

# A gendered analysis of Section 48(2)(d) of the Zimbabwean Constitution of 2013

Ebenezer Durojaye

## Abstract

The purpose of this article is to critically review the provision of section 48 (2) (d) of the Zimbabwean Constitution from a gendered perspective. Section 48 (2) (d) of the Constitution would seem to have abolished death penalty for women but retained the same for men. Given Zimbabwe's commitment to gender equality and respect for human dignity, this article argues that the disparity in the treatment of women and men under this section is not only inconsistent with the notion of gender equality and substantive equality, but also fails to comply with the rules of justifying the adoption of remedial measures. It is recommended that a better approach by the Constitution would be to abolish death penalty in its totality for both men and women.

## 1. Introduction

The Zimbabwean Constitution of 2013 has been applauded for some of its important provisions including for the first time, the inclusion of socioeconomic rights as justiciable rights. By explicitly recognizing socioeconomic rights as justiciable rights, Zimbabwe has joined the other countries in Africa such as South Africa and Kenya that have accorded these sets of rights equal status with civil and political rights as enforceable rights in their constitutions. The Constitution explicitly recognizes rights relating to housing, health, and education.

In addition, the 2013 Constitution of Zimbabwe has been commended for its gender-sensitive approach and commitments to gender equality. In this regard, the Constitution differs from the former Constitution by jettisoning the 'clawback' provision, which made the provisions of gender equality subject to customary law and practice. Section 23 of the previous Constitution provided that the recognition of gender equality will only apply, subject to existing customary law and practice. In interpreting this provision, the Zimbabwean Supreme Court had ruled in *Magaya v. Magaya*<sup>1</sup> that section 23 of the Constitution will not apply to customary personal law such as inheritance. In that case, the bone of contention was whether a daughter of a deceased could inherit from his estate under customary law. The Supreme Court had rigidly interpreted section 23 of the then Constitution by holding that the primogeniture customary law of inheritance was neither discriminatory nor unconstitutional. The coming into force of this

<sup>1</sup> [1999] ICHRL 14 (16 February 1999).























inconsistent with Zimbabwe's obligations under international and national law to ensure gender equality. While the intention of the drafters of the Constitution may seem genuine, the application of this provision will lead to unfair discrimination against male offenders convicted of capital offences. Rather than the selective prohibition of death penalty, the better approach for the country would be an outright abolition of death sentence in the country. This will be consistent with recent moves within the international community to abolish the death penalty.