An assessment of the domestic framework for protecting socio-economic rights under the Constitution of Zimbabwe of 2013

by

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ABSTRACT

Socio-economic inequality is deep-rooted in Zimbabwe due to a number of factors chief among them being the exclusion of socio-economic rights as justiciable under the now repealed Lancaster House Constitution (LHC). A plethora of excessive bureaucratic actions in a number of instances left many stranded without the recourse to the law particularly protection by the Constitution. To correct this historic anomaly, the 2013 Constitution was enacted. Significantly, the 2013 Constitution protects both civil and political rights and socio-economic rights in the same manner as justiciable rights. This provides the highest degree of interdependence and interrelatedness of all rights in the domestic legal order. In order to ensure that socio-economic rights are effectively protected and enforced, this study identifies and discusses the framework for protecting socio-economic rights under the 2013 Constitution. Firstly, it identifies the specific rights protected under the Constitution and the obligations imposed by these rights. Secondly, the study discusses the role of the courts in the protection of socio-economic rights. The study further identifies some of the major conceptual and practical challenges that are likely to arise in the adjudication of socio-economic rights. In that regard, the study attempts to come up with solutions meant to overcome the conceptual and practical challenges that are faced in the enforcement of socio-economic rights. For example, instead of adopting a purely legal-centric approach in interpreting socio-economic rights, it is suggested that courts should adopt a multidisciplinary approach taking into account founding values, historical background, political background, international human rights law norms and comparative law. Furthermore, this study argues that strictly adopting either of the two models of review namely the reasonableness approach as adopted by South African courts or minimum core approach as expounded by the United Nations Committee on Economic Social and Cultural Rights (CESCR) will inhibit the proper enforcement of the protected rights. Instead, courts should consider adopting an integrated model that includes the two named approaches to ensure that socio-economic rights are effectively protected and realised.

Keywords: constitutional protection, socio-economic rights, 2013 Constitution, domestic framework, role of the courts and judicial remedies.
DECLARATION

I, Ntandokayise Ndlovu (Student No. 200909683) declare that this mini-dissertation is my own work, and that it has not been submitted for any degree or examination in any other university or institution. All the sources used, referred to or quoted in the text have been indicated and duly acknowledged by complete references.

Signature of Candidate:………………………………………
Date: ..................................................................

Signature: ..........................................................
Supervisor: (Professor Nasila Selasini Rembe)
Date: ..........................................................
DEDICATION

My special dedication is made to mum and dad and, above all, to the Lord Almighty. I dedicate this study to the memory of my late mum and dad Philile Connie Nkabinde and Ephial M Ndlovu, respectively, who in their lives epitomized spiritual and moral values that I have endeavoured to live by. I love you mum and dad. I know you are proud of me today. Above all, I dedicate this study to my special Father, God Almighty who never left me during this journey as He promised in His special word, when things were tough, He whispered in my ear and said that, “which is impossible with man, is possible with me” and today I am a living testimony. Praise be unto you Lord, you deserve the highest praise.
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This dissertation would not have been completed without the support, strong prayers and encouragement from my family here in East London, Johannesburg and KwaBulawayo. I want to especially acknowledge my spiritual Mum and Dad (Mama (Dr) Mashudu-Thakhathi and Prof Thakhathi) for everything they did for me especially during trying times. Many thanks to my siblings, sis Mue, Kaye, Mandlo, Skhue Maps, Bro Ngue, Bongani, Sancue, Collen and Tsano Obert: God bless you guys. To my friends Sawso, Stavo, Talkaz, Ngaiza, Obert, Melissa, Danz, Mebi, JayTwanandoda, Cedrick, Ncue, Doncabe, Jantso, Queen and Kido: thank you for everything guys.
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<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Full Form</th>
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<tr>
<td>LHC</td>
<td>Lancaster House Constitution</td>
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<tr>
<td>UDHR</td>
<td>Universal Declaration of Human Rights</td>
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<tr>
<td>ICESCR</td>
<td>International Covenant on Economic, Social, and Cultural Rights</td>
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<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights</td>
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<tr>
<td>VCLT</td>
<td>Vienna Convention on the Law of Treaties</td>
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<td>CRC</td>
<td>Convention on the Rights of the Child</td>
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<tr>
<td>ZSC</td>
<td>Zimbabwe Supreme Court</td>
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<tr>
<td>ZCC</td>
<td>Constitutional Court of Zimbabwe</td>
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<tr>
<td>ZLHR</td>
<td>Zimbabwe Lawyers for Human Rights</td>
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<td>ZRP</td>
<td>Zimbabwe Republic Police</td>
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<tr>
<td>ZHRC</td>
<td>Zimbabwe Human Rights Commission</td>
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<tr>
<td>CESCR</td>
<td>Committee on Economic, Social and Cultural Rights</td>
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<tr>
<td>OPT-ICESCR</td>
<td>Optional Protocol to the International Covenant Economic Social Cultural Rights</td>
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<tr>
<td>CJ</td>
<td>Chief Justice</td>
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<td>NHRI</td>
<td>National Human Rights Institutions</td>
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Grootboom and others v Government of the Republic of South Africa and Others 2000 11 BCLR 1169 (CC).

Khosa and others v Minister of Social Development and Others, Mahlaule and Another v Minister of Social Development 2004 6 SA 505 (CC).

Mazibuko and others v City of Johannesburg and Others 2010 3 BCLR 239 (CC).

Minister of Health and others v Treatment Action Campaign and others (No 2) 2002 10 BCLR 1033 (CC).

Soobramoney v Minister of Health (Kwazulu-Natal) 1998 1 SA 765 (CC).

Permanent Secretary Department of Welfare, Eastern Cape Provincial Government and Another v Ngxuza and Others 2001 ZASCA 85.

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African Commission on Human and Peoples’ Rights
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Zimbabwe

Dare Remusha Cooperative v The Minister of Local Government, Public Works and Urban Development and others HC 2467/05.

Batsirai Children’s Care v The Minister of Local Government, Public Works and Urban Development and others HC 2566/05.


In Re Munhumeso and Others 1995 1 SA 551 (ZSC).

Bull v Minister of Home Affairs 1986 1 ZLR 202 (SC)
CHAPTER 1

Introduction to the study: research outline and context

1 An overview

11 Zimbabwe’s Constitutional History

The Constitution of a country is generally considered the supreme law of the land.¹ Most Constitutions entrench a Bill, a Chapter or a Declaration of Rights. The entrenchment of a Bill of Rights in a Constitution is particularly relevant for human rights protection. Civil and political rights have traditionally received extensive protection through their inclusion as justiciable rights at the expense of socio-economic rights.² Like other post-colonial constitutions imposed by the British on their erstwhile colonies, Zimbabwe’s independence Constitution, the now defunct Lancaster House Constitution (the LHC) adopted in 1979 entrenched a justiciable Bill of Rights which protected civil and political rights.³ Individuals have been able to invoke civil and political rights to obtain relief from the courts whenever the state has arbitrarily threatened or encroached on their rights.

Zimbabwe has been on the throes of political, economic and social crisis since the 2000s following what had been a successful first twenty years of independence since 1980. The political, economic and social crises have been accompanied by State and non-State violations of human rights. Although the LHC made provision for civil and political rights, it was more committed to guaranteeing majority rule and eradicating racial discrimination than addressing social justice and inequality in society.⁴ This commitment was carried out at the expense of socio-economic rights that never enjoyed constitutional protection as justiciable rights or aspirational directive principles of state policy under the Constitution. This shortfall was detrimental to the poor Zimbabweans because it was difficult to hold the State’s failure

¹See the Constitution of the Republic of Zimbabwe Amendment No 20 2013 (hereinafter 2013 Constitution). Section 2 of the 2013 Constitution provides that the Constitution is the supreme law of the land and any conduct, law, custom or practice inconsistent with it is invalid to the extent of its inconsistence. Furthermore, the preamble states that “all commit to the Constitution as the fundamental law of the land.”
³ The Lancaster House Constitution (LHC) came into force after the Lancaster House agreement in 1979 between leaders of the African Nationalist parties, Robert Mugabe (ZANU-PF), Joshua Nkomo (PF-ZAPU), Prime Minister of the then Zimbabwe-Rhodesia’s Bishop Abel Muzorewa and representatives of the white minority population. It has been replaced by the new 2013 Constitution.
to meet basic socio-economic goods such as education, water or health. It is worth noting that, during the enactment of the LHC, the constitutional protection of socio-economic rights globally was very rare, hence the exclusion the exclusion of these rights in the LHC should be understood within such a global context.

The historical anomaly of neglecting socio-economic rights was despite the fact that Zimbabwe is a party to a number of international and regional instruments imposing certain socio-economic rights obligations. These instruments include the International Covenant on Economic Social and Cultural Rights (ICESCR);\(^5\) the African Charter on Human and Peoples’ Rights (African Charter)\(^6\) and the Convention on the Rights of the Child (CRC),\(^7\) among others.\(^8\) Ratifying these instruments imposes universal norms that a state must fulfil in good faith (\textit{pacta sunt servanda}).\(^9\) The next section briefly discusses the few cases that were adjudicated before the constitutional protection of socio-economic rights.

111 Role of the Judiciary under the LHC

Under the LHC, judicial authority in Zimbabwe vested in the Supreme Court (ZSC), High Court and all the subordinate courts.\(^10\) The ZSC was the court of first instance in constitutional matters and a final court of appeal in non-constitutional matters. Little or no appreciable help is evident from the judiciary with regard to the protection of socio-economic rights. This is evident from the lack of socio-economic rights jurisprudence from that court (ZSC). Instead, the judiciary has been labelled as non-independent and an extension of the executive even on matters that purely concerned civil and political rights.\(^11\)

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10 See section 79 (1) LHC 1980.

