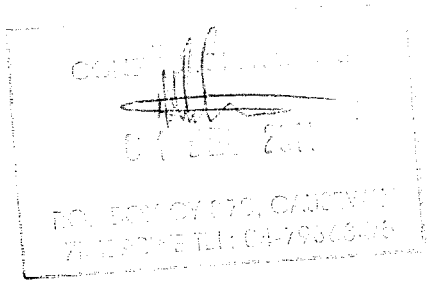
IN THE CONSTITUTIONAL COURT OF ZIMBABWE
HELD AT HARARE

CASE NO CCZ 79/2014

In the matter between:-

LOVENESS MUDZURU	FIRST APPLICANT
RUVIMBO TSOPODZI	SECOND APPLICANT
AND	
THE MINISTER OF JUSTICE, LEGAL & PARLIAMENTARY AFFAIRS	FIRST RESPONDENT
MINISTER OF WOMEN'S AFFAIRS, GENDER & COMMUNITY DEVELOPMENT	SECOND RESPONDENT
ATTORNEY GENERAL OF ZIMBABWE	THIRD RESPONDENT

APPLICANTS' HEADS OF ARGUMENT



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APPLICANTS' HEADS OF ARGUMENT

A. GENERAL

1. This clearly, is an important case that will stretch this Court's imagination but among other things, we will allow this revolutionary Court the Constitutional Court, to lay and define a marker with regards to the following issues:-

   (a) The approach to interpreting the Bill of Rights;
   (b) The Court's treatment of children's rights and more importantly gender rights;
   (c) The Court's treatment of the key subject of equality and discrimination;
   (d) The adoption and absorption an application of international law and international instruments in Zimbabwe.

2. Put simply, this case allows the Constitutional Court and gives the same an opportunity of being bold, and setting up a constitutional trajectory or DNA in these early stages of the Constitution where the

Chief Justice and every other Constitutional Judge is in the privileged and rear position of being the founding interpreters of this important document the new Constitution of Zimbabwe.

B. ISSUES

3. It is submitted that there are two main issues in this particular matter on the merits. The first is clearly, the question of protection of children's rights as defined in Article 81 of the Constitution and determining whether or not early marriages and the laws allowing and permitting the same are consistence with that right.

4. In dealing with the rights of children as defined in the Court, this Honourable Court must take into account the fact that the Court itself is the guardian of all minors in Zimbabwe.

5. Put in simple terms, this is not a matter in which this Court is neutral. It cannot be. It is duty bound by law to act in the best interest of minor children and in this regard, the Court in very simple terms is being asked to declare that it surely cannot be in the interest of minor children that they get married before the age of 18 years.

6. The second main issue that the Court will have to consider is the issue of discrimination between men and women. In particular the discrimination imposed by **Section 22 of the Marriages Act [Chapter 5:11]** *vis-a-vis* the differentiation between dates of marriage for men and women.

7. The inquiry under this head, will entail a look at the doctrine of equality within the context of **Section 56 of the Constitution of Zimbabwe.**

8. The equality and antidiscrimination clause is one of the most important provisions of the Constitution and therefore this case allows this Honourable Court to define its own trajectory on the issue of equality in the same matter that the Indian Supreme Court, the Canadian Supreme Court and the Federal Supreme Court of the United States of America and indeed the Constitutional Court of South Africa have been forced to deal with the same and in the majority of cases all these Courts have come up with flying colours on this issue.

9. However besides the main issues, this Court will have to deal with certain misconceptions in the Respondents' Opposing Affidavit in particular on the question of:-

(a) The issue of *locus standi*;
(b) The stereotype blunt suggestion that they are differences between boys and girls or men and women which justify with great respect *obnoxio* position of the law contained in **Section 22 of the Marriages Act [Chapter5:11]** and of cause the gross omission in the Customary Marriages Act.

C. THE SUPREMACY OF THE CONSTITUTION AND THE INEXTRICABLE COMPONENTS OF SUCH SUPREMACY AS A STARTING POINT

10. **Section 2 of the Constitution** is a defining clause in the Constitution. **Section 2** makes it clear that the Constitution itself is the supreme law of the country and that any law, practice, custom or conduct inconsistent with the same is invalid to the extent of the inconsistency.

11. The above section verbalises the foundations of the broad inclusive and open entered language anchored around democracy in a constitutional state, the rechtsstaat.

12. The concept of the rechtsstaat, incorporates a number of things that will be outlined below. What is clear however is that the Constitutional Court becomes the watch dog indeed a ferocious watch dog if not a bull dog over the Constitution itself and whether or not it is applied. In ***Executive Council of Western Cape Legislature & Others v President of South Africa & Others 1995 (4) SA 877 (CC)***; the South African Constitutional Court in one of its early defined decision put this principle in the following language:-

> "Constitutional *cases cannot be decided on the basis that Parliament or the President acted in good faith or on the basis that there was no objection to action taken at the time that it was carried out. It is of crucial importance at this early stage of the development of our new Constitutional order to establish respect for the principle of that the Constitution is supreme. The Constitution itself allows this Court to control the consequences of a declaration of invalidity if it should be necessary to do so. Our duty is to declare legislative and executive action which is inconsistent with the Constitution to be invalid, and then to deal with the consequences of the invalidity in accordance with the provisions of the Constitution."*

13. Thus the first immediate consequence of **Section 2 of the Constitution**, is the incorporation of the idea and concept of constitutionalism. This is the notion that government should derive its powers from a written Constitution and that its power should be limited to those set out in the Constitution. The Constitution itself

limiting the power of government in that it imposes structural and procedural limitations on power. Secondly, particularly through the Bill of Rights, it limits the exercise of such power.

14. Thus the point emphasised in the above case is the concept that constitutionalism demands that any law or conduct that is not in accordance with the Constitution for procedural or substantive factors will be held invalid. See also ***State v Makwanyane 1995 (3) SA 391.***

15. That is why the most important power that the Constitutional Court has is that of judicial review that is to say the power to overturn legislation or administrative executive actions on the basis that they are in fact unconstitutional.

16. The second constituent component of the supremacy of the Constitution is clearly the doctrine of the rule of law in the wide sense propounded by Dicey.

