

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

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## 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).

progressive Constitution signals a new dawn for constitutionalism and advancement of human rights in Zimbabwe.

Despite this significant development, this article seeks to critically review the provision of section 48 (2) (d) of the Constitution from a gendered perspective. Section 48 (2) (d) of the Constitution would seem to have abolished death penalty for women but retained 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 entirety for both men and women.

## **2. Clarifying the meaning of gender equality**

The term gender is often referred to as social construction of roles for men and women. Human beings are born male or female but the society tends to assign different roles to these sexes. Hence, men are assumed to be strong, virile, powerful, aggressive and bread winners. On the other hand, women are often perceived as weak, gentle, submissive, docile and home makers. The gendered-assigned roles are often rooted in cultural and sociological beliefs of the people. In most cases, gendered construction of men and women tend to evoke stereotypical beliefs and often lead to human rights violations or abuse. For instance, the fact that men are usually believed to be bread-winners has sometimes led to wage differences between men and women, with the latter earning lower than the former for the same job.

Also, gender stereotypes have led to the erroneous belief that women are meant to be seen and not heard. Furthermore, it has led to the situation where women are regarded as child-bearers and home keepers.<sup>2</sup> This has deepened discriminatory practices between men and women and further perpetuated the low status of women in many African societies. In an attempt to address this challenge, the international community has adopted women-centred human rights instruments grounded in the respect for human rights of all individuals regardless of gender or sex. The foremost women's rights instrument, the Convention on Elimination of All forms of Discrimination (CEDAW) against Women broadly defines discrimination to include:

[A]ny 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.<sup>3</sup>

It further recommends the need for affirmative action in order to address the historical disadvantages women have encountered across the world.

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<sup>2</sup> See PM Ebo 'The Woman Question: African and Western Perspectives' in EC Eze (ed), *African Philosophy: An Anthology* (London: Blackwell Publishers, 1999), at pp. 333–7.

<sup>3</sup> Art. 2 of Convention on the Elimination of All Forms of Discrimination Against Women GA Res 54/180 UN GAOR 34<sup>th</sup> Session Supp No 46 UN Doc A/34/46 1980.

At the African regional level, the African Union adopted the Protocol to the African Charter on the Rights of Women in 2003.<sup>4</sup> The Protocol has been regarded as one of the most radical human rights instruments to advance the human rights of women.<sup>5</sup> The Protocol contains progressive provisions among others, addressing gender inequality and the advancement of women's sexual and reproductive health and rights. It requires African states to remove practices that discriminate against women and urges states parties to take all appropriate steps to eliminate social and cultural patterns and practices that are discriminatory against women.<sup>6</sup> It equally calls for remedial measures to address past injustices to women.

In addition to these two human rights instruments, the notion of equality and non-discrimination are recognized in virtually all human rights instruments including the International Covenant on Civil and Political Rights,<sup>7</sup> the International Covenant on Economic, Social, and Cultural Rights<sup>8</sup> and the African Charter on Human and Peoples' Rights.<sup>9</sup> The government of Zimbabwe has ratified virtually all these instruments. It should be noted that the African Commission on Human and Peoples' Rights has elaborated on the provisions of Articles 2 and 3 of the African Charter dealing with non-discrimination and equality before the law. In *Zimbabwe Lawyers for Human Rights and the Institute for Human Rights and Development (on behalf of Andrew Barclay Meldrum) v. Republic of Zimbabwe* the Commission noted as follows<sup>10</sup>:

The most fundamental meaning of equality before the law under Article 3(1) of the Charter is the right by all to equal treatment under similar conditions. The right to equality before the law means that individuals legally within the jurisdiction of a State should expect to be treated fairly and justly within the legal system and be assured of equal treatment before the law and equal enjoyment of the rights available to all other citizens .... The principle that all persons are equal before the law means that existing laws must be applied in the same manner to those subject to them.

From this decision of the Commission, it is clear that all individuals deserve to be treated equally and fairly irrespective of their sex, gender or race, religious, or political inclinations.

Furthermore, the Human Rights Committee (HRC) in its General Comment 18 on Non-discrimination has noted that 'Non-discrimination, together with equality before the law and

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<sup>4</sup> African Women's Protocol adopted by the second Ordinary Session of the African Union General Assembly in 2003 in Maputo, Mozambique Maputo CAB/LEG/66.6 (2003).

