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ZIMBABWE WOMEN LAWYERS ASSOCIATION

# Making Zimbabwean Women realise their Constitutional Rights through alignment of Criminal and Commercial Laws



## **Fundamental values of the Constitution**

- Zimbabwe is founded on various fundamental values and principles which include the Supremacy of the Constitution, good governance, gender equality, diversity of cultures and religions, equality and human dignity.

## **The rights of Women in the Zimbabwean Constitution**

- Whilst all rights and freedoms provided for in the Constitution apply to all Zimbabwean people, there are specific sections in the Constitution which clearly elaborate the rights of women.
- The state is obligated to promote gender balance in particular to ensure that women fully participate in all the various spheres of the Zimbabwean society based on the fact that they are equal to men.
- The state is obligated to take measures which include legislative one essential to ensure that women are equitably represented in the various institutions of the Government and at all levels.
- The state is enjoined to ensure that women constitute half of the membership of Commissions and other elected bodies established by the Constitution or Acts of Parliament.
- The state must also take practical measures to ensure that women gain access to resources which include land on the basis that they are equal to men.
- The state is also obligated to ensure that it takes measures that are positive to ensure that gender discrimination is rectified and the imbalances resulting from past practices and policies are corrected.
- As a national objective, the state is enjoined to endeavour to implement measures “such as family care that enable women to enjoy a real opportunity to work.” Every human being in Zimbabwe has a right to life but in the event that a woman is accused of murder, the death sentence must not be imposed or carried out on her.

## Women and Commerce

### International Human rights Instruments

Instruments	Contents
African Charter on Human and People's Rights	Article 2 and 22 recognise the rights and freedoms of all person without distinction of any kind such as race, ethnic group, colour, sex language, religion political or other opinion, national and social origin fortune, birth or other status.
The Universal Declaration of Human Rights	Article 1- Recognises the inherent dignity and the equal and inalienable rights of all members of the human family regardless of sex, race, colour,language, religion or distinction of any kind.  Article 7- states that men and women 'are equal before the law and are entitled without any discrimination to equal protection of the law.
Convention on the Elimination of Discriminations Against Women (CEDAW)	Article 15-State parties shall accord to women equality with men before the law. In particular they shall give women equal rights to conclude contracts and to administer property and shall treat them equally in all stages of procedure in courts and tribunal.
The International Covenant on Economic Social and Cultural rights(ICESCR)-Article 1	Article 1 recognise that All people including women have the right of self-determination by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development
Protocol to the African Charter on Human and Peoples' rights of Women In Africa	Article 2- State parties shall combat all forms of discrimination against women through appropriate legislative institutional and other measures in this regard shall enact and effectively implement appropriate legislative or regulatory measures
Southern African Development Community Protocol on Gender and Development	Article 5 provides that state parties shall endeavour that by 2015 at least 50% of decision-making positions in the public and private sectors are held by women including the use of affirmative action measures.

## Provisions in the Constitution relating to women and commerce

**Section 3-** Zimbabwe is founded on a principle and value of gender balance.

**Section 17-** The Constitution of Zimbabwe is founded on the foundation of gender balance and has a national objective of promoting the full participation of women in all spheres of Zimbabwean society on the basis of equality with men

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**Section 56:** The Constitution further provides for equality and non-discrimination in particular it states that men and women have the right to equal treatment, including the right to equal opportunities in political, economic and social spheres.

Women should not be discriminated on the basis of gender and sex.

The state is mandated to take reasonable measures to promote the achievement of equality to advance people or classes of people like women who have been previously disadvantaged and such measures will not be regarded as unfair to men by the Constitution.

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### Labour laws

#### International Human Rights Instruments

Article and Instrument	Contents
The Convention Concerning Discrimination in Respect of Employment and Occupation or Discrimination (Employment and Occupation)	<b>Article 1</b> of the Convention states that discrimination in employment includes discrimination on the bases of sex
Maternity Protection Convention 2000	<b>Article 4</b> states that women are entitled to maternity leave of not less than 14 weeks. <b>Article 6(1)</b> states that a woman is entitled to paid maternity leave.
SADC Protocol on Gender and Development	<b>Article 19</b> prohibits the dismissal and denial of recruitment of employment on the grounds of pregnancy or maternity leave and encourages states parties to provide protection and benefits for women during maternity.
The Protocol to the African Charter on human and people's rights on the rights of women	<b>Article 13</b> informs states to enforce legislative and other measures which guarantee women adequate and paid pre- and post-natal maternity leave in both private and public sectors.  <b>Article 13</b> also prohibits all forms of exploitation of children especially the girl child and employment of children who are below the age of employment and encourages states to introduce a minimum age of employment which combats child labour.