17. The Dicey concept of the rule of law requires that the same is to protect individual by requiring the State to act in accordance with clear and general rules that are enforced by the impartial courts in accordance with fair procedures.[1]

18. In South Africa, the Constitutional Court have accepted the concept of the rule of law by simply holding that the State's conduct must be rationally related to government purposes. The leading case on the subject matter is clearly the case of ***Pharmaceutical Manufactures Association of South Africa: In re ex parte President of Republic of South Africa 2000 (2) SA 674 (CC);***

19. At **paragraph 50** the Constitutional Court stated as follows:-

[1] **AV Dicey: An Introduction to the Study of Law of the Constitution 10th Edition (1959).**

> *"it is a requirement of the rule of law that the exercise of public power by the executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the executive and other functionaries must, at least, comply with this requirement. If it does not, if falls short of the standards demanded by our Constitution for such action."*[2]

20. On the question of content, there must be rationality in terms of whatever the government or parliament does. The absence of a rational relationship, donates arbitrariness, which clearly is invalid. Lastly, the concept invokes two self evident statements that will not be expanded on. The first is democracy and accountability. See for instance ***United Democratic Movement v President of the Republic of South Africa (No.2) 2003 (1) SA 495 (CC).*** The second is the doctrine of separation of powers and checks and balances.

21. On the latter issue in ***South Africa Association of Personal Injury Lawyers v Heath 2001 (1) SA 883 (CC)***; the Constitutional Court stated as follows:-

> *"there can be no doubt that our Constitution provides for such a separation of powers and that laws inconsistent with what the Constitution requires in this regards are invalid"*

22. See also ***State v Dodo 2001 (3) SA 382 (CC).***

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[2] See also Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council 1999 (1) SA 374 (CC); New National Party v Government of the Republic of South Africa 1999 (3) SA 191 (CC); President of South Africa v South African Rugby Football Union 2000 (1) SA (CC).

23. The above submissions on this subject are being made to underscore this Honourable Court, the fact that it is indeed an ultimate authority on its own standing on par with legislature and the judiciary. But more decisively when it comes to the questions of constitutionalism, the rule of law, legitimacy, democracy and accountability, and the separation of powers, the position of the Constitutional Court is superior position than any of the other branch of the State mentioned above.

24. Having stated this, it is now proposed to deal with some general pointers on constitutional interpretation which it is urged at this Honourable Court.

D. POINTERS TO INTERPRETING THE BILL OF RIGHTS

25. The manner in which the Constitution itself is interpreted in particular the Bill of Rights denotes and requires the imperator that the Courts must develop new clear and precise jurisprudence.

26. It is respectfully submitted that on the basis of a clear analysis of the law as propounded in the House of Lords, the Privy Council, the Canadian Supreme Court, the South African Constitutional Court and the Indian Constitutional Court that Zimbabwe will not have to reinvent the wheel and that the following principles which will be covered briefly in these heads must guide this Court in the interpretation of the Bill of Rights.

27. Put differently, it is submitted that the Constitutional Court must be interpreted on the following principles:-

    (i) That it must be interpreted progressively;

(ii) That it must be interpreted generously;
(iii) That it must be interpreted purposefully;
(iv) That any Constitutional interpretation is value based;
(v) That it must be interpreted on the basis of the text;
(vi) It is transformative; and
(vii) That it seeks to create a break with the past.

PROGRESSIVE INTERPRETATION OF THE CONSTITUTION

28. The Constitutional interpretation cannot and is not the same as ordinary statutory interpretation. There are fundamental differences between Constitutional interpretation and these include the following:-

(a) The Constitution, is the supreme law. It is not easily amended. It is long-lasting and it is the apex of all legal norms within the legal order.
(b) The Constitution is justiciable and therefore standard for the assessment of the validity of both 'law' and 'conduct' in every legislative and executive echelon of government.
(c) The Constitution verbalises, as argued before, in broad, inclusive and open-ended language, values and beliefs associated with democracy and the Constitutional state.
(d) The Constitution as indicated above, was a product of intense negotiation, harbouring ideological tensions of various perspectives.

29. That being so, it is submitted that this Court must adopt a progressive broad based approach to Constitutional interpretation. The doctrine of progressive interpretation, was elegantly captured by **Lord Sankey** as "*a living tree capable of growth and expansion within its natural limits*", in ***Edwards v***

Attorney General Canada 1930 AC 124. Thus, if the Constitution is a living tree, according to **Lord Sankey,** it cannot be *"cut down"* by *"a narrow and technical construction"* but should be given "a large and generous interpretation". See also ***British Coal Corporation v The King 1935 AC 500.***

THE GENEROUS APPROACH TO CONSTITUTIONAL INTERPRETATION.

30. In this regard, it is submitted that only a generous interpretation, will give full effect to the freedoms and liberties that are contained in the Bill of Rights. See for instance ***G. Que v Blaikie 1979 (2) SCR 1016*** in which it was held that the Court must call for:-

> *"A generous interpretation, avoiding what has been called the austerity of tabulated legalism"*

PURPOSIVE APPROACH TO THE CONSTITUTIONAL INTERPRETATION

31. It is submitted that this Honourable Court must adopt, a broad and generous approach to the interpretation of the Bill of Rights that is purposive. Purposive interpretation, is aimed at interrogating and teasing out the core values that underpin the listed fundamental rights in an open and democratic society based on human dignity equality and freedom. Using this approach, we have to identify the purpose of a right in the Bill, in spirit and in substance. This purposive approach is one that has found home in a number of decisions including ***State v Mhlungu & Others 1995 (3) SA 391 (CC); State v Twala 2000 (1) SA 879 (CC); Ex Parte Attorney General, Namibia: In re***

Corporal Punishment by Organs of State 1991 (3) SA 76 (NmSC).

32. The grandmaster of the purposive approach, to Constitutional interpretation, is the Canadian Supreme Court of ***R v Big M Drug Mart Ltd 1984 18 DLR (4th)*** wherein it was stated as follows:-

> *"The meaning of a right of freedom guaranteed by the Charter was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interest it was meant to protect. In my view, this analysis is to be undertaken, and the purposes of the right or freedom in question is to be sought, by references to the character and larger objects of the Charter [of Rights and Freedom] itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedom with which it is associated within the text of the Charter. The interpretation should be ... a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the Charter's protection."*

33. The purposive interpretation or generous interpretation also finds authority in **Lord Wilberforce** famous judgment in ***Minister of Home Affairs (Bermuda) v Fisher 1979 (3) ALL ER 121.*** After referring to the influence of certain international conventions on the Constitutions of former colonies of the **British Commonwealth, Lord Fisher** called for