<sup>5</sup> See e.g. E Durojaye and N Murungi 'The African Women's Protocol and Sexual Rights' [2014] *The International Journal of Human Rights* 18, 881–97; see also F Banda 'Blazing a Trail: The African Protocol on Women's Rights comes into Force' [2006] *Journal of African Law* 50, 72–84.

<sup>6</sup> See Art. 2 of the African Women's Protocol, which draws its inspiration from Art. 2 of CEDAW.

<sup>7</sup> The **Covenant** was adopted by the United Nations General Assembly Resolution 2200A (XXI) of 16 December 1966. It entered into force on 23 March 1976, ...

<sup>8</sup> International Covenant on Economic, Social and Cultural Rights, adopted 16 December 1966; GA Res 2200 (XXI), UN Doc A/6316 (1966) 993 UNTS 3 (entered into force 3 January 1976).

<sup>9</sup> African Charter on Human and Peoples' Rights OAU Doc CAB/LEG/67/3/Rev 5, adopted by the Organisation of African Unity, 27 June 1981, entered into force 21 October 1986.

<sup>10</sup> Communication 294/2004—*Zimbabwe Lawyers for Human Rights and the Institute for Human Rights and Development (on behalf of Andrew Barclay Meldrum) v. Republic of Zimbabwe* (ACHPR).

equal protection of the law without any discrimination, constitute a basic and general principle relating to the protection of human rights'.<sup>11</sup> It further emphasizes the non-derogatory nature of this right by stating as follows:

[T]he principle of non-discrimination is so basic that article 3 obligates each State party to ensure the equal right of men and women to the enjoyment of the rights set forth in the Covenant. While article 4, paragraph 1, allows States parties to take measures derogating from certain obligations under the Covenant in time of public emergency, the same article requires, inter alia, that those measures should not involve discrimination solely on the ground of race, colour, sex, language, religion or social.<sup>12</sup>

The Committee reasons that the principle of non-discrimination does not mean equal treatment in all situations. It recognizes that in some situations different treatments may apply. It gave instances when such different treatment may not amount to a violation of the principle of non-discrimination. In the Committee's view, prohibition of death sentence for children or pregnant women may be justifiable and may not constitute a violation of the right to equality.<sup>13</sup> Limiting the prohibition of death sentence to these categories of people is an implicit recognition on the part of the Committee of the sensitive nature of such exceptions.

The Committee further reasons that while it may be necessary sometimes to apply affirmative action with a view to correcting past injustices or disadvantages experienced by certain categories of people, such an approach will only be justifiable when it 'is needed to correct discrimination in fact'. According to the HRC, 'when legislation is adopted by a State party, it must comply with the requirement of article 26 that its content should not be discriminatory'.<sup>14</sup> In one of its decisions in *Nahlik v. Austria*,<sup>15</sup> the Committee explains that Articles 2 and 26 of the ICCPR obligate states to ensure that all individuals within its territory and subject to its jurisdiction are free from discriminatory practices, whether perpetuated in private or public sphere.

At the national level, South African Courts have developed a rich jurisprudence on equality in general and gender equality in particular. Given the similarities in the legal systems of the two countries, there is a lot Zimbabwe can learn from the South African experience. For instance, in *Minister of Home Affairs v Fourie and another*<sup>16</sup> Sach J adopts a substantive notion of equality as follows:

Equality means equal concern and respect across difference. It does not presuppose the elimination or suppression of difference. Respect for human rights requires the Affirmation of self, not the denial of self. Equality therefore does not imply a levelling or homogenisation of behaviour or extolling one form as supreme, and another as inferior, but an acknowledgment

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<sup>11</sup> *Human Rights Committee, General Comment 28*, Equality of rights between men and women (Art. 3), U.N. Doc. CCPR/C/21/Rev.1/Add.10 (2000) para. 1.

<sup>12</sup> *Ibid* para. 2.

<sup>13</sup> *Ibid*.

<sup>14</sup> *Ibid*.

<sup>15</sup> Communication No 608/1995. 22 July 1996. CCPR/C/57/D/608/1995.

<sup>16</sup> [2005] zacc19.

and acceptance of difference. At the very least, it affirms that difference should not be the basis for exclusion, marginalisation and stigma.

