses and evidence and the right to interfere in both public and private places. This is completely different from what other nationalist movements have done even if they have women's ministries which are dedicated to improving women's ability to fulfil their domestic responsibilities.

The creation of this institution that is specifically directed at dealing with gender equality is a direct indication of serious commitment by the State to eradicate gender inequalities that would not be achieved if gender equality was put in the same bracket as other rights.²²⁵ The CGE's aim is to create a South African society that is free from all forms of gender oppression and inequality. It is also designed to promote respect for gender equality and protection, development and attainment of gender equality. Its mission is to promote, protect, monitor and evaluate gender equality.²²⁶ In CGE membership must be between eight and eleven including the chairperson, however there is no mandatory requirement for gender balance on the membership. Functions for CGE are set out in section 11 of the Commission for Gender Equality Act. These functions include the following:²²⁷

- To monitor and evaluate policies and practices of government bodies and officials and public and private bodies.
- To develop, conduct or manage information and education programs.
- To evaluate all existing and proposed laws that affect gender equality and make recommendations to Parliament.
- To recommend the introduction of appropriate new laws to Parliament or other legislatures.
- To investigate gender issues.
- To liaise with other organizations promoting gender equality and with civil society.

²²³ A Mavuso-Mda 'The Rising Tide of Women's National Coalition: The Experience of South Africa' (2009) 8 *Global Media Journal* 12.

²²⁴ Commission for Gender Equality Annual Report (n 9 above).

²²⁵ Commission for Gender Equality Annual Report (n 9 above).

²²⁶ Commission for Gender Equality Annual Report (n 9 above).

²²⁷ University of South Africa Unit for Gender Research in Law (n 16 above) at 248.

- To monitor government's compliance with international and regional conventions which South Africa is a party to.
- To conduct research on gender issues.

Notably some functions of the CGE, as listed above, are overlapping with those of the Ministry of Women. There is therefore a need for these organs to liaise with each other in their programs to avoid unnecessary duplication of duties. Another observation pertaining to the functionality of the CGE is that it lacks the authority to enforce its decisions. The Commission's mandate mainly focuses on monitoring progress in the attainment of gender equality, evaluating legislation and of educating people on gender rights enforcing gender rights through courts, in the absence of enforcement mechanisms of their own.²²⁸

According to the CGE's Annual Report of 2013-2014 the Commission had handled 894 gender equality related cases by 2014.62 of these cases were pertaining to gender discrimination and 61 involved gender-based violence.²²⁹ Further, due to the work and efforts of the CGE and its active involvement in the formulation of legislation and policy the following legislations were made to be more gender sensitive.²³⁰

*Trade and Industry, Licensing of Businesses Bill*²³¹

It was through the recommendations by the CGE that the Bill incorporated provisions that prohibited fronting, as this was prejudicial to women's substantive economic participation. Affirmative action provisions that were designed to empower women were also included in this legislation.

²²⁸ University of South Africa Unit for Gender Research in Law (n 16 above) at 249.

²²⁹ Commission for Gender Equality Annual Report (n 9 above).

²³⁰ Commission for Gender Equality Annual Report (n 9 above).

²³¹ Business Licensing Bill of 2013.

*Communications, National Broadband Policy for South Africa*²³²

The Commission for gender equality recommended the equal participation of women and men in the broadband industry.

*Policy on Student Housing at Universities*²³³

The CGE recommended gender mainstreaming and affirmative action in allocating accommodation to university students.

*General policy on the Allocation and Management of Fishing Rights*²³⁴

In the drafting of this policy the contribution of the CGE was for the policy to allocate quotas for women so as to counter male dominance in the industry.

*Restitution of Land Rights Amendment Act*²³⁵

CGE proposed the amendment of Section 33 of the Restitution of Land Rights, which would promote and protect land ownership by women.

*Electoral Amendment Act*²³⁶

CGE advised the legislative to ensure that the Electoral Act is compliant with international and regional obligations such as achieving 50/50 representation between men and women in political parties.

*Traditional Leadership and Governance Bill*²³⁷

It was the CGE that recommended the amendment of Clause 5(1) that did not provide for equal representation of men and women of iziGodi under iziNduna.

²³² South Africa Connect: Creating Opportunities, Ensuring Inclusion: South Africa's Broadband Policy – Gn 953/2013 (Electronic Communications Act 36 Of 2005) Available at <http://discover.sabinet.co.za.uplib.idm.oclc.org/netlaw> accessed on 15 March 2018.

²³³ Policy on Student Housing at Universities 2013.

²³⁴ General Policy on the Allocation and Management of Fishing Rights 2013.

²³⁵ Restitution of Land Rights Amendment Act 15 of 2014.

²³⁶ Electoral Amendment Act 1 of 2016.

²³⁷ Traditional Leadership And Governance Framework Amendment Bill B8B-2017.

5.4.1.3. Human Rights Commission

The Human Rights Commission (HRC) was established by the Human Rights Commission Act 54 of 1994. Its overall and main function is to promote respect for human rights. In the strictest sense HRC does not form part of women national machinery as it focuses broadly on all human rights issues that concern everyone and not specifically women's rights.²³⁸ However since it is concerned with human rights of all people, women stand to benefit also. Moreover, its authority to enforce its decisions has helped in the eradication of human rights violation. This has covered the lacunae left unaddressed by the CGE which does not have enforcement powers.

In South Africa, like in most African countries, the platform to participate in politics is gained by means of joining political parties. Political parties play a pivotal role in delivering democratic government. That means one has to be a member of a political party to be able to have influence on the direction of the government. This therefore means that citizens who are not members of any political party have no direct opportunity to participate in the politics of the day in South Africa. An assessment of the present political parties in South Africa has shown that women have been given decision making positions in political parties. That has also helped women to enter into parliament.

Two key elements of democracy that were lacking in South Africa before 1994 were a vibrant civil society and free press.²³⁹ The civil society was often harassed by the state and there existed restrictive and repressive measures against the media.²⁴⁰ This generated gross violations of human rights, the transgression of humanitarian principles in conflicts and a legacy of animosity, fear, guilt and revenge.²⁴¹ Women after independence now have the same rights with men in accessing media. The media in particular contributed to the advancement of democracy.²⁴²

²³⁸ University of South Africa Unit for Gender Research in Law (n 16 above) at 249.

²³⁹ Sanders (n 17 above) at 82.

²⁴⁰ Sanders (n 17 above) at 82.

²⁴¹ Sanders (n 17 above) at 82.

²⁴² Vos (n 202 above) at 36.

5.5. CHALLENGES IN ACCESSING DEMOCRACY AND CITIZENSHIP RIGHTS

Notwithstanding the progress made in achieving gender equality so far, there are limiting factors that are still apparent in as far as women's access to democratic and citizenship rights is concerned. For instance, exercising and accessing rights in South Africa is being done in the context of structures that were set up by the Apartheid regime. However, citizenship goes beyond the formalistic legal notion. Citizenship as a status requires the ability of citizens to effectively claim and exercise constitutional rights and as a practice it calls for active participation of citizens at all levels of government and civil society.²⁴³ What is adversely affecting the practice of citizenship in South Africa by women, as Rafudeen argues, is structural inequality that is still persisting in South Africa.²⁴⁴ These structural inequalities are a barrier to women to access essential services. The major structural feature that hinders the full enjoyment of civil liberties by women is the fact that rights have to be accessed in line with the existing order in South Africa. This *status quo* according to Rafudeen 'continues to be profoundly shaped by the systemic racism of colonialism and Apartheid.'²⁴⁵

These structures that were set up by the Apartheid regime were more or less transferred into the current South Africa, leaving those who were oppressed striving, on their own, to access rights within their societal positions. The human rights discourse relies on the same logic that inevitably reinforces the conditions of structural inequality.²⁴⁶ Societal structures give people different status and that status differentiates their access to human rights. Such structural inequalities can hinder access to formal rights.²⁴⁷ An illustrative example given by Rafudeen on the accessibility of rights within the existing structural order is that of a single mother in the high-density suburb of Soweto compared to a suburban corporate executive. These two cannot be said to have the same power of political persuasion or opportunity.²⁴⁸ Gouws argues that there is a need therefore to radically

²⁴³ A Gouws (Shaping Women's Citizenship: Contesting the Boundaries of State and Discourse 79-83 Gouws A. ed (UN) *thinking Citizenship: Feminist Debates in Contemporary South Africa* (2005) 79.