> *"a generous interpretation... suitable to give to individuals, the full measures of the fundamental rights and freedoms referred to ..." and that the Constitution called for 'principles of interpretation of its own.'* ***He went on to say*** *"This is no way to say that there are no rules of law which should apply to the interpretation of a Constitution. A Constitution is a legal instrument giving rise, amongst other things, to individual rights capable of enforcement in a court of law. Respect must be paid to the language which has been used to the traditions and the usages which have given meaning to that language. It is quite consistent with this, and with the recognition that rules of interpretation may apply, to take as a point of departure for the process of interpretation a recognition of the character and origin of the instrument, and to be guided by the principles of giving full recognition and effect to those fundamental rights and freedoms with a statement of which the Constitution commences."*

THE TEXT

34. The purposive interpretation, does not mean however that the language of the Constitution or a statute is irrelevant. The context of the text, must at all material times be the starting point. **Kentridge JA** reminded us of this in ***State v Zuma & Others 1995 (2) SA 642 (CC)*** when he states as follows:-

> *"While we must always be conscious of the values underlying the Constitution, it is nonetheless our task to*

interpret a written instrument. I am well aware of the fallacy of supposing that general language must have a single 'objective meaning'. Nor is it easy to avoid the influence of one's personal intellectual and moral preconception. But it cannot be too strongly stressed that the Constitution does not mean whatever we might wish it to mean. We must heed Lord Wilberforce's reminder that even a Constitution is a legal instrument, the language of which must be respected. If the language used by the lawgiver is ignored in favour of a general resort to 'values' the result is not interpretation but divination. ...I would say that a Constitution 'embodying fundamental principles should as far as its language permits be given a broad construction."

VALUE BASED INTERPRETATION

35. Of course it is conceded that the purposive approach to interpretation, ultimately requires a value judgment to be made about those purpose that are key and more important which have to be protected by those of Constitution and those which are not. Thus the remarks of **Mahomed CJ** in ***Ex Parte Attorney General, Namibia: In RE Corporal Punishment by Organs of State 1991 (3) SA 76 (NmSC), 91 D – F*** are critical:-

> *"It is ... a value judgment which requires objectively to be articulated and identified, regard being had to the contemporary norms, aspirations, expectations and sensitivities of the Namibian people as expressed in its national institutions and its Constitution, and further having regard to the emerging consensus of values in a*

civilised international community (of which Namibia is a part) which Namibians share. This is not a static exercise. It is a continually evolving dynamic. What may have been acceptable as a just form of punishment some decades ago, may appear to be manifestly inhuman or degrading today. Yesterday's orthodoxy might appear to be today's heresy."

CREATING A BREAK WITH THE PAST

36. As usual with all constitutional matters, thorough regard has to be given to the context, spirit and purport of the Bill of Rights in the Constitution. Until 1979, this country had never had a Constitution with an effective justiciable Bill of Rights. The fact that we now have one must be recognised in our jurisprudence and judicial thinking. The Constitution created a new legal order. See **Mr. Justice Cameron** in ***Holomisa v Argus Newspapers 1996 (2) SA 588 at 603-E-9*** wherein he stated:-

"All South African Courts must now, as a first duty, take into account the provisions of the Constitution, particularly its fundamental rights provisions.

As observed earlier, the Constitution is designed to create a new legal order in South Africa. In fulfilling this aim, the Constitution treads as a prudent path between legal revolution and legal continuity"

At 604 H-J the Judge continues

> *"A central consideration in South Africa is that the Constitution plants new values at the roots of our legal system. These include, as stated earlier, the values of equality, democracy, openness and accountability."*

37. That same point was recognised in this Honourable Court by none other than **Justice Devittie** in his seminal judgment in ***State v Sithole 1996 (2) ZLR 575 (H)*** when after painstakingly tracing the Constitutional history of this country, he stated;

> *"...The present Constitution, upon which the accused in this case places reliance, is a radical departure from an authoritarian past in which scant regard was paid to the rights of the individual and the role of the courts as guardians of the rights of the individual was marginalised. Our Constitutional history enlightens us to the values on which the present Constitution is premised – but more importantly it should alert us to the dangers of retaining the authoritarian traditions of the part."*

THE CONSTITUTION AS A TRANSFORMATIVE DOCUMENT

38. On the Constitution as a transformative document recently, **Ngcobo J** stated in ***Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others 2004 (4) SA 494 (CC)***:-

> *"South Africa is a country in transition. It is a transition from a society based on inequality to one based on equality. This transition was introduced by the interim Constitution, which was designed*
>
> > *'to create a new order ... [based on equality] in which there is equality between men and women or people of all races so that all citizens should be able to enjoy and exercise their fundamental rights and freedom'*
>
> *This commitment to the transformation of our society was affirmed and reinforced in 1997, when the Constitution came into force. The preamble to the Constitution 'recognises the justice of our past' and makes a commitment to establishing 'a society based on democratic values, social justice and fundamental human rights'. This society is to be built on the foundation of the values entrenched in the very first provisions of the Constitution. These values include human dignity, the achievement of equality and the advancement of human rights and freedom."*

39. The New Constitution of Zimbabwe offers the opportunity for a new regime of what can only be described as transformative Constitutionalism. **Karl Klare** in the decisive article ***Legal Culture Transformative Constitutionalism 1998 (14) SA Journal on Human Rights 146*** writes as follows:

> *"Transformative Constitutionalism connotes an enterprise of inducing large-scale social change through nonviolent political processes grounded in law. I have in mind a transformative vast enough to be inadequately captured by*

the phrase 'reform', but something short of or different from 'revolution' in any traditional sense of the word. In the background is the idea of a highly egalitarian, caring, multicultural community, governed through participatory democratic processes in both the polity and large portions of what we now call the 'private sphere'."

40. She proceeds as follows:-

> *"The Constitution invites a new imagination and self-reflection about legal method, analysis and reasoning consistent with its transformative goals. By implication, new conceptions of judicial role and responsibility are contemplated. Judicial mindset and methodology are part of the law, and therefore they must be examined and revised so as to promote equality, a culture of democracy and transparent governance."*

41. For an example of transformative Constitutionalism see ***Government of the Republic of South Africa and Others v Grootboom & Others 2000 11 BCLR 1169.***

CONSTITUTIONAL INTERPRETATION IN ZIMBABWE TO DATE

42. The interpretation of the Zimbabwe's Constitution in the past, has been an eclectic mixture of hybrid forms of statutory interpretation. See for instance ***Rattigan & Others v Chief Immigration Officer and Others 1994 (2) ZLR 54; State v***

Commissioner of Police 1980 (2) SA 369 (ZC); Principal Immigration Officer and Another v TOR 1993 (1) ZLR 71 (SC), Chinhamora v Angwa Furnitures SS228/96; State v Chigugudza 1996 (1) ZLR 28 (S); Chairman Public Service Commission v Zimta 1987 (1) SA 209; Commercial Farmers Union v Minister of Lands 2000 (2) ZLR 469 (S).