In the *Bhe* case,<sup>17</sup> the Constitutional Court struck down the primogeniture cultural practice that denies female children the rights of inheritance from their late father. The Court unequivocally condemned the cultural practice as discriminatory and unconstitutional. In arriving at its decision, the Court noted as follows:

The exclusion of women from inheritance on the grounds of gender is a clear violation of section 9 (3) of the Constitution .... The principle of primogeniture also violates the right of women to human dignity as guaranteed in section 10 of the Constitution as, in one sense, it implies that women are not fit or competent to own and administer property.<sup>18</sup>

From the foregoing, a blanket prohibition of death sentence for only women and not men would seem inconsistent with the notion of non-discrimination under international law and the clarification provided by the HRC and other relevant bodies. It suggests that more value should be attached to the lives of women compared to men. This may not likely lead to equality of purpose but will rather undermine the principle of equality and non-discrimination.

It should be noted that a commitment to gender equality should aim at eradicating all forms of unfair discriminations against men or women. It is aimed at ensuring that no human being should suffer any disadvantage as a result of his or her gender. Also it is intended to promote equal treatment of all individuals taking into cognisance their socioeconomic differences. In essence, gender equality does not aim at making women behave like men or vice-versa but rather to ensure that men and women are treated with utmost respect and dignity irrespective of their gender or sex.

However, it should be borne in mind that not all discriminations are inconsistent with respect for human rights. In other words, in some cases it may be justifiable to apply measures that seem to favour certain categories of people or gender than the other. This is often referred to as affirmative action. The question remains what are the limits or scope of affirmative action? Put in another way, when will affirmative action lead to a violation of the right to equality and non-discrimination?

The CEDAW Committee in its General Recommendation 25 has provided some guidance in this respect. According to the Committee, states are to adopt affirmative action in order to eliminate direct or indirect forms of discrimination against women in their laws and to improve the de facto position of women through concrete policies and programmes.<sup>19</sup> Moreover, states should address prevailing gender relations and the persistence of gender-based stereotypes that affect women through law, legal structures and institutions. The Committee further recognizes that

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<sup>17</sup> *Bhe & Others v. Magistrate Khayelitsha* [2005 (1) BCLR 1 (CC)].

<sup>18</sup> *Ibid.*

<sup>19</sup> UN Committee on the Elimination of Discrimination against Women (CEDAW), General recommendation No. 25, on Art. 4, para. 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures, 2004 para. 7.

as structures and institutions. The Committee further recognizes that as steps are taken to eliminate discrimination against women, it is important to bear in mind that women's needs may change or disappear or become the needs of both women and men. Therefore, it is necessary to continue to monitor affirmative measures in order to avoid the perpetuation of non-identical treatment that may no longer be warranted.<sup>20</sup>

In recognition of the need to address persistent inequalities among different groups in society through affirmative action, the South African Court in *Bato Star Fishing (Pty) Ltd v. The Minister of Environmental Affairs and Tourism*<sup>21</sup> has noted as follows:

In this fundamental way, our Constitution differs from other constitutions which assume that all are equal and in so doing simply entrench existing inequalities. Our Constitution recognises that decades of systematic racial discrimination entrenched by the apartheid legal order cannot be eliminated without positive action being taken to achieve that result. We are required to do more than that. The effects of discrimination may continue indefinitely unless there is a commitment to end it.<sup>22</sup>

### **3. Examining section 48 of the Zimbabwean constitution**

Arising from the discussion above, this section of the article critically analyses section 48 of the Constitution with a gendered lens, to determine whether it is consistent with Zimbabwe's obligations under international law to eliminate gender inequality.

For the avoidance of any doubt and for clarity sake, it is apposite to reproduce the provision of section 48 of the Zimbabwean Constitution of 2013 here. Section 48 titled 'the right to life' provides as follows:

1. Every person has the right to life.
2. A law may permit the death penalty to be imposed only on a person convicted of murder committed in aggravating circumstances, and
  - a. the law must permit the court a discretion whether or not to impose the penalty;
  - b. the penalty may be carried out only in accordance with a final judgment of a competent court;
  - c. the penalty must not be imposed on a person—
    - i. who was less than twenty-one years old when the offence was committed; or
    - ii. who is more than seventy years old;
  - d. **the penalty must not be imposed or carried out on a woman;** and
  - e. the person sentenced must have a right to seek pardon or commutation of the penalty from the President.

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<sup>20</sup> Ibid para. 11,

<sup>21</sup> 2004 (7) BCLR 687 (CC).

<sup>22</sup> Para. 74.