²⁴⁴ Rafudeen (n 2 above) at 226.

²⁴⁵ Rafudeen (n 2 above) at 226.

²⁴⁶ Rafudeen (n 2 above) at 227.

²⁴⁷ Rafudeen (n 2 above) at 228.

²⁴⁸ Rafudeen (n 2 above) at 226.

transform South African structures that perpetuate gender oppression through the gender machineries and the current systems of government.

At the center stage of South Africa's representative democracy are political parties. It is through political parties that representative democracy in South Africa is operationalized.²⁴⁹ Members of the National Assembly, provincial legislatures and National Council of Provinces only join these governance institutions through party membership. At national and provincial levels political parties and not allow individual candidates contest elections and voters cast their ballots for a political party of their choice. Voters have no direct say on who appears on the electoral list of political parties, or on the order with which candidates who appear on political party list will appear in. The legislature would be displaced to the various legislative's positions according to the percentage of votes received by that specific political party.²⁵⁰

The major criticism of this type of democracy is that as it depends on political parties and therefore survives through intra-party democracy. Intra-party democracy refers to the level and methods of including party members in the decision-making process of a party, including the election of its public representatives and deliberations about party policies.²⁵¹ It also includes the level at which ordinary members have a say in the nomination process of candidates standing for election to various public bodies and they are also involved in policy formulation and in the election of their leaders. The main danger of inter-party democracy is that elites may wield too much power to the disadvantage of ordinary citizens within the political party.²⁵²

Despite the significant link between political parties and the political representatives, the 1996 South African Constitution does not have any provision that directly regulates the relationship between political parties and legislatures and executives.²⁵³ Further it has not put in place any mechanisms to encourage women to form political parties. The 1996 South African Constitution only contain several provisions that emphasizes the importance of the participation of all political

²⁴⁹ Vos (n 202 above) at 39.

²⁵⁰ Vos (n 202 above) at 39.

²⁵¹ Vos (n 202 above) at 42.

²⁵² Vos (n 202 above) at 42.

²⁵³ Vos (n 202 above) at 39.

parties represented at national and provincial level in the National Assembly and the Provincial Legislature.²⁵⁴ The Constitution is silent on whether these representatives participate in such institutions voluntarily or under instruction from the party that they represent and to what extent political party can control or guide decisions made by elected representatives.²⁵⁵

Practice has however shown that elected representatives are not free agents and they are subject to political party ideologies and agendas. Their allegiance lies with the political party and not the electorate.²⁵⁶ In actual fact however, they represent the political party and in turn the party represents the electorate. There is no direct accountability between the legislature and the electorate. It is on this basis that the South African democracy has faced some criticism.

In *Ramakatsa vs Magoshule*²⁵⁷ the court held that the right to participate in the activities of a political party imposes on every political party the duty to act lawfully and in accordance with its constitution. In this matter the Constitutional court declared invalid an African National Congress (ANC) Free State elective conference held in June 2012. The court's decision affirmed 'the importance of the right of party members to participate freely in the activities of the political party they belong to and also found that the constitutions of political parties have to ensure this happens'. Fallon and Viterna argue that to some extent democratization in South Africa has marginalized women as it is based on political party activism.²⁵⁸ This argument is based on the reasoning that under democratization, political parties and not social movements, control access to the state. They add that typically, these political parties are patriarchal and resistant to women's participation. As a result, women have generally found their stoutest political voice inside social movements.

Social movements were also experienced a brain drain of sorts when those at the forefront of women's movements were often the first to transition to the leadership positions within new women's offices of the state or women's branches of parties, or even new gender-specific NGOs,

²⁵⁴ 1996 Constitution (n 1 above) Section 1(d) provides that:

The Republic of South Africa is one, sovereign, democratic state founded on the following values:

d) Universal adult suffrage, a national common voter's roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.

²⁵⁵ Vos (n 202 above) at 42.

²⁵⁶ Vos (n 202 above) at 42.

²⁵⁷ *Ramakatsa vs Magoshule* 2013 (2) BCLR 202 (CC).

²⁵⁸ Fallon & Viterna (n 213 above) at 15.

thus hindering the progress of women's social movements by eliminating many movement leaders at the precise moment they were required the most.²⁵⁹ Moreover, women who make their way into paid positions often tend to be of a higher class, and better educated, than women who remain in community-based social movements, creating problems of discord and lack of unity and cooperation within the women's movements themselves since agendas may differ as a result.²⁶⁰

The notion of participatory democracy is linked to provision of specific mechanisms which improve access to necessary means to participate in democratic processes by otherwise marginalized sections of the population.²⁶¹ Yet, while ensuring equal access to the means to participate is a crucial aspect of democracy, it remains a challenge and relatively difficult to attain. The main problem is that not all citizens will be in a position to have their voices heard which creates a spiral of silence. Furthermore, not all citizens enjoy unlimited access to relevant information that would allow them to make informed political choices and to act on such choices.²⁶² Without relevant information people are hindered from making properly rational decisions affecting their lives.

Economically, women face social, economic and ideological barriers to full and equal participation. Women are perceived in terms of their expressive and reproductive roles rather than their economic potential. The large majority of women are confined in sectors of the economy that are marked by low wages and poor working conditions.²⁶³ Low remuneration is compounded by a culture of discrimination against women, particularly in relation to receipt of social benefits. Consequently, many women in South Africa have become restricted to the informal economy. Regrettably, it is usually not disadvantaged women who trigger the court's gender jurisprudence, but rather advantaged and male complainants. Lewis and Hussen conclude that for the majority of black women in South Africa, the very concept of liberal citizenship is still a pipe dream.²⁶⁴ Rights

²⁵⁹ Fallon & Viterna (n 213 above) at 15.

²⁶⁰ Fallon & Viterna (n 213 above) at 16.

²⁶¹ Vos (n 202 above) at 36.

²⁶² Vos (n 202 above) at 36.

²⁶³ D Lewis & TS Hussen (2014) 'Qualitative report for the young women govern South Africa project within the Women-Govt Project' (2014) available at www.ajms.co. (accessed on 21 August 2018).

²⁶⁴ Lewis & Hussen (n 263 above) at 14.

on paper are yet to be transformed into substantive rights.²⁶⁵ This is especially true for those women who have experienced the historical disadvantage that is the legacy of apartheid.²⁶⁶

Gender-based violence is often vindicated using the same reasoning. Efforts to govern women's bodies have not been restricted to the legal or policy domain.²⁶⁷ In South Africa, there have been several examples of women being sexually and verbally attacked in front of heckling crowds because they were wearing short skirts.²⁶⁸ Sections of society who justify this conduct argue that women who dress in that manner provoke men, which leads to rape and other sexual crimes. This attitude has been corroborated by interviews conducted with South African male rape convicts who claimed sensationally that they targeted women who 'asked for it', or who were 'cheeky'.²⁶⁹ This was mostly true of men who had partaken in gang-rapes. Homophobic sexual crimes against black lesbians are also usually carried out by groups of men, revealing the ways in which violent men see disciplining deviant women as a central component of their masculine identity. This is so in spite of the Constitutional provision that forbids discrimination on the ground of sexual orientation. An analysis of such everyday lived experiences of women in South Africa indicates that gender-based discrimination shapes women's lives in a way that still subordinates women, despite a reformist constitution and liberal laws.

Rape and GBV are often used as an apparatus to control women and to restrict them from fully accessing equal citizenship. According to Moffet, 'in post-apartheid democratic South Africa, sexual violence has become a socially endorsed punitive project for the purpose of maintaining the patriarchal order. One result has been to constrict and compromise women's experience of citizenship, as the promises of constitutional equality are countered by the fear of sexual violence.'²⁷⁰

²⁶⁵ Lewis & Hussen (n 263 above) at 14.

²⁶⁶ Lewis & Hussen (n 263 above) at 14.

²⁶⁷ H Moffet 'Sexual Violence, Civil Society and the New Constitution' in H Britton: J Fish & S Meintjes (eds) *Women's Activism in South Africa* (2008) 155.