43. In *Hewlett v Minister of Finance 1981 ZLR 571*, Fieldsend CJ stated as follows:-

> *"...In general the principles governing the interpretation of a Constitution are basically no different from those governing the interpretation of any other legislation. It is necessary to look to the words used and to deduce from them what any particular section, phrase or words means, having regard to the overall context in which it appears."*

44. With great respect to **Fieldsend CJ**, the above is a very simplistic view of Constitutional interpretation. As argued above and as fully accepted in other jurisdictions, Constitutional interpretation is not the same as the statutory interpretation. After all the Constitution itself says it isn't. **Section 46 of the Constitution** reads as follows:-

> *"(1) When interpreting this Chapter, a court, tribunal, forum or body –*

(a) must give full effect to the rights and freedom enshrined in this Chapter;

(b) must promote the values and principles that underlie a democratic society based on openness, justice, human dignity, equality and freedom, and in particular, the values and principles set out in section 3;

(c) must take into account international law and all treaties and conventions to which Zimbabwe is a party;

(d) must pay due regard to all the provisions of this Constitution, in particular the principles and objectives set out in Chapter 2; and

(e) may consider relevant foreign law;

In addition to considering all other relevant factors that are to be taken into account in the interpretation of a Constitution.

(2) When interpreting an enactment, and when developing the common law and customary law, every court, tribunal, forum or body must promote and be guided by the spirit and objectives of this Chapter."

45. Although, this literalistic approach to Constitutional interpretation called for by **Fieldsend CJ**, has been applied in our jurisdiction, a closer look at most of the Constitutional cases indicate that in fact on the ground a purposive approach to Constitutional interpretation has been applied. See ***Minister of Home Affairs v Dabengwa & Another 1992 (1) ZLR 236 (S); Bore v Minister of Home Affairs 1986 (1) ZLR 210; In Re Moonmes & Others 1995 (1) SA 591 (SC); Catholic Commission for Justice and Peace in Zimbabwe v Attorney***

General 1993 (1) ZLR 242 (SC); Zara v Principal of Belvedere Technical College & Another 1997 (2) ZLR 508; Mandizvidza v Chaduka NO & Others 1990 (2) ZLR 375; Nyambirai v National Social Security Authority & Another 1995 (2) ZLR 1 (S).

46. Counsel has had occasion to study the ***Mawarire*** judgment, and the Heads of Argument that were presented by Counsel in those matters. Regrettably, none of the heads of Argument filed by Counsel addressed, the question of Constitutional interpretation. Only the heads filed by Counsel for the Third Respondent, Mr Tabani Mpofu, had a casual reference to statutory interpretation. Unfortunately that was only restricted to **Fieldsend CJ's** judgment in the ***Hewlett*** matter referred to above. Counsel has no doubt that it is now time that this court, fully addresses itself on the key question of Constitutional interpretation.

47. In short it is submitted that a broad generous purposive interpretation ought to be applied.

LOCUS STANDI

48. The Respondents take a very deem view of the issue of Constitutional *locus standi* which even in the old position of teh repealed Constitution this Court had already rejected.

49. The old common law principles required that for an individual to have *locus standi* he should show some legitimate interest in the matter.

50. However, it is evident from the authorities that a much broader right of access to this Honourable Court was already being defined in the cases which was a decisively departure from the older cases. See ***Tsvangirayi v Registrar and Others 2002 (1) ZLR 268 (S); Catholic Commission for Justice and Peace in Zimbabwe v Attorney General & Others 1993 (1) ZLR 242 (S); Law Society of Zimbabwe & Others v Ministry of Finance 1999 (2) ZLR 213 (S).***

51. It however took the Chief Justice, in the matter of ***Jealous Mbizvo Mawarire v Robert Mugabe NO & Others CCZ 1/2013*** that in a brutal manner, the older approach that laid mine fields across the path of Constitutional access was laid out. The Chief Justice stated as follows at **page 8 of the cycostyled** judgment:-

> *"Certainly, this Court does not expect to appear before it only those who are dripping with the blood of the actual infringement of their rights or those who are shivering incoherently with the fear of the impending threat which has actually engulfed them. This Court will entertain even those who calmly perceive a looming infringement and issue a declaration or appropriate order to stave the threat, more so under the liberal post-2009 requirements."*

52. Surely, if the legal situation brought about by **Constitutional Amendment No.19 of the Zimbabwean Constitution** is described as liberal, then the New Zimbabwean Constitution has certainly opened up undue and unlimited access to this Honourable Court hence the flood gates of Constitutional litigation prevailing. This is as it should be.

53. The fact of the matter is that **Section 85 of the Constitution of Zimbabwe** now brings an almost unlimited right of access to this Honourable Court. That section is of such a wider approach such that, there cannot be any issue surrounding the same. See ***Ferreira v Levin 1996 (1) SA 984 (CC); Van Rooyen v The State 2001 (4) SA 396; Coetzee v Comitis 2001 (1) 1254 (CC).***

54. **Section 167 (5) of the Constitution** itself provides a further indicator of this word access.

55. **Subsection 5 of Section 167** reads as follows:-

> *"Rules of the Constitutional Court must allow a person, when it is in the interest of justice and with or without of the Constitutional Court –*
> *(a) To bring a constitutional matter directly to the Constitutional Court;*
> *(b) To appeal directly to the Constitutional Court from any other court;*
> *(c) To appear as a friend of the court."*

56. Although Rules of the Court are being framed, it is quite clear that what will be key in future is the interest of justice. Put differently, the unlimited right of access offered by **Section 85**, is in future going to be qualified by the phrase "interest of justice" which will have to be incorporated in the rules.

57. If that is going to be the criteria then surely one will be hard pressed to find a better case than the present one, where the interest of justice demands that this Court change the same.

58. In any event, in terms of **Section 167 (3),** only the Constitutional Court makes the final decision whether an Act of Parliament, is constitutional. In *casu* two Acts of Parliament are being challenged. Therefore the Applicants have no choice but to approach this Court directly.

59. In simple terms, the Respondents' submissions on *locus standi* are ill-informed and totally naked and oblivious of any understanding of the provisions of the new Constitution and developments elsewhere dealing with the almost unfettered right of individuals to approach the Constitutional Court.