**Provisions of the Constitution relating to the Labour Act** **Section 24** -The Government is obliged to ensure that it adopts policies and measures to provide everyone including women the opportunity to work “in a free chosen activity” so that they can be able to have a decent living for themselves and their family

**Section 65** - Women have the right to be remunerated equally with man for similar work and have the right to a fully paid maternity leave for a period of at least three months.

**Section 81** -The age of majority in Zimbabwe is 18.**Gaps and suggestions- The Labour Act**

- Whilst the Act provides for different forms of discrimination, it is not in line with the grounds of discrimination as stated in the Constitution.
- The suggestion is that the grounds of non-discrimination provided in the Constitution as well as in international law discussed above must be incorporated in the Act.
- **Also the Act must define the constitutional term “similar work” in order to ensure equitable remuneration of men and women.**
- Section 11 provides for the employment of young persons from the ages of 13 and 15 years. With the Constitution of Zimbabwe providing that the age of majority is 18 and also stating that in all decisions regarding children the best interests of the child are paramount, the legislature must review this provision to ensure that it does not encourage child labour which is mainly faced by girl children. Also when children work full time at a young age either with or without the guardian's consent, it may lead to the deprivation of their rights like the right to education. The suggestion is that full employment of a child must begin from the ages of 18 years unless with consent from the minister and a child can do an apprentice only from the age of 15 to get exposure to the industry of their choice.
- Section 18 provides for maternity leave up to 98 days on full pay to an employee who has served a year. The Act provides that per employer, a woman is entitled to 3 periods of maternity leave and it can only be provided once in every 24 months and any leave outside the stipulated

period may be granted as unpaid leave. On the contrary the Constitution provides that women are entitled to maternity leave for 3 months and does not specify the duration they must have worked to gain the right or the number of pregnancies they must have per employee.

- Section 58 provides for what must be provided for in a Constitution of an employment council. The suggestion is that in light of the Zimbabwean national objective of gender balance and the right of women to equal opportunities, the Act must provides that the leadership of the employment council must reflect a balance on gender and promote equal opportunities for men and women.
- Throughout the Act, the Act uses the terminology “chairman” which is not gender neutral. The suggestion is that it must be replaced by “chairperson”.

## Women and Criminal law

### International Human Rights Instruments

International Covenant on Civil and Political rights (ICCPR)	Article 6 states : Every human being has the inherent right to life .This shall be protected by law and in countries that have not abolished the death penalty, sentence of death may be imposed for the most serious offence.
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### Provisions in the Constitution

Constitution	Section 48 state that the death penalty shall not be application to women and minor children.
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Criminal Procedure and Evidence Act Chapter [9:07]	<p>Section 337 provides that the death penalty may be given to an offender convicted of murder.</p> <p>Section 338 provides categories of persons exonerated from the death penalty whom include pregnant women, persons over 70 years and minors.</p>
Criminal Law (Codification and Reform) Act [Chapter 9:23]	<ul style="list-style-type: none"><li>• Section 20,23 and 47 (2) provides for the imposition of the death penalty to someone convicted of either of these crimes that is treason, terrorism and murder respectively.</li></ul>
<p>The following Acts also provide for the death penalty to be imposed:</p> <ul style="list-style-type: none"><li>• The Genocide Act [Chapter 9:20]</li><li>• The Defence Act [Chapter 11:02]</li><li>• Geneva Conventions Act [Chapter 11:06]</li></ul>	<ul style="list-style-type: none"><li>• Impose the death penalty</li></ul>



## Gaps and Recommendations

- The above mentioned laws still enable women to be put on death row. The recommendation is that women are not sentenced to death as is in the Constitution.
- Section 48 (2) of the Constitution states that a law may permit the death penalty to be imposed only on a person convicted of murder in aggravating circumstances. The use of the word “may” means that the legislature has discretionary powers of creating a law that either upholds or abolishes the death penalty.
- We therefore suggest that the death penalty be totally abolished.