The part of this section, which is subject to scrutiny or debate, is paragraph (d) of subsection 2. It might appear that the intention of the drafters of this provision was to exclude certain classes of people from the hangman. The implication of this is that where both a man and a woman have been found guilty of an offence that warrants the imposition of death sentence, only the man would face the death sentence, while the woman would be excused. This defies logic, given the blanket nature of the exclusion. It applies to all women regardless of age, marital status, criminal record or propensity. In order to understand the implications of this provision better it is necessary to examine the circumstance under which death penalty may be imposed under the Zimbabwean legal system.

Under the Zimbabwean legal system some of the offences punishable by death sentence include murder, offences related to acts of terrorism and treason:

1. Murder—This is the intentional taking of life. According to section 47 of the Criminal Code any person who causes the death of another, or intends to kill another or embarks on an act capable of causing the death of another shall be guilty of murder and if found guilty will be liable to be sentenced to death.<sup>23</sup>
2. Offences relating to Terrorism Resulting in Death—the law also stipulate the imposition of death sentence for offences relating to terrorism, especially when such acts result in death. Thus, the following terrorism-related crimes are punishable by death if they result in death: causing or furthering an insurrection in Zimbabwe; causing forcible resistance to the Government, defense forces, or law enforcement agencies; or procuring by force the alteration of any Government law or policy. It should be noted that the imposition of the death sentence will only arise for these offences if they are accompanied by the use or threatened use of weapons with the knowledge that there is a risk of killing or injuring another person; damaging or destroying property; inflicting substantial financial loss on another person; obstructing the movement of air, land, or water traffic; or disrupting an essential service.<sup>24</sup>
3. Treason—Treason is another offence that is punishable by death.<sup>25</sup> Moreover, some treason-related offences if they result in death may carry the death sentence. These include causing or furthering an insurrection in Zimbabwe; causing forcible resistance to the Government, defense forces, or law enforcement agencies; or procuring by force the alteration of any Government law or policy. These crimes are punishable by death only if accompanied by the use or threatened use of weapons with the knowledge that there is a risk of killing or injuring another person; damaging or destroying property; inflicting substantial financial loss on another person; obstructing the movement of air, land, or water traffic ; or disrupting an essential service.<sup>26</sup>

Other offences not resulting in death of another but punishable by death penalty include the crime of mutiny, and desertion in the face of the enemy.<sup>27</sup> Although the death penalty is still retained in the country, there is no offence for which a court is mandated to impose the death

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<sup>23</sup> Zimbabwe Criminal Law (Codification and Reform) Act ch. 9:23, ch. V, sec. 47, Act 23/2004, 2004.

<sup>24</sup> Ibid section 23.

<sup>25</sup> Ibid section 20.

<sup>26</sup> Ibid.

<sup>27</sup> AllAfrica.com, Zimbabwe: Death Penalty Inhuman, <http://allafrica.com/stories/201004261113.html>.

penalty. In actual sense, the court hardly applies the death penalty. Rather, courts often use the concept of 'extenuating circumstances' to engage in discretionary sentencing.<sup>28</sup> This is similar to a mitigating circumstance: 'a fact associated with the crime which serves in the minds of reasonable men to diminish, morally albeit not legally, the degree of the prisoner's guilt.'<sup>29</sup> Also, the court has always been enjoined to weigh aggravating and mitigating factors in determining whether to impose the death sentence in aggravated murder cases.<sup>30</sup>

It should be noted that in recent times there have been calls for Zimbabwe to abolish the death penalty entirely from its legal system. This call has been echoed by the Justice, Legal and Parliamentary Affairs Minister Emmerson Mnangagwa who noted in 2013 that the government is seriously considering the abolition of death sentence in the country.<sup>31</sup> This call could not have come at a better time, given that the international community has intensified the campaign for the elimination of death penalty across the world. About 102 countries (more than half) across the world have abolished death penalty in law.<sup>32</sup> Indeed, Zimbabwe is one of the 34 countries in Africa that still retains the death penalty for offenders. During its 56th Ordinary Session in Banjul, The Gambia, in April 2015, the African Commission adopted the draft text of an Additional Protocol to the African Charter on Human and Peoples' Rights on the Abolition of the Death sentence.<sup>33</sup>

One of the justifications for the continued retention of the death penalty is that it serves as a deterrent for commission of serious crimes. However, a recent publication by the United Nations has noted that 'research has failed to provide scientific proof that executions have a greater deterrent effect than life imprisonment. Such proof is unlikely to be forthcoming. The evidence as a whole gives no positive support to the deterrent hypothesis.'<sup>34</sup> On the contrary countries that have abolished the death sentence tend to witness fewer serious crimes. The publication further identifies other disadvantages of the death penalty as being too expensive and sometimes used to target certain groups in society.