²⁶⁸ Moffet (n 267 above) at 155.

²⁶⁹ Moffet (n 267 above) at 155.

²⁷⁰ Moffet (n 267 above) at 155.

Gender Based Violence (GBV) in South Africa has reached alarming rates. Moffet claims that at least one in three South African women can expect to be raped in their lifetime and one in four will be beaten by her domestic partner.²⁷¹ On the basis of these findings, she argues that South Africa has the highest rate of sexual violence of any country not at war. Moffet traces GBV and its roots to the system of apartheid in which violence was used as a mechanism of control against the Black Africans and other races.²⁷² Similarly, sexual crimes like rape in South Africa are being used as a tool of social control. Women have become classified as ‘the other’ in present day South Africa just as the Black Africans were ‘the other’ during the apartheid era. The use of violence to control the Black African population is an apartheid legacy that persists having morphed into a culture of gender-based violence.

A most prominent example reflecting the linkages between GBV, HIV/AIDS and women’s status in South Africa is that of former South African President Jacob Zuma’s Rape Trial.²⁷³ The Zuma rape trial reflects the most problematic aspect of GBV in South Africa, normalization and a lack of political will to deal with it decisively.²⁷⁴ The fact that the act was perpetrated by an influential person in the government makes the case much more solemn. The former president demonstrated no remorse over his deplorable conduct neither did he show any concern for having had unprotected sex with an HIV-positive woman.²⁷⁵ Yet he had unwittingly exposed his wives to a great likelihood of HIV infection. Another problematic area of the case was the use of the survivor’s history of rape in her childhood to establish that she was unbalanced and for that reason not to be trusted. Such comportment shows the antagonistic attitude of the country’s judiciary towards rape victims who are usually women.²⁷⁶ This discourages women to come forwards with non-consensual sex crimes as they would fear victimization and loss of dignity.

The case represented a step back in women’s fight for their democratic and citizenship rights because it left some women with the belief that as citizens they cannot access the justice system

²⁷¹ Moffet (n 267 above) at 156.

²⁷² Moffet (n 267 above) at 155.

²⁷³ *S v Zuma* 2006 SA (WLD).

²⁷⁴ A Ohja (2015) ‘Two Decades of Democracy: Gender and Citizenship in Democratic South Africa’ (2015) 3 *Asian Journal of Multidisciplinary Studies* 157.

²⁷⁵ Ohja (n 274 above) at 157.

²⁷⁶ Ohja (n 274 above) at 157.

without interference.²⁷⁷ These kinds of negative developments not only detract women's gains but also bring into question the capacity of the state to deliver justice. Moffet points out that 'the 2006 rape trial of former president Jacob Zuma provided a clear demonstration of the shortfall between the rights of women as guaranteed under the 1996 Constitution and the cultural, political, judicial and social backlash women risk should they lay claim to these rights.'²⁷⁸

In Moffet's view, the South African democracy is paradoxical as far as women's rights are concerned.²⁷⁹ The evidence of the millions of women traumatized by sexual violence in South Africa is indicative of the astounding inconsistency between the ostensibly hard-won gender rights enshrined in the country's constitution and women's lived-in experiences characterized by violation of these very freedoms.

Even the Truth and Reconciliation Commission (TRC) that was set in terms of the provisions of Promotion of National Unity and Reconciliation Act to deal with moral dimension of the transition at independence at first ignored the issues of GBV. Women were not addressed as victims in that respect. The TRC's tasks included the following:²⁸⁰

- Addressing the trauma of struggle
- Repairing trust
- Restoring humanity (and humanness, often referred to as Ubuntu)
- Building a moral basis for creating a society with new values
- Legitimizing the new dispensation.

Rape was one form of the violence and injustice that was committed against women and girls in South Africa during the liberation struggle from both sides of the struggle.²⁸¹ The TRC was thus, in its healing and reconciliation process, supposed to deal with the issues of rape and sexual violence that were committed against them. In contrast however during the hearings by the TRC

²⁷⁷ Ohja (n 274 above) at 157.

²⁷⁸ Moffet (n 267 above) at 155.

²⁷⁹ Moffet (n 267 above) at 158.

²⁸⁰ Du Toit *A Philosophical Investigation Of Rape: The Making and Unmaking Feminine Self* (2009) 10.

²⁸¹ Du Toit (n 280 above) at 10.

women were asked to forgive gross human rights violations perpetrated against their male relatives.²⁸² Males were the ones who were easily recognized by the TRC as political agents involved in the liberation struggle. Women were never asked to forgive on behalf of themselves as victims of rape and GBV. Therefore, women did not benefit as much from the TRC in their own respect. In 1996 the Center for Applied Legal Studies (CALs) at the University of Witwatersrand made a submission to the TRC on their perceived lack of sensitivity to gender issues. Their main concern was that women were not taken seriously as victims as they were seldom asked to forgive on their behalf. In response to this plea, the TRC then held Special Women's Hearings or Gender Hearings which were conducted and reported separately from the main hearings. This was again criticized on the basis that making women into a special case was in itself a form of discrimination.

Women have on their part consistently resisted GBV through their engagement in movements as well as in their intimate relations. Moffett argues that sexual violence against women enforces a certain social and political order and women's struggle against it is a form of political resistance.²⁸³ The act of resisting is defiance of the patriarchal order and prevents the violence from being normalized. Women's activism against GBV takes place both in the private and public domain. When they negotiate for power with their partners, this constitutes political action in the private domain and in the public domain such action takes the form of protests against violence on the street.

In the fight against GBV, the ANCWL has made its distinctive presence felt within the political domain in which they endeavor to engage with gender issues head-on. However, claims have been made that while the Women's League was formed on firm political grounds, their fight against gender injustice has had limited political repercussions as they continue to shy away from taking on the tenacious patriarchal *status quo* that reduces women to victims.²⁸⁴ The Women League continues to be inaudible and they are often the subject of critique as the contributions they make towards gender justice remain minimal. They refuse to critically engage with socio-political issues

²⁸² Du Toit (n 280 above) at 11.

²⁸³ Moffett (n 267 above) at 133.

²⁸⁴ P Segalo 'Gender, Social Cohesion and Everyday Struggles in South Africa' (2015) 49 *Psychology in Society* 74.

that upset women's day to day lives. In shying away from confronting the gender injustices they witlessly contribute towards the continuous drowning of women's voices.²⁸⁵

While there has been an upsurge in the total of women emancipated politically, a culture of silence around women struggles with GBV still persists. Women are accepted as full citizens on paper but within the communities in which they belong, they have limited power and control over their lives especially if they are victims of GBV. Since the transition to democracy, women can now own property and are allowed to vote meaning they can access full citizenship rights. However, this democratic freedom does not necessarily result automatically in changes in structural power relations between males and females and generally resources continue to be monopolized by men.²⁸⁶

Moffet agrees that in post-apartheid South Africa, socially prescribed gender rankings along with regulation of women's bodies are largely maintained through sexual violence.²⁸⁷ She argues that this attitude has taken the form of a 'national project' in which a number of men may indeed have bought into the notion that perpetrating sexual violence on women is an act of performing 'a necessary work of social stabilization'.²⁸⁸

Moffet is critical of fatalism now present in South African society that simply accepts that it is women's lot to be raped, and which sees this as a tragic cross to be endured, rather than an unlawful and indefensible act of violence, particularly in the era of HIV/AIDS.²⁸⁹ This notion, according to Moffet is premised on the mistaken belief that the propensity to rape has been fueled by the emasculation of the majority of South African men experienced during apartheid.²⁹⁰ There are two complications associated with this analysis however which render it problematic, and perhaps inapplicable. The first one is that it offers no critique of patriarchal frameworks that shape such 'pride' while laying the blame for rape on victims of apartheid and secondly, they assume that perpetrators of rape are blacks from poor households.

²⁸⁵ Sigalo (n 284 above) at 74.

²⁸⁶ Sigalo (n 284 above) at 75.

²⁸⁷ Moffet (n 267 above) at 159.

²⁸⁸ Moffet (n 267 above) at 159.

²⁸⁹ Moffet (n 267 above) at 159.

²⁹⁰ Moffet (n 267 above) at 162.