11 \textit{Ibid.}, section 79 (1). Section 79 (B) of LHC titled “Independence of Judiciary” provides that, “in the exercise of his judicial authority, a member of the judiciary shall not be subject to the direction or control of any person or authority, except to the extent that a written law may place him under the direction or control of another member of the judiciary”. See also Hellum & Derman “Land Reform and Human Rights in Contemporary Zimbabwe: Balancing Individual and Social Justice through an Integrated Human Rights Framework” 2004\textit{World Development} 1785 -1805. See also Mapfumo \textit{Whither to, the Judiciary in Zimbabwe? A Critical Analysis of the Human Rights Jurisprudence of the Gubbay and Chidyausiku Supreme Court Benches in Zimbabwe and Comparative Experiences from Uganda} (LLM in HRDA, UP).
A few cases focusing on socio-economic rights were litigated under the LHC. In the majority of these cases, the judiciary displayed indifference to the plight of the huge number of victims of socio-economic rights violations. Cases reflecting serious and persistent violations of human rights and therefore in need of provisional measures were often not dealt with on an urgent basis. For instance, in the case of *Dare Remusha Cooperative v The Minister of Local Government, Public Works and Urban Development and others*, Zimbabwe Lawyers for Human Rights (ZLHR) applied for an interdict to stop the continued violent destruction of homes in an area called Hatcliffe Extension in the capital Harare. However, the court dismissed the application deciding that the public policy considerations in destroying their homes and evicting them far outweighed the interests of the terms of their leases and manner of settlement. This decision is unfortunate as it allowed the continuation of destruction of houses leaving many homeless without alternative shelter.

In the case of *Batsirai Children’s Care v The Minister of Local Government, Public Works and Urban Development and others (Batsirai case)*, numerous rights were violated and these included the right to dignity, housing as well as children’s rights. In the Batsirai case, members of the Zimbabwe Republic Police (ZRP) destroyed an orphanage in Hatcliffe Extension and unlawfully evicted the inhabitants. Attempts to restore the respect and protection of the rights of children by the ZLHR failed when it applied for a spoliation order to halt the destruction of the orphanage. The presiding judge repeatedly postponed the case ignoring the urgency of the matter and the on-going violations of the rights of the affected children. Legal remedies proved fruitless on the violations of socio-economic rights despite many being left homeless, jobless and some even dropping out of school.

The year 2005 for example, saw massive forced evictions under what was called Operation *Murambatsvina* (drive out rubbish or restore order) where a lot of informal and some formal

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14 *Dare Remusha Cooperative v The Minister of Local Government, Public Works and Urban Development and others* HC 2467/05.
16 *Batsirai Children’s Care v The Minister of Local Government, Public Works and Urban Development and others* HC 2566/05.
20 *Dare Remusha Cooperative v The Minister of Local Government, Public Works and Urban Development and others* HC 2467/05.
structures were arbitrarily demolished by the government in an attempt to keep cities clean leaving many homeless without alternative shelter.\(^{21}\) There is no doubt that the government violated its own laws, the Constitution (LHC) and international law. For instance, section 199 of Zimbabwe’s Urban Councils Act provides that, authorities are required to give 28 days’ notice to evictees and the opportunity to contest the legality of the actions through a court of law.\(^{22}\) Such a legislative requirement was disregarded by the government. The official explanation for the campaign against the informal settlements and shanty dwellings was that the structures were erected illegally without proper permits and planning permission. There is no doubt that in most instances these settlements had no proper sanitation and posed a health hazard.\(^{23}\) However, what remains repugnant is not the illegality or otherwise of the homes, but the total disregard that Operation *Murambatsvina* had for people’s access to shelter, education, health, dignity and life.\(^{24}\) This is because the evictions took a particularly heavy toll affecting vulnerable groups – widows, orphans, elderly, and households headed by women or children, and people living with HIV and AIDS.\(^{25}\) To date, the government has taken no measure to investigate allegations of abuses during Operation *Murambatsvina* and to provide adequate remedies to those whose rights were violated.\(^{26}\)

The then UN Special Envoy on Human Settlement Issues in Zimbabwe, Anna Tibaijuka, was deployed to Zimbabwe by the UN Secretary-General in June 2005 to assess the scope and impact of Operation *Murambatsvina*. She reported that the Operation was carried out in an indiscriminate and unjustified manner, with indifference to human suffering and, in repeated cases, with disregard to several provisions of national and international legal frameworks.\(^{27}\) Perhaps it must be submitted that had the LHC protected socio-economic rights, better means of protection could have been put in place to provide effective relief in case of violations of

\(^{21}\) The massive forced evictions were carried out from the 25th of May 2005 in various cities leaving about 700 000 homeless without alternative or emergency shelter.

\(^{22}\) Zimbabwe Councils Act 13 of 2002 (*Chapter 29:15*) provides in section 199 that, any person who is likely to be aggrieved by the decision of the urban council may, within twenty-eight days after the date of service of the notice, appeal to the Administrative Court and no action shall thereafter be taken by the council until the appeal has been determined by that Court or the appeal has been withdrawn or abandoned.


these rights. The next section discusses the Constitutional Commission Draft of 1999 which was a major attempt to protect socio-economic rights as national objectives or state directives.

112 Constitutional Commission Draft of 1999
In 1999, the government presented without success, through the Constitutional Commission, a Draft Constitution that provided for socio-economic issues such as food security, protection of environment, cultural issues, education, shelter and healthcare. However, civil society and opposition political parties successfully lobbied and canvassed against the adoption of the Constitutional Commission’s Draft Constitution, alleging that the referendum ignored the demands of the people to entrench socio-economic rights as judicially enforceable rights. This demonstrated the growing recognition of the need to ensure that socio-economic rights are legally enforceable. The following section briefly discusses the Zimbabwe Social Charter, which is arguably the most authoritative and formal document which helped build the momentum towards the constitutionalisation of socio-economic rights.

113 Zimbabwe Social Charter of 2008
Zimbabwe has experienced, and is still experiencing, socio-economic problems ranging from high levels of unemployment, poor working conditions and deplorable living conditions, to high levels of poverty due to the marginalisation of socio-economic rights. These problems were the reason why non-governmental organisations, civil society, social movements and other forums came together to draft what came to be known as the Zimbabwe Social Charter (Charter). The Charter poignantly states that, “there has been a huge negative marginalisation and massive growth in social inequality because of the colonial and post-colonial periods in relation to economy and social welfare.” Accordingly, the drafting of the Charter demonstrated the need to diligently correct the historical anomaly of neglecting socio-economic rights in the Constitution through entrenching these rights as justiciable rights. It was affirmed that the new Constitution should guarantee everyone, without any distinction, the rights to dignity, economic and social justice and be guided by the strong

principles. These principles included, among others, social and economic justice as fundamental principles that should ensure the protection of the people’s socio-economic rights in the Bill of Rights.

To avoid further socio-economic rights violations and deprivations, Zimbabwe recently enacted a new Constitution known as the Constitution of Zimbabwe Amendment Act No 20 2013 (2013 Constitution). The 2013 Constitution responds appropriately to the historical anomaly of neglecting socio-economic rights. The 2013 Constitution entered into force on the 22nd of May 2013 and joins a few other Constitutions (Kenyan and South African) in Africa which expressly protect socio-economic rights as justiciable rights in their Bill of Rights. Accordingly, Zimbabwe is bound to ensure that its citizens enjoy the full complement of socio-economic rights – further providing for domestic remedies for the violations thereof. It is this background that prompted and motivated this study to assess the domestic protection of socio-economic rights in Zimbabwe after the enactment of a new Constitution protecting these rights.

1.2 Statement of the research problem
This study investigates and interrogates the constitutional framework for protecting socio-economic rights under the 2013 Constitution. The study particularly focuses on the role of the judiciary in the enforcement of socio-economic rights, the model of review for ascertaining state compliance with the constitutionally protected socio-economic rights provisions, and the remedial framework for addressing violations of rights. As part of addressing the key research problem, the study also focuses on the role of the Zimbabwe Human Rights Commission as one of the major constitutional organs in the framework for protecting and promoting socio-economic rights in Zimbabwe. Additionally, this study explores the conceptual and practical challenges that are likely to arise in the domestic adjudication of socio-economic rights under the 2013 Constitution.

33 Ibid., sections 2–4. See also section 3, Zimbabwe Social Charter (2008).
35 2013 Constitution, Chapter 4 contains the Declaration Rights (Bill of rights) including socio-economic rights as justiciable rights.
1.3 Significance of the study
This study focuses on socio-economic rights norms and institutions provided for their adjudication and enforcement under the 2013 Constitution. The study also discusses the possible models of reviewing state compliance with the protected socio-economic rights. The significance of this study lies in its attempt to explore and assess the prospects and challenges of litigating socio-economic rights under the 2013 Constitution. Furthermore, this study attempts to illustrate that domestic judicial protection of socio-economic rights is achievable in a country where such rights are constitutionally entrenched – and where there is a political will to abide by the courts’ decisions. Significantly, this study draws lessons from South African socio-economic rights jurisprudence where courts in that jurisdiction have experience in judicially enforcing socio-economic rights provisions protected under South Africa’s 1996 Constitution. Most importantly, this study also makes important recommendations to policy makers, human rights litigators and the judiciary who are likely to be at the forefront in ensuring that the values that underlie the constitutional protection of socio-economic rights under the 2013 Constitution are upheld.