A major argument against the death penalty is premised on the fact that it constitutes cruel, inhuman and degrading treatment.<sup>35</sup> Moreover, it is deemed to be inconsistent with the enjoyment of rights to life and dignity. In abolishing the death penalty in South Africa, the Constitutional Court in *S v. Makwayane*<sup>36</sup> noted as follows:

the death sentence destroys life, which is protected without reservation under section 9 of our Constitution, it annihilates human dignity which is protected under section 10, elements of arbitrariness are present in its enforcement and it is irremediable .... I am satisfied that in the

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<sup>28</sup> See R Hood and C Hoyle *The Death Penalty: A Worldwide Perspective* (4th edn, Oxford University Press, 2008) 280.

<sup>29</sup> *Ibid.*

<sup>30</sup> See *State v. Governor* CRB 250-1/05, High Court of Zimbabwe pp. 15-6, Mar. 5, 2007.

<sup>31</sup> I Chifera 'Justice Minister Wants to Abolish Death Penalty' <http://www.voazimbabwe.com/a/justice-minister-wants-toabolish-death-penalty/1767088.html> (accessed 12 April 2016).

<sup>32</sup> Amnesty International *Death Sentences and Execution Report 2015* (2016) 6.

<sup>33</sup> *Ibid.*

<sup>34</sup> UN Human Rights Office of the High Commission *Moving away from the Death Penalty: Arguments, Trends and Perspective* (2015) 12.

<sup>35</sup> See e.g. S Blum 'Public Execution: Understanding the 'Cruel and Unusual Punishment Clause' [1992] *Hastings Constitutional Law Quarterly* 19, 413.

<sup>36</sup> [1995] ZACC 3, 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC).



context of our Constitution the death penalty is indeed a cruel, inhuman and degrading punishment.<sup>37</sup>

#### **4. Section 48(2) (d) vis-à-vis equality provision in section 56**

As noted above, Zimbabwe is committed to the principles of equality and non-discrimination. This is clearly espoused in many provision of the Constitution. For instance, some of the founding principles of the Constitution include a commitment to respect of the right to dignity of all human beings, equality of all human beings, and gender equality. Moreover, section 56 of the Constitution contains elaborate provisions on the right to equality and non-discrimination. It provides as follows:

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 sub-section (3) if—
  - 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 sub-section (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.

This detailed provision prohibits discrimination on various grounds including sex, gender age, and marital status. Nonetheless, it recognizes circumstances when discrimination may be justifiable—that the discrimination is fair, reasonable, and justifiable in a democratic society based on openness, justice, human dignity, equality, and freedom. The provision is grounded in the principle of substantive equality in that it urges the state to strive towards addressing past historical disadvantages suffered by certain categories of people. Usually a distinction is made between formal and substantive equality. The former tends to treat all human beings equally without recognizing their differences, while the latter treats individuals equally taking into cognisance the socio-economic

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<sup>37</sup> Ibid 95.

differences. The primary consideration of substantive equality is to achieve justice and egalitarianism in society.<sup>38</sup> This provision is a radical departure from the previous constitution in the sense that it has now removed the 'claw-back' provision to gender equality vis-à-vis the application of customary law.<sup>39</sup>

It should be noted that section 56 of the Constitution is modelled on section 9 of the South African Constitution of 1996. Thus, in determining what will amount to unfair discrimination reference will be made to the jurisprudence of the South African Constitutional Court in this regard. In *Harsken and Lane*<sup>40</sup> the Constitutional Court made a distinction between discrimination and unfair discrimination. According to Goldstone J, discrimination is pejoratively referred to as an unequal treatment of people based on attributes and characteristics attaching to them. On the other hand, unfair discrimination is described as treating persons differently in a way which impairs their fundamental dignity as human beings, who are inherently equal in dignity.<sup>41</sup> The Court further laid down the factors to consider in determining unfairness of discrimination in accordance with section 8 of the Interim Constitution (section 9 of the 1996 Constitution). These include the following:

1. The position of the victim in society,
2. The purpose sought to be achieved by the discrimination,
3. The extent to which the rights and interest of the victims of discrimination has been affected, and
4. Whether the discrimination has impaired the human dignity of the victim.