According to the Centre for the Study of Violence and Reconciliation (CSVR), GBV is facilitated culturally by practices that place males in a dominant social position in relation to women which include practices such as *lobola*, *ukuthwala* and Sharia law where women fundamentally hold a position subordinate to men.²⁹¹ This normally becomes institutionalized through the process of socialization, which teaches both males and females to conform to these conservative cultural and religious expectations. CSVR points out that ‘some of these practices implicitly or explicitly condone and tolerate GBV’.²⁹²

South Africa’s Commission for Gender Equality has concluded that *ukuthwala* is a harmful cultural practice, fueling GBV, as it is hard for women who find themselves in such relationships to negotiate safe sex. The practice is also in violation of girls’ rights in terms the Children’s Act (No. 38 of 2005) of the 1996 Constitution. It also goes against international instruments ratified by the South African government such as the Convention on the Elimination of all Forms of Discrimination against Women, which calls upon the government to uphold gender equality and protect women and girls against any form of violence.²⁹³ Harmful cultural practices such as *ukuthwala* have serious repercussions for women’s participation as citizens and for their participation in democratic processes.²⁹⁴

The appallingly high prevalence of gender-based violence in countries like South Africa, a chief violation of the human rights of women and girls, arrests their economic and social potential. The concern is whether women can exercise franchise uninhibited in the face of widespread gender-based violence. They cannot act free from intimidation and punishment. This constitutes a source of serious infringement of the rights of women in South Africa. The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) recognizes that violence against women has an inhibitory effect on women’s ability to access the same rights and freedoms as their male counterparts. Critically, violence against women overlaps with other practices

²⁹¹ Centre for the Study of Violence and Reconciliation (CSVR) Report available at www.csvr.org.za/.../Gender%20Based%20Violence%20in%20S... 8 (accessed on 24 August 2018).

²⁹² CSVR (n 291 above) at 8.

²⁹³ South Africa ratified the Convention on the Elimination of all forms of Discrimination against Women (CEDAW) http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en (accessed on 26 May 2018).

²⁹⁴ CSVR (n 291 above) at 9.

perpetuating subjugation and prejudice against women that present themselves in the political, economic, social and cultural spheres of women's lives, along with gender imbalances, linked to patriarchal power relations that take women as inferior to men.

McEwan argues that political and civil rights are of little benefit to most women unless socio-economic rights are accorded centrality and interpreted in gendered terms.²⁹⁵ The tendency of global economic processes to amplify inequalities and undermine the possibilities for economic redistribution is also a major challenge to those struggling for gender justice. Local, national and global economic factors therefore have a bearing on the ways in which women's citizenship is mediated. The South African context demonstrates clearly the importance of second-generation rights (social and economic), which go beyond first-generation rights (political and civil). 'The exclusion of poor, black women from effective access to social services, economic resources and opportunities means that as yet South Africa has not achieved full citizenship for all.'²⁹⁶

5.6. CONCLUSION

Having endeavored to establish what South Africa has done so far to combat inequality and improve the status of women it has to be noted that a lot still needs to be done. The pursuit of gender equality remains a challenge in South Africa. Despite the noticeable changes in South Africa on the status of women and equality a lot needs to be done in pursuit of gender equality to establish a balanced society. The living conditions of many women have not yet improved when compared to those of men. Hence the need to address gender inequalities in South Africa goes beyond having a Bill of Rights in place, and equality legislation.

The transition from apartheid to post-apartheid witnessed a remarkable shift in gender politics in South Africa, related to the concepts of civil society and citizenship, universality and equality, and the pluralization of politics at all levels. Gender issues have been pivotal to State restructuring, including increased formal political participation of women and national vehicles for the promotion and maintenance of gender inequality. McEwan carried out a case study in Cape Town

²⁹⁵ McEwan (n 209 above) at 469.

²⁹⁶ McEwan (n 209 above) at 469.

to demonstrate that even though local government has adhered to some guidelines it is failing to nurture meaningful participation, particularly amongst black women.²⁹⁷ The latter have not been involved in development projects and also perceive local government as having failed its mandate to facilitate participation. There is a broad frustration with the performance of local government in this regard.

Accordingly, the South African Government needs to be taken to task for it to uproot these structural inequalities and it need to involve a range of stakeholders such as non-governmental organizations and faith-based organizations.²⁹⁸ Media can be another forum where women's issues may be tackled from. There is need to adequately cover women issues and women must be given a platform to air their views without fear and intimidation.²⁹⁹

Masango and Mfere, quoting Amadi, argue that the persistent yoke of inequality on women can only be eradicated if there is:³⁰⁰

- (a) Full implementation of Affirmative Action across Africa.
- (b) Constitutional reform to enlarge the chances of women.
- (c) Novel re-orientation on discriminatory cultural practices.
- (d) Re-invention of governance with novel participatory rules for women.

With regards to democracy, its improvement in quality and form may assist in the eradication of gender inequalities inherent in South Africa. It can be argued that representative democracy in South Africa relies heavily on the political parties yet political parties are self-governed entities with their own agendas. Additionally, the influence of the political parties is enjoyed by the elite who have wealth.³⁰¹ Very few women possess such power to influence the decisions in the political parties as compared to their male counterpart that gained access to wealth through structures of apartheid when women were still under oppression. However, to suggest that South Africa must do away with a party system might be far-fetched, unrealistic and over ambitious. Hence, the focus

²⁹⁷ McEwan (n 209 above) at 480.

²⁹⁸ Apleni (n 12 above) at 2.

²⁹⁹ Apleni (n 12 above) at 3.

³⁰⁰ Masango & Mfere (n 3 above) at 24.

³⁰¹ Vos (n 202 above) at 46.

must be on the improvement of that existing system. The enhancement of democracy through a party system requires State intervention through National legislation that sets out guidelines for the activities of each political party and measures each political party's needs to advance democracy and gender equality. This legislation may be backed by section 7 (2) of the Constitution that requires the state to, *inter-alia*, promote and fulfill rights in the Bill of rights.³⁰²

Such legislation may also assist in managing intra-party democracy. Intra-party democracy must be a national concern as it may ultimately improve the quality of democracy in the country as whole.³⁰³ The National Party legislation would facilitate democracy in many ways that include, as suggested by Katz Ride in a Pierce de Voss article, the determination of what constitutes a political party and regulation of the political party activities to ensure appropriate forms of party organization and behavior.³⁰⁴

In essence the state needs to provide a legislative framework upon which political parties have to abide by in order to enhance democracy which encourages political parties to, among other things, ensure gender or ethnic balance in choosing candidates for public office and regulating the relationship between political parties and the electoral system or the electorate. Such party laws would put in place minimum requirements necessary to protect the democratic participation of party members in the course of executing the activities of the party. These minimum requirements must encompass a whole range of political parties' activities starting from the formation of party policies, the election of public office bearers and the selection of the party's candidates for elections as public representatives.³⁰⁵ Achievements made by South Africa in the inclusion of women in citizenship and democratic participation cannot be underrated when compared to the Zimbabwean situation. This necessitates a discussion on what Zimbabwe can learn from South Africa that is tackled in the next chapter.

³⁰² 1996 South Africa Constitution Section 7(2) provides that:
the state must respect, protect, promote and fulfil the rights in the Bill of Rights.

³⁰³ Vos (n 202 above) at 46.

³⁰⁴ Vos (n 202 above) at 43.

³⁰⁵ Vos (n 202 above) at 43.

CHAPTER SIX

BEST PRACTICES FROM SOUTH AFRICA AND OTHER RECOMMENDATIONS.

6.1. INTRODUCTION

South Africa and Zimbabwe have somewhat similar social and traditional contexts and so they share an analogous perception of women as second-class citizens. However, South Africa has made significant strides in an attempt to redress gender disparity and encourage political participation and respect of democratic and human rights of women. South Africa has, since attaining independence in 1994, expeditiously given women opportunities to participate politically. This has been in part a result of South African women's political activism, which began in the apartheid era. South African women from across the political divide were able to unite and with one voice call for improvements in their welfare. They have managed to maintain this position in the post- apartheid era and as a result, South African women, unlike their Zimbabwean counterparts, enjoy better access to governance and democratic and citizenship rights not just in the region, but also internationally.