1.4 Objectives/ Purpose of the study
This study has a number of objectives. Firstly, it seeks to illustrate that the domestic framework for the protection of socio-economic rights is important towards the promotion and realisation of these rights. Secondly, it seeks to demonstrate that the role of the judiciary is imperative to the development of the content, meaning and nature of socio-economic rights through domestic adjudication. Thirdly, this study seeks to illustrate that judicial activism as compared to judicial deference is more favourable towards the promotion and protection of socio-economic rights. Fourthly, this study seeks to serve as a guideline to the socio-economic rights litigators on the issues that are likely to arise in the enforcement and interpretation of these rights under the 2013 Constitution. Lastly, this study seeks to form the basis for further research as well as for current policy and legal design around socio-economic rights and other rights in the 2013 Constitution.

1.5 Research questions
This dissertation will attempt to answer the following questions:

i. What is the nature and content of socio-economic rights protected under the 2013 Constitution and what is the nature of duties that such rights impose on the State?
ii. Does the inclusion of socio-economic rights in the 2013 Constitution guarantee the full realisation and judicial protection of these rights?

iii. What mechanisms does the 2013 Constitution introduce into the framework for protecting socio-economic rights?

iv. What role do the judiciary and quasi judiciary bodies play in the protection and enforcement of socio-economic rights?

v. What are the obligations on Zimbabwe, both domestically and internationally, in terms of the realisation of socio-economic rights?

1 6 Research hypotheses

i. Constitutional protection of socio-economic rights is central in promoting a dignified life.

ii. Constitutional entrenchment of socio-economic rights imposes on the state the obligations to respect, protect, promote and fulfil the protected rights.

iii. The effective realisation of both civil and political rights and socio-economic rights imposes both positive and negative duties on the state.

iv. In a democratic society based on human dignity, equality and freedom judicial and non-judicial mechanisms also play an important role in the framework for respecting, protecting, promoting and fulfilling socio-economic rights.

1 7 Research methodology

This is a desktop based qualitative research. Both primary and secondary legal sources were used – primary data was in the form of constitutional provisions, international and regional human rights instruments, legislation and case law. Furthermore secondary materials were referred to. Secondary sources included text books, journal articles and reports in relation to the framework for the protection of socio-economic rights under the 2013 Constitution of Zimbabwe.

1 8 Delimitation

The 2013 Constitution protects civil and political rights and socio-economic rights in an interdependent and interrelated way. However, this study limited itself only to the socio-economic rights entrenched under this Constitution.
1.9 Ethical implications of the study
In this study, the researcher does not intend to carry out any interviews, questionnaires or collection of any information from the public. This will be a desktop-based research that will draw knowledge and analysis from literature, regional and international human rights instruments, case law as well as constitutional and legislative provisions. The researcher will nevertheless acknowledge all sources of information directly or indirectly referred to in this study.

1.10 Chapter outline
This study is divided into four chapters. The principal aim of chapter one is to provide an overview of the study. This chapter further describes the research problem, significance, aims, methodology, background and the theoretical framework thereof in respect of the protection of socio-economic rights in Zimbabwe.

Chapter two explores and discusses the specific socio-economic rights provided for under the 2013 Constitution focusing on the nature and content of these rights and the obligations such rights impose on the State.

Chapter three explores the role of the judiciary and the entire institutional framework introduced by the 2013 Constitution for protecting socio-economic rights which is core in this study. Chapter 3 analyses the model of review, interpretation and other practical and conceptual challenges that are likely to arise in the enforcement of socio-economic rights under the 2013 Constitution. Although this is not a comparative study, this chapter also referred to South African jurisprudence in the area of socio-economic rights given the experience gained by the courts and other non-judicial institutions in that country in the enforcement of socio-economic rights protected under the 1996 Constitution. Such comparative insights are important and would prove an invaluable learning guide for the protection and enforcement of socio-economic rights under the 2013 Constitution.

Chapter four provides a summary of the conclusions reached throughout the study. It will also seeks to articulate the theoretical contribution of the study for scholarship in this field. The study concludes by making recommendations on a framework for effective protection and enforcement of socio-economic rights under the 2013 Constitution through judicial and non-judicial mechanisms.
CHAPTER 2

The Socio-Economic Rights Protected under the 2013 Constitution of Zimbabwe

2 Introduction

The Universal Declaration of Human Rights (UDHR) provides for interdependence and interrelatedness of all human rights by incorporating both socio-economic rights, and civil and political rights in the same instrument. Thus, human rights law includes all socio-economic rights, as well as civil and political rights such as the right to freedom of speech and the right to a fair trial. All rights are deeply intertwined, for example, the right to freedom of expression means little without a basic or elementary education, and the right to vote means little in the face of starvation. In the same accord, it can be argued that the right to work means little if people are not allowed to meet and assemble in groups to discuss working conditions. Civil and political rights and socio-economic rights are interrelated, indivisible and interdependent and must be given the same means of protection in a democratic society based on human dignity, equality and freedom. The 2013 Constitution in the similar vein as the UDHR protects socio-economic rights as well as civil and political rights in the same manner.

Zimbabwe’s independence Constitution, the Lancaster House Constitution (LHC) did not provide for socio-economic rights. Even though it was fundamentally weak on socio-economic rights matters, the LHC made a strong commitment to civil liberties and political rights that could have been interpreted to protect and realise socio-economic rights. Unlike India where the judiciary extended civil and political rights to protect socio-economic rights, this was not the case in Zimbabwe. The new Constitution (2013 Constitution) corrects this anomaly of neglecting socio-economic rights by firmly protecting these rights in the same

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42 See chapter 2 of the Lancaster House Constitution, 1979 (LHC).
43 See for example Olga Tellis v Bombay Municipal Corporation 1985 Air 1986 India Supreme Court 18.
manner as civil and political rights. Furthermore, the 2013 Constitution creates a framework through which these rights may be protected. Therefore, it is the principal aim of this chapter to discuss the constitutional protection of socio-economic rights under the 2013 Constitution of Zimbabwe.

This chapter is divided into sections. The first section discusses the legislative framework that was designed to protect socio-economic rights in Zimbabwe before their constitutional protection. This helps to give a historical background and a better perspective regarding the protection of such rights under the Constitution. The second section which is part of the main aim of this section explores the obligations imposed by socio-economic rights in the 2013 Constitution. The final section discusses the specific core set of socio-economic rights protected under the Constitution focusing on the nature and content of these rights, followed by the conclusion.

Conspicuous under the LHC era, despite the neglect of socio-economic rights in that Constitution, is that, the government put in place a number of legislative and policy measures relating to social security, education, housing, labour, health and water.\(^44\) Perhaps what was lacking and missing was a strong human rights perspective and basis for these social measures. The language used in the legislative framework was not a rights language. Such legislative measures however, were broadly formulated limiting the manner in which individuals could claim these measures as rights in a court of law. In fact, the range of these legislative measures was part of Zimbabwe’s social policies due to the socialist ideology of the government of the day. The relevant pieces of legislation included the National Social Security Authority Act 12/1989,\(^45\) the Social Welfare Assistance Act 10/1988,\(^46\) the Education Act 5/1987,\(^47\) the Labour Act 16/1985,\(^48\) the Medical Services Act 27/1998,\(^49\) the Public Health Act 19/1924,\(^50\) the Water Act 31/1998,\(^51\) the Housing Standards Control Act 29/1972,\(^52\) and the Urban Councils Act 21/1997.\(^53\) However, such legislative measures were not in themselves enough to ensure the full protection and enforcement of socio-economic

\(^{44}\) This is pursuant to the requirement under Article 2 (1) of International Covenant Economic Social Cultural Rights 1966.
\(^{45}\) National Social Security Authority Act 12/1989 Chapter 17:04 (as amended).
\(^{46}\) Social Welfare Assistance Act 10/1988 Chapter 17:06 (as amended).
\(^{47}\) Education Act 5/1987 Chapter 25:04 (as amended).
\(^{48}\) Labour Act 16/1985 Chapter 28:01 (as amended).
\(^{49}\) Medical Services Act 27/1998 Chapter 15:13 (as amended).
\(^{50}\) Public Health Act 19/1924 Chapter 15:09 (as amended).
\(^{52}\) Housing Standards Control Act 29/1972 Chapter 29:08 (as amended).
\(^{53}\) Urban Councils Act 21/1997 Chapter 29:15 (as amended).
measures. The treaty body that oversees the implementation of the International Covenant on Economic Social and Cultural Rights (ICESCR) the Committee on Economic Social and Cultural Rights (CESCR) requires that they must be backed by strong judicial measures.\textsuperscript{54}

There was no coherent constitutional and effective framework for protecting socio-economic rights in the pre-2013 Constitution era. The next section discusses the specific obligations imposed by constitutionally protected rights including socio-economic rights.