E. THE MERITS

(EA) CONSTITUTIONAL PROTECTION OF CHILDREN

60. In **paragraph 32 record 10** of the papers, the First Applicant makes the following statement:-

> *"In this Court Application, I therefore seek to protect the rights of children, in particular girl children, who are being subjected to the vagaries of early marriages before eighteen (18) years."*

61. It is not the function of another little girl, to protect the rights of other children. The rights of other children ought to be protected by the State and in particular the Courts as they are upper guardian of our minor children.

62. In this regard **Section 81 of the Constitution of Zimbabwe** reads as follows:-

"81. Rights of children

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

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

(b) To be given a name and family name;

(c) In the case of a child who is –

(i) Born in Zimbabwe; or

(ii) Born outside Zimbabwe and is a Zimbabwean citizen by descent; to the prompt provision of a birth certificate;

(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) Not to be recruited into a militia force or take part in armed conflict or hostilities;

(h) Not to be compelled to take part in any political activity; and

(i) Not to be detained except as a measure of last resort and, if detained –

(i) to be detained for the shortest appropriate period;

(ii) to be kept separately from detained persons over the age of eighteen years; and

(iii) To be treated in a manner, and kept in conditions, that take account of the child's age.

(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."

63. If this Court is the upper guardian of all minors, then it is guided by an entrenched principles of common law, which is the best interest requirement.

64. Thus in ***Fletcher v Fletcher 1948 (1) SA 130 A***, the Appellate Division of South Africa held that the most important factor have considered where children are considered whether children's custody and access is the best interest of the child.

65. Through this state, the best provision, has now been made a constitutional issue through the provisions of **Section 81 (2) of the Constitution**. More than that **Section 81 (3)** which states that children are entitled to adequate protection by the courts, in particular by the High Court as their upper guardian is also sucrocide.

66. The challenge to this Honourable Court therefore is a simple one it is to meet and be equal to the paramount nature of a child's interest and the fact that the line of protection is not two little girls struggling in Glenview but the Courts itself.

67. On this score, it is submitted very crudely and very basic that it cannot be in the interest of any child to married before the age of eighteen (18) years. It is that simple.

68. In ***Bannatyne v Bannatyne 2003 (2) SA 363 (CC);*** the South African Constitutional Court held that the best interest requirements provides obligations on parents to properly care for children. However it also imposed obligations on the State to create the necessarily conditions

and the necessary infrastructure to ensure that children receive the protection that they are entitled to in terms of **Section 28 of the South African Constitution** which is exactly word for word with **Section 81 of the Zimbabwean Constitution**. In other words a positive obligation exists on the State to protect children. That obligation is in the Constitution itself.

69. The best interest provision is indeed an international concept protected by several instruments.

70. For starters the **Hague Convention on the Civil Aspects of International Child Abduction 1990** protects the child's best interest by ensuring the custody and disputes are adjudicated by the Court of the child's habitual residence.

71. Equally, **Article 3 of the Children's Convention** reads as follows:-

> *"1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interest of the child shall be a primary consideration.*
> *2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his part or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.*
> *3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the*

standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision."

72. The same concept is also recognised in the **OAU Charter on the Rights of the Child.**

73. In this regard the **1995 UN Convention on the Rights of the Child,** and the **African Charter on the Rights and Welfare of the Child** are key instruments in protecting the rights of children.

74. Zimbabwe still has a long way to go before it adopts a separate child protection legislation to follow what is common in other jurisdictions for instance in South Africa where they have a **Child Care Act No. 74 of 1983**. This law is overdue.

75. It is submitted that allowing children to be married is subjecting the same to maltreatment, neglect or any form of abuse which is proscribed in **Section 81 (1) (e).**

76. If our Courts have held that child whipping is unconstitutional. See ***State v Williams & Others 1995 (3) SA 633 (CC),*** surely it must find early marriages being a total form of complete abuse.

77. Equally an important provision relevant to this matter is the right of children to family or parental care codified in **Section 81 (1) (d).**

78. Unlike the South African Constitution, the Zimbabwean Constitution, defines the issue of family and family protection as an obligation on the State. **Section 19 of the Constitution** reads as follows:-

"19 Children

(1) The States must adopt policies and measures to ensure that in matters relating to children, the best interests of the children concerned are paramount.

(2) The State must adopt reasonable policies and measures, within the limits of the resources available to it, to ensure that children –

(a) Enjoy family or parental care, or appropriate care when removed from the family environment;

(b) Have shelter and basic nutrition, health care and social services;

(c) Are protected from maltreatment, neglect or any form of abuse; and

(d) Have access to appropriate education and training

(3) The State must take appropriate legislative and other measures –

(a) To protect children from exploitative labour practices; and

(b) To ensure that children are not required or permitted to perform work or provide services that –

(i) are inappropriate for the children's age; or

(ii) place at risk the children's well-being, education, physical or mental health or spiritual, moral or social development."

79. Equally **Section 25 of the Constitution** reads as follows:-

"25. Protection of the family

The State and all institutions and agencies of government at every level must protect and foster the institution of the family and in particular must endeavour, within the limits of the resources available to them, to adopt measures for –

(a) The provision of care and assistance to mothers, fathers and other family;

(b) The prevention of domestic violence."

80. Even if the above were absent, the Zimbabwean Constitution provides for a right to human dignity in **Article 51** which reads as follows:-

> ***"51 Right to human dignity***
>
> *Every person has inherent dignity in their private and public life, and the right to have that dignity respected and protected."*

81. The right to family life and family protection is essentially part of the human dignity protected by the Constitution and in South Africa where family protection is not specifically provided in the Constitution, the Constitutional Court has held that this right is indirectly protected via the right to dignity. See for instance ***Dawood v Minister of Home Affairs 2000 (3) SA 936 (CC) paragraph 36, Booysen v Minister of Home Affairs 2001 (4) SA 485 (CC) paragraph 10.***

82. Indeed this Constitution makes a clear demarcation between children and adults. Indeed the legal age of majority Act delineates adults and minors. Equally **Section 78 of the Constitution** which only gives the right to every person who has attained the age of eighteen (18) years to found a family is significant.

83. On the basis of the application of the *expressio unius rule* it therefore means that any person under the age of eighteen (18) cannot found a family and *a fortiori* cannot be married.

84. The *expresio unius rule* is an important aspect of our law. It was defined by **Gubbay CJ** in ***Chivinge v Mushayakarara & Another 1998 (2) ZLR 500 (SC)***

85. Thus there can be no question that the Constitution protects children but not only that it is clear that the Constitution in very obvious terms, proscribes the founding of a family which can only be done through marriage for no Constitution can promote general application to persons above the age of eighteen (18).