It is apparent from the discussion in chapter four that there are a lot of lessons Zimbabwe can extract from the South African context in relation to gender equality and women's access to democracy, citizenship and protection of women's human rights. This now requires Zimbabwe to do more to advance women's status and curb women's marginalisation. In chapter four it has been contended that, at least at an institutional level, women in South Africa are better off than women in Zimbabwe with regards to equality, access to democracy and citizenship. As such Zimbabwe may learn some best practises from South Africa.

6.2. LESSONS FOR ZIMBABWE FROM SOUTH AFRICA

Although Zimbabwe has shown its commitment to gender equality in the 2013 Constitution and by endorsing regional and international instruments, the gender gap still exists in various sectors. This position South Africa did overcome through consideration of the plight of women's movement at independence negotiations, affirmative action, equality legislation, activeness of state institutions in combating gender equality and proper financing of the state machinery to meet its mandate. From South Africa's strategies of addressing women's equality, Zimbabwe may learn the following lessons: -

6.2.1. Equality Legislation

It has been noted that the South African equality clause mandates the government to put in place legislation for the promotion of equality. In section 9 (4) it provides that:

No person unfairly discriminates directly or indirectly against anyone on one or more grounds in terms of subsection (3). National Legislation must be enacted to prevent or prohibit unfair discrimination.

Following this provision South Africa enacted the Promotion of Equality and Prevention of Unfair Discrimination Act (Equality Act).¹ According to Currie and De Waal the Equality Act has three main anchors which are the prevention of unfair discrimination, access to Justice and promotion of Justice.² With regards to access to justice all Magistrates' and High Courts are Equality courts. This abridged the financial burden of legal suits that were required to go to the higher courts in cases of unfair discrimination.³ The contribution made to the equality of women by this legislation is quite tremendous. On preferment of equality, chapter five sets out a list of positive duties placed on the state, companies, partnerships, clubs and associations to foster substantive equality and address unfair discrimination. These measures include crafting of action plans, codes of conduct, internal mechanisms and information campaigns.⁴ It also takes into account discrimination in

¹ Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (Equality Act).

² I Currie & J De Waal *The Bill of Rights Handbook* (2017) 245-248.

³ Equality Act (n1 above) Section 16(1).

⁴ Equality Act (n 1 above) Section 25 & 26.

labour and employment, education, health care services, housing, accommodation, land and property.

Zimbabwe can emulate South Africa to come up with an equality legislation which expounds on equality and enjoins the establishment of equality courts in the country. Although there is no constitutional provision that specifically necessitates the enactment of any national equality legislation it can use the Affirmative Action provision in terms of section 56 (6) which 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.

This legislation must be rapt with helping women to access equality. Currently women can only contest the infringement of their rights in the High Court or Supreme Court or Constitutional Court in terms of chapter 8 of the 2013 Constitution. According to section 166, an individual can approach the Constitutional Court directly without going through the High Court provided that the court has given a direct access in terms of the Constitutional Court rules. Approaching the High Court in Zimbabwe is very expensive for run-of-the-mill citizens. Moreover, average women cannot easily benefit from the direct access provision of the Constitution unless they have financial resources for a lawyer and other related costs requisite at the apex court. Once the Equality Act is enacted in Zimbabwe it will inevitably compel the establishment of Equality Courts. Having an Equality Act in place and Equality Courts that deal with section 56 violations for use by women will help them to be enthused to pursue cases of inequalities and this would improve their status.

6.2.2. Other Legal Frameworks.

Over and above the Equality Legislation, South Africa has instigated a reformist legislative framework to guarantee parity between women and men. These include the espousal of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, and the Children's Act of 2005, which strive, amongst other things, to guarantee a gender responsive treatment of girls in conflict with the law. Copious policies and programmes have also been framed along with plans of action, to embolden the quest for gender equality and eradicate discrimination against

women. These include among other things the 365-day National Plan of Action to end Gender Violence and the National Gender Policy. A Strategic Framework has been established in order to monitor evolvement of women's emancipation and gender equality within the public service.⁵

6.2.3. Women's Reproductive Rights

Dissimilarities between Zimbabwe and South Africa are especially pronounced if one considers the handling of women's reproductive rights along with bodily and psychological integrity. While both Zimbabwe and South Africa explicitly provide for reproductive rights and bodily and psychological integrity, only in the South African Constitution is this right treated as an unqualified right.⁶ Section 48 of the 2013 Constitution provides that:

- (1) 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 is different from the South African position wherein section 12 provides that:

- (2) Everyone has the right to bodily and psychological integrity, which includes the right:
 - (a) to make decisions concerning reproduction.

The new Zimbabwean Constitution of 2013 provides a qualified right to make choices *vis-à-vis* reproduction but also meritoriously prohibits abortion by calling for an act of Parliament to be made to safeguard the lives of unborn children, except in rare cases. Unlike Zimbabwe, South Africa openly provides an unqualified right to make choices about reproduction.⁷ Limiting the reproduction rights of women adversely affects their status because when one is compelled to keep a pregnancy by the State, which the Government would not provide for and which might not have been premeditated, it adds an encumbrance on those women. Furthermore, where there are no

⁵ S Abdennebi-Abderrahim Study on discrimination against women in law and in practice in political and public life, including during times of political transitions at 6 available at https://www.ohchr.org>wg_global (accessed 16 October 2018).

⁶ Research and Advocacy Unit 'Active Citizenship and Women in Zimbabwe' (2017) at 10 available at www.researchandadvocacyunit.org (accessed on 21 October 2018).

⁷ Research and Advocacy Unit (n 6 above) at 2.

easily accessible facilities for termination of pregnancy women end up using facilities that are insalubrious and chancy due to compelling personal reasons for them to eliminate their pregnancy.

Zimbabwe needs to follow the South Africa model of giving women absolute reproductive rights and provide for safe facilities accessible to women when the need arises. This will also help to curb the possibility of children having children. Following the case of Mudzuru, through which child marriages are now outlawed, there is a gap that has been left unfilled to the detriment of women.⁸ In a situation whereby a girl child has been impregnated and the husband is prohibited by the law to marry her or maybe the father has been prosecuted for statutory rape there is no contingency given to the girl child concerning the pregnancy. This can however be resolved by giving women absolute reproductive rights. Women must choose what to do with the pregnancy and facilities must be provided for women who choose to abort.

6.2.4. Women's Involvement in Democracy

The other problem in Zimbabwe which South Africa has addressed which made her overtake Zimbabwe in terms of women's equality is that it involved women in the negotiations of gender issues prior to independence. The envelopment of women at the transitional stage was a cornerstone to gendered democracy in South Africa. This was not present in Zimbabwe such that women's concerns only fit into the plot later after men had amassed power and dominated key positions after independence. During independence parleys in South Africa, women were not adequately represented and gender issues were sidelined. Seemingly in Zimbabwe the tussle over women's freedom and their emancipation only commenced after independence. Even at the negotiation of the Zimbabwean unity government in 2008, women were underrepresented and gender issues were shelved again. There was only one female representative out of six.⁹

At this stage Zimbabwe cannot turn back the hands of time to the negotiations with the colonizers to present women issues. However, it has to make it a priority to embroil women on national

⁸ *Loveness Mudzuru & Another vs Minister of Justice, Legal and Parliamentary and others* CCZ12/2015.

⁹ M Maphosa; N Tshuma; G Ncube 'Participation of Women in Zimbabwean Politics and the Mirage of Gender Equity' (2015) 4:2 *Ubuntu: Journal of Conflict and Social Transformation* 127.

negotiation tables whenever occasion calls. Currently there is no involvement of women in issues that affect their representation and status. State institutions need to represent women and also ensure women representation at national programs and processes. Seemingly the Ministry of Women Affairs apparently represents the government to people and not women to government.

6.2.5. National Quota System

Both South Africa and Zimbabwe have quotas in place to guarantee that women are amply represented in their party lists. However, the quota system is practiced at the discretion of political parties. For South Africa it has worked yet in Zimbabwe it is still to produce favourable results. Since the end of the apartheid system and the first democratic elections in 1994, women in South Africa have continued to make advances in the field of politics and governance in South African.¹⁰ Before South Africa's elections in 1994, in parliament, female representation was only 2.7 percent.