What this means is that if the provision of section 48 (2) (d) were to be challenged by a male plaintiff as constituting unfair discrimination, he would need to establish the above to succeed. Regarding the first condition, can it be said that men have been historically disadvantaged in Zimbabwe? The answer will be in the negative as the situation is the contrary. On the second condition, it might be difficult for the government to justify why all categories of women are excluded from death sentence and same privilege not extended to men. As noted earlier, if this provision was to be limited to pregnant women or women with children only, this may constitute a strong justification for its inclusion. However, as it is, excluding all women, married or unmarried, with or without children, from death sentence and not according same to men would seem problematic and difficult to justify. It should be noted that in the *Hugo* case<sup>42</sup> a presidential pardon to convicted women with children less than 12 years was challenged by male prisoners on the grounds that it was discriminatory and inconsistent with the equality provision of the South African Constitution. In rejecting this argument, the majority of the Constitutional Court held that given the peculiar situation of women and the role they play in society, the president's action was not discriminatory. In justifying its position the court noted as follows:

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<sup>38</sup> C Barnard and B Hepple 'Substantive Equality' [2000] *Cambridge Law Journal* 59, 562–85, at 566.

<sup>39</sup> Section 23 of the former Constitution recognizes the right to non-discrimination subject to the application of customary law and practice.

<sup>40</sup> *Harsken v. Lane NO and others* 1999(1) SA 300(CC).

<sup>41</sup> *Ibid* para. 322

<sup>42</sup> *President of Republic of South Africa and others v. Hugo* 1997 (3) SA 1012.

For many South African women, the difficulties of being responsible for the social and economic burdens of child rearing, in circumstances where they have few skills and scant financial resources are immense. The failure by fathers to shoulder their share of the financial and social burden of child rearing is a primary cause of this hardship. The result of being responsible for children makes it more difficult for women to compete in the labour market and is one of the causes of the deep inequalities experienced by women in employment .... It is unlikely that we will achieve a more egalitarian society until responsibilities for child rearing are more equally shared.<sup>43</sup>

Some commentators have argued that the position of the majority in this case is capable of perpetuating stereotypes of women as child-bearers and rearers.<sup>44</sup>

On the third condition, it does seem that this provision tends to attach to more value on women than men in society. The subtle message this provision may be sending is that a woman's life should be more cherished than that of a man. The whole essence of substantive equality is not to 'shift' disadvantage but rather to correct any disadvantage any categories of people may have experienced in the past. In the *National Coalition for Gay and Lesbian Equality v. Minister of Justice and others*,<sup>45</sup> the South African Constitutional Court noted that the criminalization of same sex relationship between consenting male adults constituted a gross violation of the right to equality and non-discrimination. This is because on one hand consensual sexual acts between men are penalized while on the other hand sexual acts between a man and woman are not punished.

On the last condition, it would seem that the application of this provision will impugn the right to dignity of men. It gives an impression that men accused of murder or other capital offences are worse criminals than their female counterparts and therefore deserve no 'mercy'.

It thus seems from the above that there is a conflict between sections 48 and 56 of the Constitution. Ordinarily, where a conflict arises between a provision of an act and the Constitution, the latter usually takes pre-eminence. However, since there are two conflicting provisions of the Constitution, the rule of interpretation will apply. It is trite that where a conflict exists in the provisions of a legislation, the latter provision will take pre-eminence. In this situation, the provision of section 56 of the Constitution will take pre-eminence over section 48 (2) (d). As noted earlier, a more pragmatic approach would have been to abolish death penalty entirely in the country. Given the recent development under international law, it would have been better if the Zimbabwean government had embraced the abolitionist approach of eradicating the death penalty rather than making exceptions for women, without extending same to men.

## 5. Conclusion

The adoption of the 2013 Constitution of Zimbabwe marks a milestone in advancing human rights in general and gender equality in particular. However, this article has shown that the selective prohibition of the death penalty under section 48 (2) (d) of the Constitution is

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<sup>43</sup> Para. 727–8.

<sup>44</sup> See e.g. RJ Cook and S Cusack *Gender Stereotyping: Transnational Legal Perspective* (Philadelphia: University of Pennsylvania Press, 2010) 12.

<sup>45</sup> [1998] 15, 1999 (1) SA 6 (CC).

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.