## Termination of Pregnancy Act

<p>Protocol to the African Charter on Human and People’s Rights on the Rights of Women</p>	<p>Article 14(2)(c), “state parties shall take appropriate measures to protect the reproductive rights of women by authorizing medical abortions in cases of sexual assault,rape,incest and where the pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus.”</p>
<p>Termination of Pregnancy Act section 4 provides:</p>	<p>States that termination of pregnancy can happen when the life of the mother and her physical health are endangered by the continuation of the pregnancy ,or there is serious risk that the child to be born will suffer from physical or mental defects of such a nature that it will be permanently seriously handicapped and there is reasonable possibility that the foetus conceived is as a result of unlawful intercourse.(e.g rape )</p>
<p>Constitution</p>	<p>Section 52 state that every person has the right to bodily and psychological integrity, which includes the right to make decisions concerning reproduction.</p> <p>Section 48 (3) an Act of Parliament must protect the lives of unborn children and that Act must provide that pregnancy may only be terminated only in accordance with that law.</p>

## Gaps and Suggested Recommendations

- The law does not consider issues relating to when the mental health of the mother is endangered by the continuation of the pregnancy'.
- There is no clear procedure of what a survivor of rape or other unlawful sexual intercourse should do when confronted with an unwanted pregnancy. The Case of **Mildred Mapingure vs Minister of Home Affairs ,Minister of health and Minister of Justice SC 402/12**(a woman who was raped and failed to get the termination order on time due to delays and lack of a clear procedure to follow resulting in her conceiving a baby .)
- There is need for the Act to outline clearly the process for obtaining a termination order .It should outline the procedural steps a person is to take so as to obtain the necessary termination order to ensure rape survivors protect and control their biological integrity.
- Also to identify and name the “authorities “ involved in the process of obtaining the termination order and define their roles and obligations
- There is need to include the mental health of the mother as a ground for termination

## The Rights of Women in Prisons

### International Human Rights InstrumentsAfrican Charter on Human and People's Rights

- Article 1 provides for Member States of the Organization of African Unity to recognize the rights, duties and freedoms enshrined in the Charter and to undertake to adopt legislative or other measures to give effect to them.
- Article 5 states that every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.

## **The International Covenant on Civil and Political Rights (ICCPR)**

- Article 10 of the Covenant provides that all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

## **The United Nations Body of Principals for the Protection of All Persons under Any Form of Detention or imprisonment**

- Principles 1 states that all persons under any form of detention or imprisonment shall be treated in a humane manner and with respect for the inherent dignity of the human person.
- Principle 6 discourages and outlaws the use of torture or to cruel, inhuman or degrading treatment or punishment on anyone who is in detention.
- Principle 5 speaks of how pregnant women, nursing mothers' children and juveniles should be treated.

## **The UN Standard minimum rules for the Treatment of Prisoners were adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders**

- The Rules covers issues of food, accommodation, personal hygiene, issues of children born in prison, separation categories, clothing and bedding, exercise and sport and medical services.
- Sections 23 (1) and (2) states that where nursing infants are allowed to remain in the institution with their mothers; provision shall be made for a nursery staffed by qualified persons, where the infants shall be placed when they are not in the care of their mothers.

## **The Protocol to the African Charter on Human and People's rights on the rights of women in Africa**

- Article 24 states that parties undertake to protect “(b) the right of pregnant or nursing women or women in detention by providing them with an environment which is suitable to their condition and the right to be treated with dignity”.

## Provisions in the Constitution

The Constitution prohibits discrimination and provides that both women and men have right to equal treatment including the right to equal opportunities in all spheres.

- Section 50 provides for rights of arrested and detained persons who must be treated humanely and with respect for their inherent dignity e.g in **Nancy Kachingwe & Others VS Minister of Home Affairs SC145/04** This matter of humane treatment was addressed. This judgment spells out that holding cells should be of reasonable size, it should be well ventilated, should have sufficient light, clean water, decent flushing toilets and running water.
- Section 51 provides for the promotion and protection of the right to human dignity. Section 50 subsection (5) (c) provides for the rights of prisoners to be visited by their spouse or partner, relative, their chosen religious counsellor.