2.1 Nature of obligations imposed by socio-economic rights

The effective protection and guarantee of human rights recognises that such rights impose a combination of negative and positive duties.\textsuperscript{55} Recent developments in human rights law have established that all human rights impose at least four levels of duties on the state.\textsuperscript{56} These obligations include the obligation to respect, protect, promote and fulfil as a framework for analysing and articulating the nature and the scope of state obligations imposed by rights.\textsuperscript{57} In the case of \textit{Social and Economic Rights Action Centre (SERAC) and another v Nigeria (SERAC case)}, the African Commission on Human and Peoples’ rights held that the obligations to respect, protect, promote and fulfil act as an analytical tool for assessing state compliance with human rights obligations under the African Charter on Human and Peoples’ Rights.\textsuperscript{58} Thus, elaborating the duties imposed on the state by a particular right using the respect, protect, promote and fulfil typology helps to understand the specific state action required for the implementation of a right. Additionally, using the typology model has greatly assisted towards clearly identifying, deconstructing and redressing violations of rights especially socio-economic rights.\textsuperscript{59}

The socio-economic provisions protected in the Constitution present Zimbabwe with a number of obligations namely, the obligation to respect, protect, promote and fulfil these

\begin{footnotesize}
\begin{itemize}
\item[56] See General Comments by the CESCR and other treaty bodies. See also CESCR General Comment 12 para 15 on the right to food where the CESCR started applying the duties to protect, respect, fulfill and promote as an analytical mechanism.
\item[57] See \textit{Social and Economic Rights Action Centre (SERAC) and another v Nigeria} (2001) AHRLR 60 (ACHPR 2001) para 46 (hereinafter \textit{SERAC case}).
\item[58] See SERAC case para 44-48.
\item[59] See Leckie “Another Step Towards Indivisibility: Identifying the Key Features of Violations of Economic Social and Cultural Rights” 1998 \textit{Human Rights Quarterly} 91. See also CESCR General Comment 12, General Comment 15, and General Comment 11. See also the \textit{SERAC case}.
\end{itemize}
\end{footnotesize}
Section 44 of the Constitution enjoins the State to respect, protect, promote and fulfil the rights in the Bill of Rights including socio-economic rights by explicitly stating that “the state and every person including juristic persons and every institution and agency of the government at every level must respect, protect, promote and fulfil the rights and freedoms set out in the Bill of Rights.” The importance of these obligations in the 2013 Constitution is that, they create a framework for analysing and clarifying the nature and scope of state obligations imposed by human rights norms. Additionally, these duties act as an important analytical tool in elaborating the demands that socio-economic rights impose on the government. It must also be noted that the Constitution protects the right to equality and non-discrimination and therefore this enjoins Zimbabwe to prohibit discrimination in the enjoyment of rights including socio-economic rights.

2 1 1 Obligation to respect

The obligation to respect entails the duty not to interfere with the enjoyment of socio-economic rights. It requires states to refrain from interfering directly or indirectly with the enjoyment of all human rights and freedoms of the individual to use material resources alone or in association with others to satisfy their basic needs or to enjoy the right in question. The obligation to respect mandates states to refrain from the acts and omissions whose effect is to interfere or deprive individuals or a group’s enjoyment of their rights. In essence, the state is enjoined to respect right holders, their freedoms, autonomy, resources and liberty of action. Consequently, the obligation to respect mandates states to refrain from engaging in any conduct that arbitrarily denies or limit equal access to socio-economic rights by individuals and groups respectively.

The obligation to respect is enshrined in section 44 of the Constitution. In terms of the obligation to respect, Zimbabwe must refrain from carrying out any practice, policy or legal measure that impinges on the integrity of individuals or groups without necessarily obligating it to take positive action to improve the situation of those who are not accessing socio-

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60 See section 44 of the 2013 Constitution. See also Shue Basic Rights: Subsistence, Affluence, and U.S Foreign policy (1980).
62 See article 56 of the Constitution. See also article 2 (2) of International Covenant on Economic, Social and Cultural Rights (1966).
64 Ibid.
65 Ibid.
66 Ibid. See also SERAC case para 46.
economic rights. In essence, the obligation to respect entails Zimbabwe’s duty to refrain from acts or omissions whose effect is to interfere or deprive individuals or groups’ enjoyment of socio-economic rights. Respecting socio-economic rights mandates Zimbabwe, _inter alia_, not to adopt laws or other measures, and to repeal laws and rescind policies, administrative measures and programmes that interfere with the enjoyment of the protected rights. The following section discusses the duty to protect as espoused in the Constitution.

### 2.1.2 Obligation to Protect

The obligation to protect enjoins the states to take measures that prevent non-state actors (third parties), such as individuals, groups, co-operations and other entities from interfering with individuals or groups’ enjoyment of socio-economic rights.\(^{67}\) The obligation to protect entails the creation and maintenance of an atmosphere by an effective interplay of laws, regulations and other measures so that individuals and groups may realise their rights and freedoms.\(^{68}\) Langford provides that, the obligation to protect requires more than the passage of legislation and thus entails a regulatory system which includes inspection, prosecution and other monitoring mechanisms to restrain individuals, corporations and other entities from interfering in the enjoyment of socio-economic rights.\(^{69}\) The duty to protect is particularly relevant where the state cannot fully provide all the social goods and services to those within its territory. This is because the states should and must regulate private interactions to ensure that individuals are not arbitrarily deprived of the enjoyment of their socio-economic rights by other private individuals or groups.\(^{70}\) Accordingly, the obligation to protect mandates the state to establish effective regulating and control mechanisms, which include independent monitoring, genuine public participation and the provision of legal remedies for non-compliance.\(^{71}\)

The obligation to protect enjoins Zimbabwe to act positively to regulate, prevent and remedy similar interferences by third parties.\(^{72}\) The obligation to protect enshrined in section 44 of the Constitution should also be understood to impose a positive obligation on Zimbabwe, and this requires the state to adopt laws, policies and regulations as well as an effective remedial

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\(^{68}\) Ibid.


\(^{71}\) See for example CESCR General Comment 15 para 24.

framework to safeguard socio-economic rights against violations by third parties.\textsuperscript{73} Thus, Zimbabwe is constitutionally mandated to adopt necessary measures to prevent third parties from interfering or denying equal access to the basic necessities of life.

The obligation to protect is a clear recognition that the responsibility of Zimbabwe goes beyond the actions of itself or its agents to positive protection of the individual from third party violation.\textsuperscript{74} The next section explores the obligation to fulfil.

\textbf{2 1 3 Obligation to Fulfil}

The obligation to fulfil requires states to adopt appropriate, constitutional, legislative, administrative, budgetary, judicial, promotional and other measures including relevant national policies to ensure the goal of full realisation of socio-economic rights to those who cannot secure rights through their personal efforts.\textsuperscript{75} The duty to fulfil is the most difficult and contentious to implement of all the obligations imposed by socio-economic rights. This is because it is often difficult to articulate a clear violation of the obligation to fulfil as it involves the court’s evaluating and analysing the substantive adequacy of government’s programmes.\textsuperscript{76}

In the same accord as other obligations, the obligation to fulfil is enshrined in section 44 of the Constitution. In terms of the obligation to fulfil, Zimbabwe is required by the Constitution to adopt appropriate and reasonable legislative, administrative, judicial and other measures towards the full realisation of socio-economic rights.\textsuperscript{77} The obligation to fulfil is the most difficult duty to implement. This is because it is often difficult to articulate a clear violation of the duty to fulfil as it involves the courts evaluating the adequacy of government policies and programmes.\textsuperscript{78} Such a task may involve highly technical issues that are beyond the expertise of the courts.\textsuperscript{79} Nevertheless, the obligation to fulfil is important to the realisation of socio-economic rights in the Constitution. This is because this duty mandates Zimbabwe to

\textsuperscript{74} See section 45(2) of the 2013 Constitution on the applicability of the Bill of Rights to non-state actors.
\textsuperscript{75} See Eide et al 172.
\textsuperscript{77} See also article 2(1) of the International Covenant of Economic Social and Cultural Rights 1966 on the nature of obligations imposed on State parties.
\textsuperscript{78} See n. 76 above.
\textsuperscript{79} Ibid.
proactively engage in a course of action meant to strengthen access to the constitutionally protected socio-economic rights.\textsuperscript{80}

2 1 4 Obligation to promote

The obligation to promote requires states to undertake actions that create, maintain and ensure the realisation of all socio-economic rights.\textsuperscript{81} The steps to be taken to promote a particular right will depend on the right in question but generally involves appropriate education and public awareness concerning access to socio-economic rights.\textsuperscript{82} The obligation to promote is enshrined in section 44 of the Constitution and is closely linked to the obligation to fulfil. The duty to promote in section 44 of the Constitution mandates the state to undertake actions that create, maintain and restore the realisation of socio-economic rights such as the adoption of educational and informational programmes designed to enhance awareness and understanding of socio-economic rights.\textsuperscript{83} The obligation to promote is closely linked to the right to access to information also enshrined in the Constitution.\textsuperscript{84} Denying citizens access to information relating to socio-economic rights would constitute a violation of the obligation to promote. The CESCR provides that the proper exercise and respect for human rights can only take place in a situation where there is sufficient awareness of rights by the bureaucrats and the citizens at large.\textsuperscript{85}

The next section discusses the specific core set of socio-economic rights protected under the Constitution. These rights include the right to education, health care, potable water, sufficient food and the socio-economic rights of detained and arrested persons. It must be mentioned here that all socio-economic rights under the Constitution can only be realised progressively through reasonable measures taking into account available resources.\textsuperscript{86}

\textsuperscript{80} Ssenyonjo (2009) 25.
\textsuperscript{81} Ibid.
\textsuperscript{82} Ibid.
\textsuperscript{83} See section 7 of the 2013 Constitution which mandates Zimbabwe to ensure the promotion and sufficient public awareness of the Constitution.
\textsuperscript{84} See section 62 of the 2013 Constitution.
\textsuperscript{86} See the wording of socio-economic rights under the 2013 Constitution.


2 2 Specific rights protected under the 2013 Constitution

2 2 1 The nature and content of the right to education

Section 75 (1) (a) of the Constitution provides that every citizen and permanent resident of Zimbabwe has a right to a basic state-funded education including adult basic education. Section 75 (1) (b) provides for the right to further education which the state must, through legislative and other measures, make progressively available and accessible. Although section 75 (1) (b) is internally qualified and subject to progressive realisation, primary or elementary education is capable of immediate realisation. Progressive realisation entails that the right to education may only be realised over time and not immediately but Zimbabwe must take steps towards the full realisation of this right. What is important however is that section 75 refers to two important elements concerning the content of the right to education, namely availability and accessibility. These are discussed below in line with the CESCR guidelines on the content of the right to education in General Comment number 13.