There was a drastic revolution after 1994 however and women gained 27 percent of parliamentary seats in the 1994 post-apartheid elections. This number amended in the 1999 elections when women earned 30 percent of representation. The upward trend persisted in 2004 when representation improved to 32 percent. In the upper house of parliament, women won 16 of the 54 seats, which is equivalent to 29.6 percent. At the local level, there has also been a steady upturn in the political participation of women. For instance, in the 1995 local elections, women garnered 19 percent of local offices. This percentage rose to 29.6 after the 2000 local elections and scaled further higher to 40 percent in 2006 and 42.3% in 2009. These achievements were made conceivable by a voluntary gender quota adopted by the African National Congress (ANC). The party statute has a provision calling for a quota of not less than fifty percent of women in all elected structures.

¹⁰ Abdennebi-Abderrahim (n 5 above) at 35.

6.2.6. Women's Political Representation

On the ranking of Women Political Participation South Africa currently stands at the fourth position regionally and eight globally.¹¹ One has to however view this position against the background that those women who easily made it the top were firstly ANC members and also had some links to prominent male figures. For example, Nkosana Zana Dlamini Zuma is the ex-wife to the former President Jacob Zuma and Winnie Madigizilela Mandela a former wife to the former President Nelson Mandela. This can be viewed to mean that numbers of women in Parliament may be compromised by party loyalty as opposed to developmental issues. Women's political equality goes further than their representative numbers. It also requires an assessment as to the kind of women in such decision-making positions for in most cases those who make it to be on top may not be akin to women issues and in most cases they are not from the grassroots.

Zimbabwe has been trailing far behind in appointment of women in public office. In September 2013 then President Robert Mugabe allotted a 26-member cabinet which contained only three women. The three women made up a meagre 12% of the cabinet, 38% shy of the standard 50-50 representation based on sex and well below women's proportional population considering the fact that women make up 52% of the population¹² Additionally, only three women out of 13 ministers of state were appointed, 10 of which were provincial affairs ministers and the other three serving the presidium. The President also appointed only five female deputy ministers out of 24. Contrary to the provisions of the Constitution and the SADC Protocol on Gender and Development only 60 women were elected to the National Assembly through proportional representation.

Political parties are at logger heads with each other fighting for political hegemony in the country yet none of them are fighting for women's rights. The president of the main opposition party, the Movement for Democratic Change, Mr. Nelson Chamisa at some point addressing his followers, castigated Dr Grace Mugabe and said as a woman she must know her position and avoid venturing into politics. He even sensationally indicated that even his wife must know that her position is to cook for him. Such proclamations show a total disdain for women in the arena of politics

¹¹ Abdennebi-Abderrahim (n 5 above) at 23.

¹² Maphosa *et al* (n 9 above) at 145.

countering the constitutional notion of unfair discrimination. Of note also is the hounding out of the Movement for Democratic Change – Tsvangirai (MDC-T) party of the Vice President, which, while admittedly had political motivations, also contained undertones of gender discrimination. The implication seemed to be that as a woman, Khupe was not passably equipped or proficient in leading the party.

Women parliamentarians should be proactive in framing legislation that obliges political parties to act in harmony with affirmative action policies. Steps should also be taken to appraise the existing legislative framework through amendments that incorporate gender sensitivity and uphold women's rights. Female parliamentarians must form networks with their constituents and make gender equality issues a priority. In so doing, they should endorse and protect women's rights and seek to emancipate women economically and socially. Women parliamentarians should partner with women athwart the political divide to set up a women's coalition to campaign for a mutual women's agenda.¹³ Efforts should also be made to strengthen the reach and functions of the Women Parliamentary Caucus and the Parliamentary Portfolio Committee on gender which is responsible for monitoring and evaluation of implementation of policies on gender equality and women's empowerment.¹⁴

6.2.6. Financing of Democratic Institutions

While both countries have set in place appropriate democratic institutions which women can use to assert their political rights, the variance rests in the effectiveness of these institutions. Zimbabwe is lacking on the implementation of Gender related programs and policies through its institutions. The major contributing factor is lack of prioritization in resource allocation towards gender related institutions. For instance, the Ministry of Women Affairs has always been allocated an insufficient budget and the Gender Commission is failing to tick off with the essential impact because of privation of resources.

¹³ S Abdennebi-Abderrahim (n 5 above) at 27. Study on discrimination against women in law and in practice in political and public life, including during times of political transitions at 27 available at <https://www.ohchr.org/.../women/.../publicpoliticallife/africaregi>. (accessed on 16 November 2018).

¹⁴ T Guzura Are we there yet? An evaluation of the impact of the Zimbabwe National Gender Policy on Gender Mainstreaming in Zimbabwe (2014) available at <https://www.researchgate.net/publication/304834003>. (accessed on 28 October 2018)

6.2.7. Improving Awareness on Women's Rights

Zimbabwe needs to progress on the awareness of human rights from grassroots level to certify the incorporation of women from both rural and urban and traversing all age groups. Zimbabwe and South Africa rank 107 and 88 respectively in the global gender related development listing. This is generally indicative of the low priority given to gender with respect to access, control and ownership of economic resources and decision-making positions in Zimbabwe. Therefore, more effort has to be invested to ensure that gender imbalances among men and women, rich and poor are addressed adequately.¹⁵

6.2.8. Political Parties to Involve Women

Political parties in Zimbabwe should also create an atmosphere forbearing of women's participation as voters, candidates and political party founders. Taking this into account, political parties should come up with measures to improve the number of women in party leadership positions while at the same time implementing internal rules that mandate that the party progress in terms of women appointed to influential political posts until women occupy at least 50 percent of positions in each election. Political parties should also deal with gender equality issues in their programmes and activities and make concerted efforts to distribute equal and sufficient resources for women's political campaigns.

South Africa has also seen the establishment of vibrant women's political parties through the influence of Helen Zille of South Africa's Democratic alliance and Mamphela Ramphele, leader of Agang political party. South African women have been prompted to form their own political parties by the dearth of enthusiasm among existing political parties, mostly male dominated, to champion women's political representation. In male dominated political parties' women's roles are mainly confined to the parties' women's wings. Ndlovu and Mutale are of the view that women's divisions in political parties in Zimbabwe are toothless bulldogs whose main function is to

¹⁵ M Mulenga; G Manase & B Fawcett (2001). An Analysis Of Sanitation Policies In Southern Africa: The Case Of Gender Policies In Sanitation In South Africa, Zambia And Zimbabwe at 1. Available at <http://www.researchgate.net/publication/24245784>. (accessed 15 October 2018).

mobilise women as voters.¹⁶ Fundamentally, the birth of women's political activism has been essential in prompting the positive changes in women's political participation in Africa.¹⁷ Yet, in Zimbabwe, the foremost female led political party, the Zimbabwe Union of Democrats, was only created 19 years after independence in 1999 by Margaret Dongo and it did not survive due to lack of government support and victimisation.

6.3. OTHER RECOMMENDATIONS FOR ZIMBABWE

Over and above the mentioned lessons which may be learnt from Zimbabwe, due to her unique demographical set up may also contemplate the following endorsements which can arguably improve the status of women from all sectors. These recommendations are as follows:

6.3.1. Constitutional Reform

In this regard constitutional reform means a thorough relook into constitutional provisions and which ascertains the need for enhancement either by amendment, restructuring certain provisions or inserting more provisions.

6.3.1.1. The Bill Of Rights

The Zimbabwean bill of rights can draw lessons from the South African bill of rights as far as protection from discrimination is involved. RAU¹⁸ argues that the South African bill of rights mandates the South African government to ratify national legislation to avert private discrimination. The Zimbabwean Constitution's Bill of Rights on the other hand does not explicitly recognise private discrimination. This, according to RAU is a shortcoming on the part of Zimbabwe's 2013 Constitution despite the fact that it provides that both men and women have the

¹⁶ S Ndlovu & SB Mutale Emerging Trends in Women's Participation in Politics in Africa (2013) 3:11 *American International Journal of Contemporary Research* at 74.

¹⁷ Ndlovu & Mutale, (n 16 above) at 74.