The Constitution also provides for the rights of everyone including female prisoners and the rights include, the right to education, to health care, and right to water. Section 54 and 55 provide that no person may be compelled to do forced labour and prohibits slavery. It further provides for freedom from torture or cruel, inhuman or degrading treatment or punishment.

### Prisons Act

- The Act provides for the composition of the prison service. It further gives the President the power to appoint the Commissioner and provides for the appointment of the members of the Prison Service Commission as well as the appointment of the prison officers.
- Section 76 provides for the employment of prisoners but state that female prisoners shall not be employed outside the office. Section 76 (2) provides as follows;
- Female prisoners shall not be employed outside a prison except on the recommendation of a medical officer, and then only on such labour as may be prescribed
- Section 78 provides for maintenance of unconvicted prisoners and allows their family to bring them basic necessities. It states that, "An unconvicted prisoner may be permitted to maintain himself and to arrange for the purchase of, or receive from private sources at proper hours, such food, clothing, bedding or other necessities as the Commissioner may from time to time determine."

- Section 79 states that no food, clothing, bedding or other necessities permitted under section seventy-eight shall be given, hired or sold to any other prisoner, and any prisoner who contravenes this section shall be liable to lose all privileges permitted under that section for such time as the officer in charge may determine.
- 80 Food, clothing and bedding for unconvicted prisoners if an unconvicted prisoner does not provide himself with food, clothing and bedding, he shall receive the normal prison food, clothing and bedding

### **Gaps and Suggested Amendments**

- Women must be equitably represented in the Prison Commission and also within the prison service.
- The Prisons Act should be clear on whether “employment” connotes paid labour and how payment of the labour will be done. Also the provision that female prisoners cannot be employed outside the prison will be discriminatory if the employment accrues benefits.
- The Act does not provide for maintenance of convicted prisoners. It is paramount that the Act must provide for the rights of convicted prisoners to humane treatment and which conforms to international standards. The Act should provide for the custody of all prisoners under conditions of human dignity and the following must be taken into consideration;
- Approach to safety - This includes taking necessary steps to ensure the safe custody of every prisoner and the maintenance of security and good order in every prison.
- Nutrition- Each prisoner should be provided with an adequate diet to promote good health.
- Hygiene - Due to the biological makeup of women, women prisons must be clean and their bedding clean and tidy. The prison must provide every prisoner with clothing and bedding sufficient to meet the requirements of hygiene and climatic conditions. The accommodation of women prisoners shall have facilities and materials required to meet women's specific hygiene needs, including sanitary towels and pants provided free of charge and a regular supply of water to be made available for the personal care of children and women in particular women involved in cooking and those who are pregnant, breastfeeding or menstruating.

- **Health care** - Prisoners should be provided with basic health care, in order for them to lead a health life. Medical treatment should be provided for by a medical officer, medical practitioner or by a specialist or health care institution or person or institution identified by such medical officer except where the treatment is provided by medical practitioner. Every prisoner who is sick must be allowed to be visited by and examined by a medical practitioner of her choice. No prisoner should be compelled to undergo medical examination, intervention or treatment without informed consent.
- **Mothers of young children** - Female prisoners should be allowed to have their children in prison and the prison should provide for food, clothing, health care and facilities for the sound development of the children for the period that such children remain in prison. A mother and child unit should be provided for the accommodation of female prisoners and the child whom they may be permitted to have with them. Breast feeding mothers must also be provided with adequate nutrition and facilities which ensures hygienic conditions.
- **Education for prisoners** - Prisoners should have access to basic State funded education, trained teachers and classrooms should be provided. Library facilities with inclusive of computers and internet should also be provided. Every prisoner who is a child and is subject to compulsory education must attend and have access to such education programmed.
- The Act should define what it means by “employment of prisoners” and also incorporate the definition of employment in the labour Act. The Labour Act should stipulate how much the Prisoner should be paid and who the remuneration is paid to.
- There should no discrimination between male and female when it comes to employment within or outside the Prison.
- The Act should take into account gender balance whenever commissions are established and where staff is employed so that female prisoners are taken care of by female prison officers and also to promote gender equality between male and female prison officer.



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