2 2 1 1 The essential elements of the right to education

The content of the right to education has been articulated by the CESCR in General Comment 13. At the very least, the right to education encompasses the following; availability which entails that, educational institutions must be available in sufficient quantity and must contain adequate and appropriate infrastructure such as buildings and sanitation facilities for both sexes. Furthermore, availability obligates Zimbabwe to ensure that teachers are sufficiently trained and qualified, and receive competitive salaries.

2 2 1 1 1 Accessibility

The right to education in the Constitution must be accessible. The concept of accessibility entails that educational institutions and programmes must be accessible to everyone without discrimination of any kind. In essence, this means physical and financial accessibility.
Physical accessibility enjoins Zimbabwe to ensure that educational facilities are within safe, physical reach and reasonably convenient, whether geographically or through modern day technology.\textsuperscript{94} Financial accessibility further enjoins the government to ensure that education is affordable to all particularly the vulnerable and marginalised.\textsuperscript{95} For example this may include putting in place monitoring measures to ensure both state and non-state actors charge reasonable tuition fees and levies.

2 2 1 1 2 Acceptability

Acceptability\textsuperscript{96} means that the form and substance of education including curricula and teaching methods must be relevant, culturally appropriate and of high standard.\textsuperscript{97} Thus for education to be acceptable, the state must ensure that teaching methods and curricula is in line with the technological changes of the world. In fact the scope of acceptability of basic education has been broadened to include a system of education that seeks to protect the individual rights of learners on issues such as language rights, parental choice and discipline of learners.\textsuperscript{98}

2 2 1 1 3 Adaptability

Adaptability\textsuperscript{99} entails that the right to education must be flexible so that it can adapt to the needs of the changing societies and communities and respond to the needs of the students within diverse social and cultural rights.\textsuperscript{100} The right to education in the Constitution is flexible in that it allows for the establishment of private independent educational institutions of reasonable standards provided they do not discriminate on any ground prohibited in the Constitution.\textsuperscript{101} This is important because it further widens the scope of the realisation of the right to education by allowing the provision of schools and other learning institutions by private entities.\textsuperscript{102}

\textsuperscript{95} CESCR General Comment 13 para 6.
\textsuperscript{96} Ibid.
\textsuperscript{97} Ibid.
\textsuperscript{98} See Biegon & Musila (2011) 228 above.
\textsuperscript{99} Ibid.
\textsuperscript{100} Ibid, see also ESCR in Zimbabwe (2009) 71.
\textsuperscript{101} Section 75 (2) 2013 Constitution.
\textsuperscript{102} Ibid., section 75 (2).
Education is a highly powerful tool by which economically and socially marginalised people can lift themselves out of poverty and participate fully as citizens. Where it is effectively guaranteed and implemented, the enjoyment of all human rights and freedoms is enhanced; where it is denied or violated, the enjoyment of other rights and freedoms is curtailed. In essence, the right to education in the Constitution is the precondition for the enjoyment and realisation of other rights. For example, for the enjoyment of civil and political rights to vote and to be elected, at the very minimum require a certain level of education, including literacy. Similarly, several socio-economic rights such as labour rights in the Constitution can only be exercised and realised in a meaningful way after a minimum level of education has been achieved. Noteworthy is the growing consensus that tolerance and respect of human rights shall be major characteristics of educated human beings. Thus courts and the Zimbabwe Human Rights Commission as key institutions in the domestic protection of socio-economic rights must ensure that the government fulfils its constitutional mandate and ensure education at primary level is free and compulsory while at the same time progressively ensuring that barriers that hinder access to the right to education at all levels are removed. The next section discusses the right to health.

2 2 2 The nature and content of the right to health

Section 76 (1) of the Constitution provides that every citizen and permanent resident of Zimbabwe has the right to have access to basic health care services including reproductive healthcare services. The right “to have access to” entails that this right is subject to realisation overtime through reasonable legislative and other measures subject to available resources. Section 76 is internally qualified in that, the state must take reasonable legislative measures within the limits of available resources, to achieve the progressive realisation of the right to have access to healthcare. The explicit recognition of the right to healthcare as a justiciable right in Constitution will, if properly implemented, ensure the enjoyment of the highest

106 See section 65 of the 2013 Constitution.
108 Ibid.
attainable standard of health for all Zimbabweans especially the vulnerable groups. The recognition of the right to healthcare will empower courts to review health policies and programs put in place by the government. It further empowers citizens to hold accountable, political leaders to justify policy decisions that negatively impact on the right to health of vulnerable groups.

While the Constitution protects the right to health for everyone, section 76 (2) provides for a specific protection of the right to have access to health care of vulnerable groups. These are people living with chronic illnesses. In other words, “to have access to” entails that Zimbabwe must facilitate access to or create an enabling environment for everyone to access a service. It does not mean that the government must provide socio-economic goods and services on demand but must instead remove all the barriers that are capable of impairing the enjoyment of the right to health care. Of importance under the right to health is that no person may be refused emergency medical treatment in any health care institution. Nevertheless this right is also subject to progressive realisation taking into account available resources. The right not to be refused emergency medical treatment is of particular relevance to Zimbabwe. This is because it serves a very important purpose of ensuring that treatment is given in an emergency and is not frustrated by bureaucratic requirements or other formalities. This means that a person who suffers a sudden catastrophe that calls for immediate medical attention should not be refused ambulance or other emergency services which are available and should not be turned away from a hospital that is able to provide the necessary treatment. In the South African case of Soobramoney which is relevant to our courts, the Constitutional Court of South Africa interpreted a similar provision and held that, emergency medical treatment provision requires that remedial treatment that is necessary and available be given immediately to avert harm. Currie and De Waal have explained that not to be refused emergency medical treatment may be applied horizontally entailing a duty for

110 The 2013 Constitution identifies vulnerable groups to include, the elderly, women, children, disabled and war veterans.
111 See the South African Constitutional Court decision in Minister of Health v Treatment Action Campaign (TAC) 2002 5 SA 721 CC.
112 See section 72 (2) 2013 Constitution.
114 Ibid.
115 Section 76(3) (3) 2013 Constitution provides that “no person may be refused emergency medical treatment in any health-care institution.”
116 See section 76 (4) of the 2013 Constitution which limits all the health care rights enshrined in section 76.
118 Ibid.
119 See Soobramoney v Minister of Health (Kwazulu-Natal) 1998 1 SA 765 (CC) (Soobramoney case) para 20.
private hospitals but does not extend to routine medical services or guarantee free services.\(^{120}\) What the right entails is that emergency treatment may not be refused because of lack of funds, but payment for treatment maybe sought after the treatment has been provided.\(^{121}\)

The scope and content of the right to health care was elaborated by the CESCR in General Comment 14 as encompassing both health care and access to the underlying determinants of health. Thus the right to health care is an inclusive right, incorporating not only timely and appropriate health care but also the underlying determinants of health.\(^{122}\) These include access to safe and potable water and adequate sanitation, healthy occupational and environmental conditions and access to health related education and information, including information on sexual and reproductive health.\(^{123}\) Accordingly, to ensure the proper protection of the right to health, Zimbabwe is enjoined by the Constitution to put in place reasonable legislative and policy measures for the determinants of the right to health. Moreover, Zimbabwe must ensure the following elements concerning healthcare are satisfied to allow for the protection and the realisation of the right to health; maternal and child healthcare, including family planning; immunisation against major diseases; appropriate treatment of common diseases and injuries and the provision of essential drugs.\(^{124}\)

2 2 2 1 The essential elements of the right to health

2 2 2 1 1 Availability

The normative content of the right of access to health care in the Constitution further entails that healthcare services must be available, accessible and adaptable, and of high standard as articulated in CESCR General Comment 14.\(^{125}\) The notion of availability, firstly mandates Zimbabwe to ensure that public health and healthcare facilities, goods and services are functioning and of sufficient quantity.\(^{126}\) Secondly, availability demands that Zimbabwe ensures the underlying determinants of the right to healthcare, such as safe and potable water

\(^{120}\) Curie & De Waal (2013) 593.

\(^{121}\) Ibid., 593.


\(^{123}\) See General Comment 14 para 11.

\(^{124}\) Ibid.

\(^{125}\) See CESCR General Comment 14 para 12.

\(^{126}\) Ibid.
and adequate sanitation are available in sufficient quantity. Furthermore, Zimbabwe must ensure that everyone has an equal opportunity to attain the highest standard of health. Noteworthy is that availability enjoins Zimbabwe to ensure that there is enough public funding for health in view of the fact that often public health facilities are the only type of health facility to which the poor can ever have access.

2 2 2 1 2 Accessibility

Accessibility enjoins Zimbabwe to ensure that health facilities are physically and financially accessible, i.e. accessible without any discrimination to all especially to the vulnerable and marginalised, as well as be economically accessible. According the CESCR in General Comment 14, physical accessibility entails that, health facilities, goods and services must be within safe physical reach for all sections of the population, especially vulnerable or marginalized groups, such as ethnic minorities and indigenous populations, women, children, adolescents, older persons, persons with disabilities and persons with HIV and AIDS. Physical accessibility also implies that medical services and underlying determinants of health, such as safe and potable water and adequate sanitation facilities, are within safe physical reach, including in rural areas. Physical accessibility further includes adequate access to buildings for persons with disabilities. Economic accessibility entails that health facilities, goods and services must be affordable for all. Payment for health-care services, as well as services related to the underlying determinants of health, has to be based on the principle of equity, ensuring that these services, whether privately or publicly provided, are affordable for all, including socially disadvantaged groups. While also promoting the right to health, Zimbabwe must ensure health related information is disseminated to the entire country subject to the confidentiality of personal data.