86. Indeed, in the execution of the Court's function as upper guardian of the minor children the paramount factor is the best interest. As argued above, whilst Respondents may argue otherwise, it is not in the best interest of children to be married before eighteen (18) years and one would argue even to have sexual intercourse before the age of eighteen (18) years.

(EB) WHAT THE COURT DOES IF THERE IS AN INFRACTION

87. At the end of the day, if the Court finds that there is an infraction of the Bill of Rights caused by the two laws being challenged, the second stage of the enquiry is under **Section 86 of the Constitution of Zimbabwe.**

88. **Section 86 (2)** is very clear. It states that the fundamental rights and freedoms set out in this Chapter may be limited only in terms of a law of general application and to the extent that the limitation is fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom.

89. In simple terms, the onus shifts to the State to show that the current marriages laws are fair, reasonable, necessary and justifiable.

90. How can anyone submit that let alone the government of the people submit that it is fair, reasonable, necessary and justifiable to have the current laws?

91. Just to expand on **Section 86 of the Constitution** it is submitted that it is for the Respondents to justify that a particular law which the Court would have found that it infringes a right is legitimate. The burden of justification is one that falls squarely on the Respondents. See ***Nyambirai v NSSA & Another 1995 (2) ZLR 1 (S); State v Makwenyane 1995 (3) SA 391 (CC) paragraph 102; National Coalitions for Gays & Lesbians Equality v Minister of Justice 1999 (1) SA (6) (CC).***

92. It is also important to underscore the point that in the second stage of enquiry the Courts depart from the generous broad and interpretation stated above to a strict one.

93. The above cases illustrate that.

94. In addition the question of whether an infringement of a right is a legitimate limitation of that right involves a far more factual enquiry than the question of interpretation. In this regard, appropriate evidence must be led to justify the limitation of a right in accordance with the criteria laid down.

95. Put in simple terms, a Court will not be able to make a decision whether the limitation is reasonable, necessary or justifiable in openness, democratic society based on human dignity, equality and freedom without evidence in data. See for instance **Cameron J** in ***State***

v Meaker 1998 (8) BCLR 1038. Failure to provide the relevant data and statistics justifying the limitations is fatal. See for instance ***Philips v Director of Public Prosecution 2003 (3) SA 43; Moiese v Greater Germiston Transitional Local Council 2001 (4) SA 491 (CC).***

THE MYTH OF THE RESPONDENTS' DEFENCE

96. The Respondents' opposing affidavit has not provided any data or evidence to justify the retention of the law. Instead what the government simply sought to do is to justify infraction on old fashioned stereotype sexist arguments.

97. **Paragraph 11** of the opposing affidavit makes this heretical point:-

> *"It is true that the Marriage Act, [Chapter 5:11] differentiates between the minimum age of marriage for boys and girls, and that eh Customary Marriage Act, [Chapter 5:11] does not specify any minimum age for either boys or girls. I, however, deny that there is anything unconstitutional about that state of affairs. The differentiation is simply that, and is necessitated solely by the sexual difference itself and the implications therefore for married life. As far as I am aware the differentiation arises from biological and psychological maturity levels for boys and girls."*

98. It is absolutely absurd to suggest that there are different biological and psychological maturity levels for boys and girls. This is not true and is a common stereotype.

99. Even if it was true, surely, such a statement must be supported by evidence from an expert.

100. Differences between men and women boys and girls, whilst of course are located on reproductive components but those are not the real differences. The real differences lie from gender issues.

101. By this we refer to social issues and socialisation models that create and justify differences between men and women based on that socialisation. It is that socialisation that explains why some parents would send boy children to school only and not girls.

102. Socialisation predicates that the role of the girl child is to be married and be dumped on some poor child who has paid lobola.

103. This is the very point made by various feminist scholars. See for instance **Gender, Law and Justice edited by Elsje Bonthuys and Cathrine Albertyn Juta 2007.**

104. At **page 22** the following is stated:

> *"The need for first generation feminists to distinguish between sex and gender arose from the assumption that women's biological differences from men, and particularly their reproductive processes, rendered them more emotional, less intelligent and less able to take part in 'male' pursuits like education, religious leadership, intellectual and physical labour and politics.*[3] *Since social differences between people could*

[3] The South African case of Incorporated Law Society v Wookey 1912 AD 623 held that women could not be admitted as attorneys. Several (male) legal academics expressed the opinion that women's biological functions as mothers would render their participation in the public sphere 'unnatural.' See Kaganas & Murray 1994 Acta Juridica 6

be eradicated by cultural change, unlike biological differences which were seen as immutable, the exposure of gendered or socially constructed differences was an effective strategy for defying male dominance. For feminist lawyers the distinction between sex and gender assisted in exposing how these assumptions were also embedded in the structure and logic of law.

The sex/gender distinction gave to rise attempts to ascertain which differences were biological and which were social. Some feminists argued that most of the differences between men and women which institutions like the law regard as natural or 'given' are, in fact, socially construed and therefore subject to change. From this proceeds the argument either that women could behave like men, or that men could be socialised to behave more like women. Bartky, for instance, argues that even the typically female body, generally regarded as 'natural', is produced by three types of social practice:[4]

105. The statement made in **paragraph 11** of the Respondents' Affidavit is based on stereotypes, ***Messrs E. Bonthuys and Cathrine Albertyne*** stated as follows at **page 26**:-

"Stereotypes contain both descriptive and normative elements – they describe how certain people are, but also prescribe how they should behave[5]*. The belief that stereotypes reflect 'natural' or biological differences between men and women translates into a view that behaviour which defies stereotypes*

[4] The Feminine Body in Jaggar & Rothenberg (eds) Feminist Frameworks 454, 455.
[5] O'Sullivan 'Stereotyping and Male Identification: 'Keeping Women in their Place'" 1994 Acta 547 549-550.

should be discouraged[6]. *For example, women who have in accordance with stereotypes of good mothers and wives will be rewarded by the legal system, by obtaining custody of children and protection of their financial interests. However, women who reflect stereotypes of bad wives and mothers are punished and their treatment serves as a warning of the dangers of non-compliance for other women*[7].

Closely associated with the use of gender stereotypes is the issue of essentialism, which is premised on the idea that there are certain essential features which are generally and universally shared by all women[8]. *These features are regarded as 'natural' while, in fact, they are socially produced and reflect specific value systems and choices*[9].