¹⁸ Research and Advocacy Unit (n 6 above) at 9.

right to equal treatment, including the right to equal opportunities in political, economic, cultural, and social spheres.¹⁹

6.3.1.2. Maternity Leave vs Paternity Leave

Section 53 has pregnancy as one of its itemized ground on the prohibition of unfair discrimination. The same section prohibits both direct and indirect discrimination in section 54 (4). This is a welcome development and a huge contribution towards the status of women in Zimbabwe. Nonetheless, it can arguably be said that the section propagates indirect discrimination in section 65 (7) by providing that:

Women employees have a right to fully paid maternity leave for a period of at least three months.

Yet it does not accord men any paternity leave where there is a new baby born in the family.

Indirect discrimination, as was discussed in chapter 4, exists when an apparently central provision of the law has a different effect on groups of people who are supposed to benefit from it. Section 65 deals with labour rights and these labour rights must accrue to both male and female employees. Yet maternity leave is accruing only to female employees without men being given paternity leave. This is probably based on the fact that because women are the carriers of pregnancy they need time to be with the babies. However, giving women time to be with the babies without giving men the same responsibilities distinguishes unfairly between men and women. It also assigns women a duty or a role or rather a family responsibility which men are not given. It has to be recognized at constitutional level that when men have a mutual family responsibility over their new born babies with their wives they must be given paternity leave from the time their baby is born. Giving women maternity leave without giving men paternity leave takes women back to the conditions of oppression based on care duties and family responsibility. A constitutional reform is therefore being advocated to enact provisions for paternity leave on the same conditions with women. Men and women must take leave at the same time to help each other to prepare for the coming of the new baby.

¹⁹ Research and Advocacy Unit (n 6 above) at 9.

6.3.1.3. Composition of the cabinet

Ever since the enactment of the 2013 Constitution the cabinet has never achieved gender equality in its formal or substantive nature. The 2018 cabinet consisted of 6 women and 14 men, women representation contributing 30%. Although there could be other political confines in the attainment of gender equality at cabinet level the very provision of the constitution possesses a great limitation to the effect that the president is limited in his exercise of powers to choose a significant number of women and is also not being compelled to observe gender equality. Ministers and deputy ministers are appointed in terms of section 104, which provides as follows:

- (1) Ministers and deputy ministers are appointed from among senators or members of the National Assembly, but up to five, chosen for their professional skills and competence, may be appointed from outside parliament.
- (2) In appointing ministers and deputy ministers, the president must be guided by considerations of regional and gender balance.

The major provisions which disregard gender equality are apparent from the given provisions. Firstly, the president is not mandated to ensure gender equality in the composition of the cabinet. He is only supposed to take the issue of gender balance as a mere recommendation. Secondly the inclusion of women in the cabinet can be said to be heavily limited by sub section (3) which requires members to come from Parliament except for five. So, for women to be able to stand a higher chance of inclusion in cabinet they need to have a majority as parliamentarians in either houses or one of the two houses. The major question is whether women with better qualifications can stand an equal chance to compete with men to be members of parliament and then of cabinet.

Women's drawback with regards to their entry into politics has been discussed in chapter three. Furthermore, practice has shown that only Members of Parliament from the ruling party are appointed to be cabinet ministers unless if there is an extenuating arrangement like the one which subsisted in 2008. This further limits the chances of women to be appointed into cabinet. There is therefore a need to amend section 104 (3) to increase the number of those appointed on the premises of their skill. It also needs to be indicated that this cabinet does not necessarily have to draw from the ruling party alone. If they are to be appointed from Members of Parliament section 104 (4) has to make it mandatory for the president to produce a gender balanced cabinet.

6.3.1.4. The Identity of Children Born In Wedlock.

This recommendation may seem too radical considering that Zimbabwe is still under patriarchal norms. Occasioned by the payment of *lobola*, children born out of marriage are given the surname of the father. If it's a girl she will have an opportunity to carry her husband's surname once she gets married. With regards to the rights of parents over children the 2013 Constitution is very clear with regards to custody and guardianship in section 80(2), it provides that:

Women have the same rights as men regarding the custody and guardianship of children, but an Act of parliament may regulate how those rights are to be exercised.

This section could have indicated that women and men have the same rights regarding the identity of children over and above issues of custody and guardianship. If Zimbabwe wants equality between men and women over their children then both sexes must be given the right to give them their surname. Practice has shown that only children born out of wedlock are given the surname of their mother since probably the husband would not be available. This means that it is possible that a child can bear a mother's surname and the fact that it is, by practice, limited to those who are not married poses an unnecessary distinction between women based on marital status. In most cases even the birth certificates of those children with their mother's surname contain no name of the father. Proper equality between men and women in a marriage set up must give both sexes equal opportunity to give either of the surname or both to a child, with the name of both parents appearing on the birth certificate. Otherwise men do have the right to the identity of the children born in wedlock's and women do not have.

6.3.2. Revisiting Certain Cultural Practices.

There are certain cultural practises that go to the root of women status and equality in Zimbabwe. For instance, in chapter one *lobola* culture was alluded to. It was clearly pointed out that *lobola* culture creates a hierarchy in a marriage such that women are not treated the same as men. According to Armstrong 'the deconstruction of customary law rather than an emphasis on the

concept of equality represents the most promising strategy for producing justice for women.²⁰ Armstrong traces the historical development and function of customary law in pre – colonial societies. His findings indicate that in pre-colonial times, customary law was a flexible system of law that favoured the conciliation and settlement of disputes rather than a rigid state-centred application of a rule. It was family centred. The traditional and original function of customary law was therefore the conservation of the family and security of women and children. In such societies, marriage was upheld as a joint partnership and was not considered as a guardian-minor relationship as it is now.

Another cultural practice in Zimbabwe which has never been denounced yet it upsets women's status and equality with men is polygamy. Polygamy was initially established to provide women with the protection of marriage because there were not enough men to go around and an unmarried woman was vulnerable. Yet today it constitutes the backbone of female subservience. Additionally, under original customary law, family property was the norm and widows were not displaced from their dead husband's land. According to Armstrong, customary law morphed in response to a dynamic socioeconomic context. During colonialism, customary law was remodelled to serve the political agendas of the colonialists. This attitude spilt over into many post-independence governments in Africa and as a result, customary law began to be applied as a tool to subjugate women. Armstrong suggests that accentuating the role of laws and statutes to address gender inequality could potentially lead to the more subjugation of women.²¹ Rather the solution that is:²²

Needed instead is an emphasis on the concept of social justice, including assurance that a women's choices are informed and her interests are promoted.

²⁰ A Armstrong Women, customary law and equality: lessons from research in southern Africa. (1994) 7 *South Afro-Polity Econ Mon.* 69.

²¹ Armstrong (n 20 above) at 69.

²² Armstrong (n 20 above) at 69.

6.3.3. The Role Of Civil Society

Civil society also has a role to play. Women who are active in civil society must make efforts to groom women and girls for political activism and agency and must synergise with women who are already in government to form coalitions and partnerships. Women's civil society groups should seek and maintain synergistic partnerships with men and work together with other groups to support women's political involvement and they should make men a part of support networks on behalf of gender equality concerns, which include the need to improve women's political involvement. Importantly, civil society should also utilise a multigenerational approach in encouraging full realisation of human rights and political input of women and efforts should be made to reach out to conservative communities where extremism and fanaticism has made it difficult to broach issues of gender inequality.

Civil society's function should also be to carry out training and outreach and awareness campaigns on existing national and international policies put in place to improve women's access to democracy, human rights and political participation. In addition, cultural and religious impediments should be tackled by creating options and models for civic engagement. Monitoring mechanisms should also be put in place to evaluate and assess government departments' compliance with and implementation of protocols and commitments related to gender equality and to evaluate the progress of elected officials in terms of their commitments to establishing a gender-sensitive government.