128 See CESCR General Comment 14 para 9.
130 Ibid. see also Toebes The Right to Health as Human Right in International Law (1999).
131 See CESCR General Comment 14 para 12.
132 Ibid.
133 Ibid.
134 Ibid.
135 See CESCR General Comment 14 para 12 (b).
2 2 2 1 3 Acceptability

Zimbabwe is enjoined by the right to health care in the Constitution to ensure that health facilities, goods and services respect medical ethics and are gender sensitive and culturally appropriate. In addition, Zimbabwe is also enjoined to ensure the full realisation of the right to health through the progressive provision of health facilities, goods and services that are scientifically and medically appropriate and of good quality. In essence acceptability enjoins the government to put in measures and programmes that will guarantee healthcare and its underlying determinants.

The government must ensure that reasonable measures are put in place to ensure the progressive realisation of this right regardless of the available resources. The CESCR has further elaborated that, as part of the means to ensure full and proper realisation of the right of access to health, the state must adopt and implement a national public health strategy and plan of action. Such a plan must address the health concerns of the entire population; be devised and periodically reviewed on the basis of a participatory and transparent processes, and must contain indicators and benchmarks by which progress can be closely monitored. This resonates with the specific obligations imposed by the Constitution to protect, respect, fulfil and promote the right to health care. The next section discusses the right to portable water.

2 2 3 The nature and content of the right to clean and potable water

The 2013 Constitution protects the right to water as a justiciable right and therefore subject to judicial enforcement. Section 77 (1) (a) of the Constitution provides that every person has the right to safe and potable water. The right to clean and potable water as a justiciable right is a major development in Zimbabwe. This is so because over the decades the water situation in Zimbabwe has been appalling leading to the outbreak of preventative waterborne diseases such as cholera in 2008 which claimed more than four thousand lives.

137 The concept of progressive realisation is discussed in Chapter 2 and in this chapter.
139 General Comment 14 para 12 (d). It is submitted here also that it is the duty of the national key institutions to ensure the government complies with its constitutional obligations in an endeavour to progressively release socio-economic rights.
2.2.3.1 The essential elements of the right to clean and potable water

2.2.3.1.1 Adequacy

The normative content of the right to water has been elaborated by the CESCR in its General Comment 15 on the right to water. The CESCR provides for the components of the right to water and these include; availability, acceptability, accessibility, information and participation and high quality water services.\(^{141}\) However, the guiding principle is that available water must be adequate for human dignity, life and health.\(^{142}\) This access and adequacy is necessary to prevent water-borne diseases such as cholera, avoidable deaths resulting from dehydration and most significantly to provide for consumption, cooking, and personal and domestic hygiene purposes.\(^{143}\) Additionally, water must be available to all, particularly to the marginalised and vulnerable groups of society.\(^{144}\) Therefore, to fully realise and protect the right to water under the 2013 Constitution, courts must generously and purposefully interpret this right to ensure that it is adequate for human dignity, life and health in accordance with the Constitution and its international obligations contained in articles 11\(^{145}\) and 12\(^{146}\) of ICESCR. General Comment 15 explicitly stipulates that, the right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic use.\(^{147}\) This means that water should be available to all.

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\(^{142}\) CESCR General Comment 15 para 11.

\(^{143}\) Ibid., para 2.

\(^{144}\) Ibid., para 12 (c) (ii).

\(^{145}\) Article 11 (1) of ICESCR stipulates that, “the state parties to the ICESCR recognise the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The states parties will take appropriate steps to ensure the realisation of this right, recognising to this effect the essential importance of international cooperation based on free consent.”

\(^{146}\) Article 12 (1) of ICESCR proclaims that “the states parties to the ICESCR recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.”

\(^{147}\) CESCR General Comment 15 para 2 the CESCR stated that “the human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses. An adequate amount of safe water is necessary to prevent death from dehydration, to reduce the risk of water-related disease and to provide for consumption, cooking, personal and domestic hygienic requirements.”

\(^{147}\) See CESCR General Comment 15 para 11-12.
22312 Availability
The availability component enjoins state apparatus to ensure sufficient and continuous supply of both personal and domestic water.\textsuperscript{148} Sufficient water supply is explained under World Health Organisation (WHO) guidelines to ensure at least 50 litres per person per day in order to reach a low level of concern over health impacts.\textsuperscript{149} According to WHO, one hundred litres per person per day, is the minimum needed to provide a sufficient quantity for all basic personal and food hygiene as well as laundry and bathing, assuming efficient patterns of use.

22313 Accessibility
Accessibility entails that water must be accessible at all times. Consequently, this means that water facilities and services must be accessible to everyone without any form of discrimination.\textsuperscript{150} Closely linked to accessibility are four concepts namely physical accessibility, economic accessibility, non-discrimination and information accessibility. In terms of physical accessibility, water services must be within the physical reach of the citizens.\textsuperscript{151} With regard to economic accessibility, water services must be affordable particularly by the vulnerable and marginalised segments of society.\textsuperscript{152} Information accessibility entails the right to receive and impart information concerning water services.\textsuperscript{153} In terms of non-discrimination water must be accessible to all citizens especially the vulnerable and marginalised groups without any form of restriction and discrimination based on any ground.

22314 Quality
There is no doubt that sufficient water alone is not enough to ensure a human right to water.\textsuperscript{154} For this reason, Zimbabwe must ensure that water for personal and domestic use is safe and free from micro-organisms, chemical substances and radiological hazards.\textsuperscript{155} This fulfils the safety component of the right to water and this further recognises the fact that even

\textsuperscript{148} See CESCR General Comment15 para 12.
\textsuperscript{150} CESCR General Comment 15 para 12 (c).
\textsuperscript{151} Ibid., para12 (c) (i).
\textsuperscript{152} Ibid., para12 (c) (ii).
\textsuperscript{153} Ibid., para12 (iv).
\textsuperscript{154} Ibid., para12 (c) (iv).
\textsuperscript{155} Ibid., para12 12 (b).
though many people may receive this basic water requirement or more, in some cases the water delivered may not be of adequate quality.\textsuperscript{156} Additionally, General Comment 15 stipulates that water for personal and domestic use must be of an acceptable colour, odour and taste.\textsuperscript{157} The next section discusses the right to food.

\section*{2 3 4 The nature and content of the right to food}

Section 77 (1) of the Constitution also protects the right to food as a justiciable right. It provides that every person has the right to sufficient food. However, the Constitution immediately acknowledges that the right to food, similar to the other socio-economic rights protected under the Constitution, can only be realised progressively through reasonable and other measures.\textsuperscript{158} The former UN Special Rapporteur on the right to food opined that,

\begin{quote}
the right to food means to have regular, permanent and unrestricted access, either directly or by means of financial purchases to quantitatively and qualitatively sufficient food corresponding to the cultural traditions of the people to which the consumer belongs, which ensure a physically and mentally healthy individual, collectively fulfilling a dignified life free of fear.\textsuperscript{159}
\end{quote}

It is contended that without food there can be no life. In line with the Special Rapporteur’s definition of the right to food, it is further argued that the right to adequate food is indivisibly linked to the inherent dignity of the human person and indispensable for the fulfilment of the other human rights enshrined in the 2013 Constitution.\textsuperscript{160} The CESCR further affirms that the right to adequate food is inseparable from social justice requiring the national and international levels oriented to the eradication of poverty and the fulfilment of all human rights for all.\textsuperscript{161} Section 15 of the 2013 Constitution is in line with this requirement by the CESCR, as it provides for food security and the creation of food reserves that are meant to ensure continual access to adequate food.\textsuperscript{162}

\begin{thebibliography}{100}

\bibitem{157} \textit{Ibid.}, chapter 4.
\bibitem{158} Section 77 of the 2013 Constitution.
\bibitem{160} Committee on Economic, Social and Cultural Rights, General Comment 12 \textit{The Right to Adequate Food} (1999) U.N. Doc. E/C.12/1999/5 (CESCR General Comment 12 para 4). See also African Commission in \textit{Social and Economic Rights Action Centre (SERAC) and another v Nigeria} (2001) AHRLR 60 (ACHPR 2001) where the African Commission held that the right to food is implicit from other Charter Rights as the right to life, health and development.
\bibitem{161} See the SERAC case.
\bibitem{162} Section 15 of the 2013 Constitution provides for food security among other things and obliges the state to encourage people to grow and store sufficient food, secure the establishment of adequate reserves and encourage
\end{thebibliography}
The normative content of the right to food is provided for in General Comment 12 on the right to food by the CESCR. Noteworthy is the point made by the CESCR that the right to food is realised when every man, woman and children, alone or in community with others has physical and economic access at all times to adequate food or means for its procurement.\textsuperscript{163} General Comment 12 stipulates that the right to food shall comprise of the following components, namely dietary needs, availability, accessibility, acceptability, food free from adverse substances and quality of services.\textsuperscript{164}

\textbf{2 3 4 1 The essential elements of the right to food}

\textbf{2 3 4 1 1 Dietary needs}
Dietary needs entail adequate quality and quantity of food to provide nutrients for physical and mental growth, development and maintenance.\textsuperscript{165} Thus Zimbabwe must ensure that food is both available in good quality and affordable at all times.