106. In short there are no differences between men and women which would justify the discrimination in our law.

F. DISCRIMINATION AND GENDER EQUALITY

107. The New Zimbabwean Constitution has created, a conscious and serious jurisprudence pertaining to gender equality and women's rights. In **Article 17** of the same states as follows:-

> *"17. Gender balance*
>
> *(1) The State must promote full gender balance in Zimbabwean society, and in particular –*

---

[6] See par 2.2.2 for a discussion of the biological origins of sex and gender.
[7] O'Sullivan 1994 Acta Juridica 188-191; Bonthuys 'Familiar Discourses of Parenthood' 1999 THRHR 547 549-550.
[8] Southwell 'The Case of the Invisible Woman: Essentialism, Intersectionality and Marginalisation in Feminist Discourse' 1994 CILSA 357.
[9] Minow Justice Engendered in Smith (ed) Feminist Jurisprudence 217 227; O'Sullivan 1994 Acta Juridica 187; Pieterse 2001 SA Public Law 94.

(a) The State must promote the full participation of women in all spheres of Zimbabwean society on the basis of equality with men;

(b) The State must take all measures, including legislative measures, needed to ensure that –

(i) Both genders are equally, represented in all institutions and agencies of government at every level; and

(ii) Women constitute at least half the membership of all Commissions and other elective and appointed governmental bodies established by or under this Constitution or any Act of Parliament;

And

(c) The State and all institutions and agencies of government at every level must take practical measures to ensure that women have access to resources, including land, on the basis of equality with men.

(2) The State must take positive measures to rectify gender discrimination and imbalances resulting from past practices and policies."

108. Further **Article 56(1) & (2), of the Constitution** reads as follows:-

"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."

109. **Article 56(ii)** is significant. The fact that women and men have the right to equal treatment including the right to equal opportunities in political economic cultural and social spheres is key. They are at first instance all equal below the law.

110. **Section 56** (3) is key. It makes it clear that no person shall be discriminated on the basis of age and sex. Clearly, **Section 22 of the Marriages Act** is making discrimination on the basis of both age and sex. Clearly an infraction has occurred and that being the case as submitted above, the duty of the Court is now to consider whether the same is justifiable, necessarily and reasonable in a democratic society.

111. Further, **Section 80 of the Constitution** reads as follows:-

"80. Rights of women

(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 those rights are to be exercised.
(3) All law, customs, traditions and cultural practices that infringe the rights of women conferred by this Constitution are void to the extent of the infringement"

112. In **Section 80(iii),** the Constitution makes it clear that all laws, customs, traditions and cultural practices that infringe the rights of women conferred by this Constitution are void to the extent of this infringement.

113. What is an issue in *casu* is the concept of equality between women and men.

114. Equality is an important jurisprudential concept and issue. Equality it is submitted is at the epicentre of any democratic society. Whilst liberty, is considered a more critical value it is submitted that there cannot be liberty without equality. **Justice Dennis Davies** writes as follows on equality and equal protection:-

> *"A society committed to equality attempts to makes the lives of all its citizens better by insisting that each person must be shown equal concern and respect. Without such an enterprise members of society who have a compelling interest in developing and exploiting their own capacity for autonomy, in promoting their own conceptions of the good life, and analysing and criticising other conceptions will find their ability dependent upon an initial arbitrary distribution of resources. Equality thus is inextricably linked to the conception of liberty if society is to allow the promotion of competing interests."*[10]

115. Perhaps it is **Aristotle's** view which is more critical.

> *"Equality in morals means this: those things that are alike should be treated alike, while things that are unalike should be treated unalike in proportion to their unlikeness. Equality and justice are*

[10] See Dennis Davies "Equality and Equal Protection" in the Rights and Constitutionalism in the New South African Legal Order by Van Wyk, Dugard, De Villiers and Davies published by Juta & Company 1994 Page 196.

synonymous: to be just is to be equal, to be unjust is to be unequal".[11]

116. In this regard, it is important to appreciate that not every class differentiation or distinction based on sex is *ultra – vires* Constitution.

117. The starting point always is to determine whether or not unlawful discrimination has occurred. In this regard our courts have developed a two staged approach to assist in the deconstruction. To pass the test of permissible classification two conditions must be made *viz:-*

> *"a) The classification must be found on an intelligible differentiation, which distinguishes persons or things that are grouped together from others left out of the group.*
> *b) The differentiation must have a rationale in relation to the object sought to be achieve by the statute".*

118. This approach has been well developed both in South African and Zimbabwean law. In South African law, the Courts have dealt with the doctrine of equality in a number of cases beginning with the foundational case of ***Brink v Kitshoff NO 1996 (4) SA 197, President of the Republic of South Africa v Hugo 1997 (4) SA (1) (CC), Prinsloo v Van der Linde & Another 1997 (3) SA 1012, Harksen v Lane NO & Others 1998 (1) SA 300 (CC).*** In the last case, ***Harksen v Lane NO & Others,*** *supra*, then inimitable **Goldstone J**, defined the stages of the enquiry which are as follows:-

> *"(a) Does the challenged law or conduct differentiate between people or categories of people? If so, does the*

[11] Aristole Nishomaschean Ethics (Ross Rosses) edited 1925 Volume lll 1131.

differentiation bear a rational connection to a legitimate government purpose? If it does not then there is a violation of the equality provisions in the Constitution. Even if it does a bear rational connection, it might nevertheless amount to discrimination.

(b) *Does the differentiation amount to unfair discrimination? This requires a two-stage analysis:-*

(i) *Does the differentiation amount to 'discrimination? If it is on a specified ground, then discrimination will have to be established? If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.*

(ii) *If the differentiation amounts to 'discrimination', does it amount to 'unfair discrimination'? If it has to be has been found to have been on specified ground, and then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complaint and others in his or her situation. If not at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation.*

(d) *If the discrimination is found to be unfair then determination will have to be made as to whether the provision can be justified under the limitations clause provisions of the Constitution."*

119. The above approach, has been consistently applied in a number of decisions including the ***National Coalition for Gays and Lesbian Equality v Minister of Home Affairs 200 (2) SA 1 (CC)***, which is referred to in the Constitutional Court's decision of ***Gumede (born Shange) v President of the Republic of South Africa & Others (CCT 50/08), Jooste v Score Supermarket Trading (Pty) Ltd 1999 (2) SA 1 (CC), Du Toit v Minister of Welfare and Population Development & Others 2003 (2) SA 198 (CC), Satchwell v President of the Republic of South Africa 2002 (6) SA 1 (CC), J v Director General Department of Home Affairs 2003 (5) SA 621 (CC).***

120. The approach in Zimbabwe law has hardly been any different. To begin with, our Courts have been consistent, in the few cases that have been heard before the same, in holding that discrimination on the grounds of sex is not permitted. ***Wazara v Principal of Belvedere Technical Teachers College and Another 1997 (2) 508 (H),*** dealt with the question of discrimination against women in the form of the right of a college to expel a pregnant woman. Smith J, had no hesitation in holding that would constitute unlawful discrimination for the purposes of **Section 23 (2) of the Constitution of Zimbabwe** although the only caveat being that **Constitutional of Zimbabwe Amendment No. 14 being Act No. 14 of 1996**, only became law on the 6th of December 1996, a few days before this case was decided.[12]

[12] It was Constitutional Amendment No. 14, which introduced the concept of discrimination based on gender.