The upsurge in a civil society inundated with women's movement organisations in Africa is one of the factors which have led to an increase in the number of women involved in politics and Zimbabwe can emulate this.²³ Women led and gender centred civil society organisations such as the Action for Development (Uganda); National Women's Lobby Group (Zambia); National Committee on the Status of Women (Kenya); have played a critical role in lobbying for women's political control and representation. In Zimbabwe, the role played by organisations such as Women of Zimbabwe Arise (WOZA) and the Msasa Project can be amplified and braced by forming other organisations concerned with improving the plight of women. Such organisations have been

²³ Ndlovu & Mutale (n 16 above) at 74.

instrumental in pushing gender sensitive reforms in legislation and in the constitution and so could potentially level the playing field for women. Civil society can play a role in conducting civic education for women across all spheres of life. Ndlovu and Mutale attribute the steady increase in the number of women occupying or running for public office as a result of spirited efforts by civil society and so Zimbabwe needs to harness this strength and potential and put it to good use in the fight against gender inequality.²⁴

6.3.4. Gender Mainstreaming

In Zimbabwe, the struggle for gender equality need not be labelled as an exclusively female domain. Selerud²⁵ is of the opinion that the gender equality project should be given the same attention and solemnity as the liberation struggle and gender issues should be approached and discussed at national level. Gender mainstreaming must be put in place from national level and be cascaded down to the local authority level. The idea must also be adopted in the private sector through a policy framework or National Legislation. Simply put, both men and women should work together in the fight for equal recognition and status of women in society. However, arguably, for women's status to improve, both men and women have to participate meaningfully in the gender equality discourse.

6.4. CONCLUSION

The main research problem of this thesis was centred on an examination of the equality and status of women politically in Zimbabwe and South Africa. Both countries share a mutual pre-colonial history which is fused with a patriarchal social system. This inevitably subjected women to men's hegemonic control both in the private sphere and public arena historically. An examination of the relationship between equality of women and patriarchal ideologies has shown that women are delimited in access to political opportunities at the same level with men. Patriarchal structures and

²⁴ Ndlovu & Mutale (n 16 above) at 74.

²⁵ KO Selerud Women's Empowerment in Southern Africa: The Case of South Africa, Zimbabwe and Mozambique (2008) <https://lip.lub.lu.se/student-papers/record/1316969/file/1316970.pdf>. (accessed on 6 October 2018) 31.

ideologies influence whether developmental initiatives will differentially advantage women and men.²⁶ This system obstructed women from benefiting equally from the political development of the country and from citizenship and democracy.

In Zimbabwe the colonial epoch was however dissimilar from the period of independent struggles. Women tasted a stint of independence during the liberation struggle during which men and women were at par.²⁷ There were no defined roles assigned to any sex or gender. This however did not go beyond the precincts of liberation struggles as it only applied to few women who were in actual fact tangled in the fight for political emancipation. The majority of average women remained under the subjugation of men due to repressive laws and practises. They continued to be treated as minors until after independence.

After independence some of the resounding efforts made by Zimbabwe to elevate the status of women, which had repercussions for their unrestricted access to political rights, include the enactment of the Legal Age of Majority Act (LAMA) which gave women majority status which they had not enjoyed before independence.²⁸ The 1985 Matrimonial Causes Act gave women and men the right to no-fault divorce and to maternity leave without the threat of losing their jobs.²⁹ The Sex Disqualification Removal Act of 1985 declared that women with the requisite credentials could not be barred from holding the same offices and positions as men.³⁰ Government set up a Ministry for Community Development and Women's Affairs (MCDWA) to protect women's interests. The ministry called for the repeal of bigoted laws and labour practices. At some point it called, without success though, for the eradication of *lobola* (bride wealth). However, Zimbabwe's sterling efforts to end gender discrimination after independence were hampered by its very own Constitution which was not women's rights friendly.³¹

²⁶ L Jave 'Gender Patriarchy and Development in Africa. The Zimbabwean Case' (1995) Working Paper No. 254 *Women & International Development* 3.

²⁷ Jave (n 26 above) at 6.

²⁸ Legal Age of Majority Act 15 of 1982.

²⁹ Matrimonial Causes Act 33 of 1985.

³⁰ Sex Disqualification Removal Act of 1985.

³¹ Constitution of Zimbabwe Act No.1 of 1980 Section 23(1).

The successor of the 1980 Constitution, the 2013 Constitution, brought in a new era as it is gender - friendly considering its elaborate equality provision (section 56), the women's rights provision (section 80) and marriage rights provision (section 26). These sections brought about formal equality as well as substantive equality. What is contested now, is the implementation of these Constitutional provisions. Failure by Zimbabwe to put up an implementation and monitoring apparatus on the implementation of the 2013 Constitution has led to non-compliance and freehand implementation of the women friendly provisions. Its implementation is lagging behind even the regional targets. For instance, Zimbabwe failed to reach the 50/50 percent women representation in decision making positions by 2015. Because of this pitiable implementation of the 2013 Constitution women are still suffering. The government has left it for women to fight for their own right. Notwithstanding, they do not have requisite resources, knowledge and patronage from government institutions. For instance, in *L. Mudzuri and another vs Minister of Justice and others*, the Ministry of Women Affairs was seen justifying an Act of Parliament which was clearly in contravention to section 26 (a) which provides that: -

The State must take appropriate measures to ensure that: -

- (a) No marriage is entered into without the free and full consent of the intending spouses.
- (b) Children are not pledged in marriage

And section 78 which provide that: -

- (2) Every person who has attained the age of eighteen years has the right to found a family.
- (3) No person may be compelled to enter into marriage against their will.

In this matter the Ministry of Women Affairs portrayed an attitude which is in contrary to its broad mandate. This left the applicant (a woman seeking constitutional protection against men) spending resources in a matter that the Ministry of Women Affairs could have consented to aid with. Even the human rights state institutions such as the Gender Commission, and Human Rights Commission remained passive to the disadvantage of women. It can thus be submitted that the state machinery and human rights institutions are not proactive in gender issues. They are only giving women the mundane and routine projects which buttress their lower position in society. Such projects which were at some point initiated by the Ministry of Women's Affairs include teaching women to make peanut butter, knitting and sewing. These projects were not sustainable due to dearth of resources as such their contribution towards women status remains mediocre.

In a nutshell government is passive on the implementation of the 2013 Constitution. It has not shown any direction. This position leaves women living the life of secondary citizens without the same access to citizenship participation and democratic rights as men. Although in some instances women are given equivalent space with men to partake in the citizenship and democracy of Zimbabwe, they are not being shown how to contribute and the government and human rights institutions are not playing a focal role in this respect. Women are relatively new players in the field of political participation. What the government is simply doing is to put them in the same playing field with men who have experience as an added advantage. The government is watching from the terraces while women are being victimised yet it is not doing anything. Although political parties have been implementing party quotas, this has been done to serve party interest and not women interests.

South African women, as was echoed by Du Toit, were initially largely excluded from the peacekeeping process after Apartheid and the violence which they were victims of during the liberation struggle was initially not regarded as a prerequisite to include them in the reconciliation process.³² Not only was this attitude exclusionary of women but it also maintained a culture of violence in the post-apartheid society which does not regard gender-based violence as a form of discrimination. It is submitted however that although South Africa has a lot to improve to fulfil its promises of gender equality since 1994, the country is still ahead of Zimbabwe in terms of the advancement and emancipation of women and there are some best practices that can be emulated by Zimbabwe.

Overall, the study has applied the doctrinal research approach to determine the extent to which political space has been opened for Zimbabwean women since independence. It has traced the historical position of women in Zimbabwean and South African society politically, and the ways in which their socioeconomic station has contributed to their access, or lack of access thereof.

The study also took account of the differences in access to democracy and citizenship between men and women. It was determined that access to democracy and citizenship is gendered. Because of their traditional gender roles and society's gender expectations, women are excluded from the

³² L Du Toit *A Philosophical Investigation Of Rape: The Making and Unmaking Feminine Self* (2009) 13.

public sphere and confined to the domestic sphere, where abuses of their rights to democracy and citizenship are difficult to detect. There is a correlation between inequality and lack of democracy and citizenship. Women lack representation in higher offices of government and this has slowed down the momentum of the social movement for the total emancipation of women.

Using the comparative method, Zimbabwean jurisprudence, with special attention to its treatment of gender issues, was compared with its South African counterpart. Best practices, which Zimbabwe could emulate, were noted. It was determined that Zimbabwe's equality laws and constitutional provisions leave a lot to be desired when it comes to guarantees for protections of women's rights. The 2013 Constitution has nonetheless made commendable efforts in this regard. Some lacunae however still exist. Laws are yet to be aligned to the constitution. Even the Ministry of Women's Affairs and its functions are yet to be reconfigured, in line with Zimbabwe's new constitution.

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