\textbf{2 3 4 1 2 Availability}
In terms of availability, Zimbabwe must ensure the population has the ability to obtain food themselves directly, or processing and distribution systems exist to make food available in accordance with demand.\textsuperscript{166} In essence this entails the existence of national supply of food sufficient to meet the nutritional needs of all people in the country and geographically distributed in such a way that it is physically available to everyone.\textsuperscript{167}

\textbf{2 3 4 1 3 Acceptability}
Acceptability means a need to account for non-nutrient based values attached to food. Additionally, to ensure the proper protection of the right to food, a state is enjoined to ensure food free from adverse substances.\textsuperscript{168} This means that the implementation of protective policies and laws must ensure food is safe and uncontaminated.

\begin{flushright}
and promote adequate and proper nutrition through mass education and other appropriate means. This resonates with the obligation to promote.\textsuperscript{163} See section 65 2013 Constitution.\textsuperscript{164} See CESCR General Comment 12 para 6-8.\textsuperscript{165} \textit{Ibid.}, para 6-8.\textsuperscript{166} \textit{Ibid.}\textsuperscript{167} \textit{Ibid.}\textsuperscript{168} \textit{Ibid.}\end{flushright}
23414 Accessibility

Accessibility of food refers to household food security. Accessibility requires that people be able to acquire the food that is available or to make use of available opportunities to produce food for own use.\(^{169}\) This capacity exists if people exercise some entitlement over food or its means of production: they earn income by selling labour or other commodities, which they use to buy food, they have an entitlement to social assistance by the state with which they acquire food or they exercise some other form of legal control means of food production such as land, implements, water so that they can produce food for own use.

Consequently, Zimbabwe has national obligations in respect of the right to sufficient food. These obligations include the obligation to take necessary action to mitigate and alleviate hunger even in times of natural or other disasters.\(^{170}\) In addition, Zimbabwe must mobilise international assistance through humanitarian organisations to ensure that there is proper access to the right to food especially in times of need.\(^{171}\)

245 Socio-economic rights of arrested and detained persons

2451 Nature and content of socio-economic rights of arrested and detained persons

The Constitution also protects socio-economic rights of arrested and detained persons. Unlike other socio-economic rights discussed above, socio-economic rights of arrested and detailed persons in Zimbabwe are not internally limited; but these rights are only subject to the general limitations clause in section 86 of the Constitution discussed below. In essence, this entails that Zimbabwe bears immediate obligations to fully realise socio-economic rights of the detained persons. Section 50 (5) (d) of the Constitution provides that any person who is detained, including a sentenced prisoner, has the right to conditions of detention that are consistent with human dignity, including the opportunity for physical exercise and the provision at the state expense, of adequate accommodation, ablution facilities, personal hygiene, nutrition, appropriate reading material and medical treatment.

The next section discusses the concept of progressive realisation which underlies all socio-economic rights discussed above.


\(^{171}\) See Article 2(1) of the ICESCR. See also articles 1(3), 55 and 56 United Nations Charter.
2.5 Progressive realisation

In the same vein, as the parent source of socio-economic rights (ICESCR), the 2013 Constitution provides that all protected socio-economic rights can only be realised progressively through reasonable and other measures taking into account available resources. It is therefore significant to briefly articulate what this concept entails. Progressive realisation generally means moving forward or advancing stages in a manner continuous, increasing, growing, developing, on-going, intensifying, accelerating the realisation of socio-economic rights.\(^{172}\) In essence, the concept of progressive realisation asserts that, the state must gradually and continuously improve the conditions of socio-economic rights and abstain from taking any retrogressive measures.\(^{173}\) In General Comment 3, the CESCR stipulated that the notion of progressive realisation of socio-economic rights constitutes an acknowledgement that full realisation of all socio-economic rights will generally not be able to be achieved in a short period of time.\(^{174}\)

In *Grootboom and Others v Government of the Republic of South Africa and Others* (*Grootboom case*), which is relevant to the courts in Zimbabwe, the Constitutional Court of South Africa echoed that, progressive realisation acknowledges that due to their nature, socio-economic rights will not be immediately implemented but the state must take steps to achieve the full realisation of these rights.\(^{175}\) Furthermore the, the Constitutional Court of that country held that accessibility of socio-economic goods must be progressively facilitated and these must be accessible not only to a large number of people but to wide range of people as time progresses.\(^{176}\) Additionally, the notion of progressive realisation reflects the difficulty of access to socio-economic rights given entrenched structural patterns of the economy and systematic disadvantaged. What is important about the concept of progressive realisation under the 2013 Constitution is that, realisation overtime should not be misinterpreted as depriving the obligation of all meaningful content of socio-economic rights.\(^{177}\) This is because progressive realisation acknowledges the realities of the real world and inherent complexities involved in ensuring full realisation and protection of socio-economic rights.\(^{178}\)


\(^{173}\) Ibid.


\(^{175}\) Grootboom and others v Government of the Republic of South Africa and Others 2000 11 BCLR 1169 (CC) (*Grootboom case*) para 45.

\(^{176}\) Ibid., para 45.

\(^{177}\) See CESCR General Comment 3.

\(^{178}\) Ibid., para 9.
Riedel warns, however, that progressive realisation does not mean that states have unfettered discretion to do as they please when it comes to the fulfilment of socio-economic rights.\textsuperscript{179} Currie and De Waal also opine that, the fact that the full realisation of socio-economic rights can only be achieved over time does not alter the obligation on the state to take those steps that are within its power immediately.\textsuperscript{180}

Thus Zimbabwean courts must interpret progressive realisation as the gradual improvement of access to socio-economic rights. Additionally, courts must construe and apply the notion of progressive realisation to mean the practical taking of steps, which include legal, administrative, operational and financial steps, towards the full realisation of socio-economic rights.\textsuperscript{181} Part of the steps must be to remove any retrogressive measures that limit the access to protected rights. The CESCR opined that the principle of progressive realisation also entails a presumption against the adoption of retrogressive measures which have the effect of restricting access to socio-economic rights.\textsuperscript{182} The next section discusses the general limitation clause.

\textbf{2.6 Limitations clause}

The constitutional rights and freedoms in the Constitution are not absolute but they have boundaries set by the rights of others and important concerns such as public order and safety, health and democratic values. The 2013 Constitution provides for specific criteria for the justification of restrictions of the rights in the Bill of Rights.\textsuperscript{183} Section 86 of the Constitution provides that the fundamental rights and freedoms set out in the Bill of Rights maybe limited only:

\begin{quote}
\ldots in terms of the law of general application and to the extent that the limitation is fair, reasonable necessary and justifiable in a democratic society based on human dignity, equality, freedom, taking account all relevant factors including; the nature of the right and freedom concerned, the importance of the purpose of the limitation, the nature and extent of the limitation, the relationship between the limitation and its purpose, in particular whether it imposes greater restriction on the right or freedom
\end{quote}


\textsuperscript{181} See CESCR General Comment 3 para 9.

\textsuperscript{182} \textit{Ibid.}, para 9. See also CESCR General Comment 13 para 45, see also CESCR General Comment 14 para 32.

\textsuperscript{183} See section 36 of the 1996 South African Constitution.
concerned that are necessary to achieve its purpose and whether there are any less restrictive means of achieving the purpose of limitation.\(^{184}\)

A law that limits a right prima facie infringes the right. Nevertheless, the infringement will not be unconstitutional if it takes place for a reason that is accepted as a justification for infringing rights in an open and democratic society based on human dignity, equality and freedom.\(^{185}\) In essence, this means that not all infringements of fundamental rights are unconstitutional. Where an infringement can be justified in accordance with criteria in section 86, it will be constitutionally valid.

However, the existence of the general limitation clause does not mean that the rights in the Bill of Rights can be limited for any reason.\(^{186}\) The reasons for limiting the right need to be exceptionally strong, fair, necessary, reasonable and justifiable. Otherwise, if rights under the 2013 Constitution can be overridden simply on the basis that the general welfare will be served by the limitation then there is little purpose in the constitutional entrenchment of rights.\(^{187}\) Thus our courts must ensure any law that limits constitutionally-protected rights is justifiable in an open democratic society based on human dignity, equality and freedom. This entails that the limitation must serve a purpose that most people would regard as important and there is no other realistically available way in which the purpose can be achieved without limiting the rights.\(^{188}\)

### 2.7 Summary

The LHC was more committed to ushering black majority rule. It was, to a certain extent, committed to a framework for protecting civil and political rights. However, it lacked an explicit framework for protecting and enforcing socio-economic rights as justiciable rights. The 2013 Constitution responds appropriately to this historical anomaly, firstly by protecting these rights as judicially enforceable rights. Socio-economic rights that are protected in the Constitution include, the right to health care, portable water, sufficient food, education, as well as socioeconomic rights of arrested and detained person as discussed above.

At the very least, Zimbabwe is obligated by the Constitution, to ensure proper protection and realisation of socio-economic rights. This is because the Constitution protects the right to

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\(^{184}\) See section 86 of the 2013 Constitution.

\(^{185}\) Currie & de Waal (2013) 151.

\(^{186}\) Ibid.

\(^{187}\) Ibid.

\(^{188}\) Ibid., 151-152.
human dignity and thus it is not possible to respect people’s inherent dignity while denying them access to basic necessities of life such as health, food, education and water. Zimbabwe is therefore bound to put in place reasonable and practical measures to meet the obligations (obligations to protect, respect, promote and fulfil) imposed by the specific socio-economic rights in the Constitution to uphold human dignity while progressively realising these rights taking into account maximum available resources. It was discussed in this chapter that socio-economic rights are not absolute and thus are subject not only to internal qualification but also the limitation clause in section 86 of the Constitution.
CHAPTER 3

The role of the courts in the enforcement of socio-economic rights under the Constitution

3 Introduction

It is now widely accepted that without legal enforceability mechanisms, socio-economic rights amount to no more than pragmatic ideals. As such, socio-economic rights in the 2013 Constitution present the courts with an opportunity to enforce these rights. This inclusion of socio-economic rights in the Constitution is aimed at advancing the socio-economic needs of the Zimbabwean people, especially the vulnerable, impoverished and marginalised through the imposition of short and long term obligations on the state. The judicial enforcement of socio-economic rights is a powerful indication that the Constitution’s vision goes beyond merely guaranteeing abstract equality – rather courts must ensure that these rights become a reality. It is the vision of the Constitution to ensure democracy, transparency, accountability, good governance and the rule of law. Significantly, it is the vision of the Constitution to reaffirm the commitment to uphold and defend fundamental rights and freedoms which include socio-economic rights.