121. Surely, a generous purposive broad and interpretation requires the Court should declare unconstitutional **Section 22 of the Matrimonial Causes Act** as long as the **Customary Marriages Act.**

G. COMPERATIVE INTERNATIONAL LAW AND INTERNATIONAL INSTRUMENTS

122. It is common cause that international instruments, particularly those that Zimbabwe have ratified, and international jurisprudence, provide guidance when interpreting the declaration of rights. See for instance ***State v A Juvenile 1989 (2) ZLR 61 (S).***

123. The New Zimbabwean Constitution itself in **Section 46 (1) (c)** makes it clear that when interpreting the Bill of Rights the Court must take into account the international law and all treaties and conventions to which Zimbabwe is a party to.

124. Zimbabwe is also a signatory of and has ratified the **Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)** adopted for signature on the 18 December 1979 and entered into force on 3 September 1981. In **Article 16 subsections (c), (d), and (f)**, the following rights are provided for:-

> *"(a) States parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriages and family relations and in particular shall ensure, on a basis of equality of men and women;*
>
> *(b) The same rights in responsibilities during marriages and it dissolution;*

(a) *The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount;*

(b) *The same rights and responsibilities with regard to guardianship, wardship, trusteeship, and adoption of children, or similar institutions where these concepts exists in national legislation, in all cases the interests of the children shall be paramount."*

125. Similar provisions are also found in **Article 2 (C) of the Declaration on the Elimination of Discrimination Against Women of 7 November 1967.**

126. The law, in South Africa and in the United States, will be dealt with below. The Indian Constitution as well protects equality and outlaws sexual discrimination. **Article 14 and 15 (1) of the Indian Constitution** provide that:-

> *"14. The State shall not deny to any person equality before the laws or the equal protection of the law within the territory of India.*
>
> *15. (1) The Sate shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them."*

127. In interpreting **Article 14,** the Indian Supreme Court has required that any legislative classification or distinction must be

shown first to be founded on "*intelligible differentia*" which has a rational relation to the object sought to be achieved by the impugned legislation. **Article 15** is a matrix that is a derivative of the right to equality under Article 14. See ***Basu: Shorter Constitutional History of India 10th Ed at 63, Seervai: The Constitution of India 3rd Ed Volume 1 Chapter 9.***

128. Similarly, in **Canada Section 15 of the Charter on Rights and Freedom** reads as follows:-

> *"(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.*
>
> *(3) **Subsection** (1) does not preclude any law, program activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."*

129. Again, in interpreting **Article 15**, the Canadian Constitutional Court has adopted more or less the Indian, American and indeed South African position that any classification must have logic, and must have a rational connection with the Government Policy sought to be attained. See for instance ***Andrews v Law Society***

of British Columbia (1989) 36 CRR 193 [1989] 1 SCR 143; (1989) 56 DLR 4th 1.

H. AGE AND SEXUAL DISCRIMINATION IN OTHER JURISDICTIONS

130. Over the years has been developed a whole host of reach jurisprudence on age and gender classification.

131. In the leading case of ***Frontiero v Richardson***, the Federal Supreme Court was concerned with a Federal law that allowed a man to automatically claim his wife as a dependent and thereby receive a greater allowance for quarters and for medical benefits. A woman, however, could only gain these benefits if she could prove her spouse was dependent on her for over half of his support. The court held the law to be unconstitutional.

132. In a famous passage, **Justice Brennan** wrote as follows at **page 773**:-

> *"There can be no doubt that our Nation has had a long and unfortunate history of sex discrimination. Traditionally such discrimination was rationalised by an attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage." Justice Brennan argued that the characteristics that justify strict scrutiny of racial classifications also are present as to gender discrimination: 'Women still face pervasive, although at times more subtle, discrimination in our educational institutions, in the job market, and perhaps most conspicuously, in the political arena.*

Moreover, since sex, like race and national origin, is an immutable characteristic determined solely by birth, the imposition of special disabilities upon members of a particular sex would seem to violate the basic concept of our system that legal burdens should bear some relationship to individual responsibility."

133. Equally in ***Stanton v Stanton***[13]; the Federal Supreme Court declared unconstitutional a Utah law that required that parents support their female children until age 18, but that male children be supported until age 21. The Court found deplorable the rational of the difference being the 'old notions' the female is destined solely for the home and the rearing of the family, and only the male for the market place and the world of ideas.

134. In ***Kirchberg v Feenstra***[14], the Court expressly used the doctrine of scrutiny developed in ***Craig v Boren*** above to invalidate a Louisiana law that gave a husband, as 'head and master' of property jointly owned with his wife, the unilateral right to dispose of such property without his spouse's consent.

135. Further in the ***United States v Virginia, 518 U.S. 515 (1996);*** the Supreme Court declared unconstitutional the exclusion of women by the **Virginia Military Institute (VMI).**

136. In our law as indicated above, the cases of ***Wazara v Belvedere Teachers College supra*** and ***Chadoka supra*** all outlaid discrimination connected with female students that fell pregnant, in universities and colleges who were being expelled and not the boy responsible for the same.

[13] 421 U.S. 7 (1975)
[14] 450 U.S. 455, 459 (1981)

137. In *casu*, how can the age of marriage be different and how can it be justified?

I. CONCLUSION

138. It is respectfully submitted that justice requires that the Court issue a declaratory Order to the effect that all marriages in Zimbabwe cannot then take place with minors. More importantly, the Court must declare **Section 22 of the Marriages Act** null and void as well as the Customary Marriages Act to the extent that it does not proscribe the age of eighteen (18) and above as the age of marriage.

139. It is so submitted.

DATED AT HARARE ON THIS 1st DAY OF DECEMBER 2014

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