Moreover, an argument may be advanced that the constitutionalisation of socio-economic rights is a commitment to transform Zimbabwe’s society from the one that is based on socio-economic deprivation to one that is based on equal and equitable distribution of resources. However, the Constitution does not provide a comprehensive blueprint for a transformed society nor stipulate the precise processes for achieving it. Instead it provides a set of institutions, rights and values for guiding processes of social change and transformation. Consequently, individuals and groups who allege the infringement of their socio-economic

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189 Wiles “Aspirational Principles or Enforceable Rights? The Future for Socio-Economic Rights in National Law” 2006 American University International Law Review 35-64. It is important to state that direct protection of socio-economic rights as justiciable entitlements offers the best opportunity to develop a jurisprudence which engages seriously with the content of these rights and the nature and scope of the obligations they impose.
190 See the Preamble and section 3 of the 2013 Constitution.
191 See the Preamble 2013 Constitution.
193 These institutions include the Constitutional Court with very wide powers, the Zimbabwe Human Rights Commission with quasi judiciary powers, and Public Protector, among others. See also the founding values in section 3 of the Constitution and state objectives in Chapter 2 of the Constitution.
rights should have the opportunity to seek relief or remedy in the courts and other non-judicial organs such as the Zimbabwe Human Rights Commission.\textsuperscript{194}

The principal aim of this chapter is to discuss and analyse judicial enforcement of socio-economic rights in Zimbabwe under the Constitution. Although it is beyond the scope of this chapter to engage in a comprehensive comparative analysis, reference will be made to the judicial enforcement of socio-economic rights under the 1996 South African Constitution. This is because the judiciary in that country has played a significant role in protecting socio-economic rights protected under the 1996 South African Constitution. An array of cases from the Constitutional Court of South Africa demonstrate some practical and conceptual challenges that arise in the legal enforcement of these rights, hence the need to refer to the decisions from that country. The courts in South Africa have developed a reasonable model of review of these rights and as illustrated below, this model is likely to influence our courts in interpreting socio-economic rights. This chapter is divided into five sections; the first section explores and discusses the role of the judiciary in rights adjudication and how these rights should be interpreted in a transformative manner. This section further discusses international law, foreign law and the founding values in the Constitution as interpretative tools in respect of socio-economic rights. The values espoused in the Constitution include, the respect of supremacy of the Constitution, fundamental rights and freedoms, recognition of inherent dignity and human worth and recognition of the equality of all human beings among others.\textsuperscript{195} The second section then explores the possible model for ascertaining state compliance with the protected rights. The third section discusses another conceptual and practical challenge in the socio-economic rights discourse, the remedial framework in adjudicating socio-economic rights. The fourth section examines legal standing mechanisms introduced by the Constitution. This chapter concludes by exploring the complementary role of the Zimbabwe Human Rights Commission (ZHRC) in the protection and promotion of these rights.

\textbf{3 1 Role of judiciary under the Constitution}

Section 162 of the Constitution vests judiciary authority in the courts. The Constitution provides that it is supreme and all three main arms of government derive their authority from

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{194} CESC\textsuperscript{R}, General Comment 3 \textit{The Nature of States Parties’ Obligations} U.N. Doc. E/1991/23 (General Comment 3 para 3).
\item \textsuperscript{195} See section 3 of the 2013 Constitution.
\end{itemize}
\end{footnotesize}
This means that all branches of government submit to the Constitution and every conduct must be consistent with the constitutional precepts. However, under a constitutional supremacy, the judicial branch acquires a much more prominent role. This is because the judiciary has the task of policing the boundaries of action taken by the political branches to ensure that they stay within the bounds of the Constitution and the law.\(^{197}\) This task is explicit in section 165 (1) (c) of the Constitution which stipulates that, the role of the courts is paramount in safeguarding human rights and the rule of law. In addition, section 164 of the Constitution provides that courts are independent and only subject to the Constitution and no one is permitted to interfere in the discharge of their judicial functions.\(^{198}\) Section 164 (2) (b) of the Constitution further places an obligation on the state to protect and assist the judiciary in carrying out its functions effectively, particularly to ensure that all court orders are obeyed.\(^{199}\) As a result, the courts in Zimbabwe, particularly the new Constitutional Court (ZCC) must recognise its primary role as that of deepening constitutional democracy, upholding the protection of human rights and entrenching the rule of law.\(^{200}\) The ZCC has a duty to ensure that it interprets all laws in line with the Constitution particularly the Bill of Rights. The Constitution provides for constitutional democracy mechanisms such as rule of law, constitutional supremacy and entrenched fundamental rights. However, the effectiveness of these mechanisms lies in their enforcement through an independent and impartial judiciary.

The subservience of all organs of state to the Constitution by requiring that they constantly justify their actions in terms of the Constitution potentially places the courts on a path of conflict with the political branches of government. This is likely to be contested by these political branches as to the extent of courts’ functions and roles under the Constitution. The duty of the courts is to ensure that the elected branches of government adhere to the Constitution and the law hence the subordination of these political organs. This subordination however, is particularly relevant with regard to the protection of rule of law, separation of powers and most of all the protection and the adjudication of all rights including socio-

\(^{196}\) See section 2 of the 2013 Constitution.


\(^{198}\) See section 164 (1) (2) of the 2013 Constitution. See also section 164 (2) which stipulate that the independence, impartiality and effectiveness of the courts is significant to rule of law and good governance.

\(^{199}\) See section 164 (3) of the 2013 Constitution.

\(^{200}\) See for example principles guarding the entire judiciary in the 2013 Constitution, particularly section 165 (1) (c) which provides that the role of the courts is paramount in safeguarding human rights and freedoms and rule of law.
economic rights. Nevertheless, the subordination of the political branches of government to the judiciary may entail the interference in policy choices by the judiciary which might fall foul of the doctrine of separation of powers. Writing in the South African context, the late former Chief Justice (CJ) of South Africa, Justice Pius Langa cautioned that judges are not law-makers and thus must be careful in being over active or passive in socio-economic rights matters.  

However, Langa CJ was also quick to recognise the prominent role of the judiciary in a constitutional democracy, that where there is need to align the laws and government conduct with the Constitution, the judiciary to a certain extent, do legislate and as such must fulfil the mandate.

The judgement of the Supreme Court of Zimbabwe in *Zimnat Insurance Co Ltd v Chawanda* further highlighted the special role of the judiciary in developing countries such as Zimbabwe. The Zimbabwe Supreme Court reasoned that:

> [t]oday, the expectations among people all over the world and particularly in developing countries are rising and the judicial process has a vital role to play in moulding and developing the process of social change. The judiciary can and must operate the law to fulfil the necessary role of effecting such development. It sometimes happens that the goal of social and economic change is reached more quickly through legal development by the judiciary than by the legislature. This is because judges have a certain amount of freedom of latitude in the process of interpretation and application of the law.

Accordingly, the judiciary must understand its constitutional duty and ensure that constitutionally protected socio-economic rights become a reality through a generous contextual interpretation that gives content to these rights.

Therefore, the broad range of socio-economic rights in the Constitution present the courts with an important opportunity to develop the legal system to be more attuned to poverty, social marginalisation and respect for human dignity and fundamental rights. Additionally, these rights present the judiciary with an important opportunity to re-establish itself as one of the true upholders of human rights in Africa. This is because when the people have exhausted all the avenues in the protection of their rights; they will turn to the courts to act as their institutional voice and last resort. It follows that judges must shy away from highly structured

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203 See *Zimnat Insurance Co Ltd v Chawanda* 1991 2 SA 825 ZSC.

204 Ibid.
interpretation of rights and adopt a policy-oriented and substantive legal reasoning that promotes the protection of socio-economic rights.\textsuperscript{205} For example, recently, the High Court in Harare granted temporary injunctions to halt evictions of people and destruction of people’s homes in Mazoe by the government.\textsuperscript{206} These positive orders were granted after the Zimbabwe Lawyers for Human Rights (ZLHR) argued that the Constitution provides for a right not to be evicted without a court order,\textsuperscript{207} which in essence protects the right to shelter. This is a sign that the courts are positioning themselves as a key player in the domestic framework for protecting the poor and the marginalised against arbitrary and excessive bureaucratic actions.

It is thus contended that courts must use their wide judicial powers to give social justice to the poor and economically and socially disadvantaged. Such remit include powers to grant appropriate and equitable remedies, powers to determine the constitutionality of any legislation and conduct, including powers to develop the common law or customary law in line with the parameters of the Constitution.\textsuperscript{208} This is because in interpreting socio-economic rights provisions under the Constitution, judges and indeed the entire judiciary cannot remain aloof from social and economic needs of the vulnerable and impoverished.\textsuperscript{209} Accordingly, through their activism, judges must nudge the government to move forward and improve the social and economic conditions of the poor.\textsuperscript{210} This way the government will be able to respect the socio-economic provisions in the Constitution and fulfil its obligations. Justice Ajibola puts it in the following words:

\begin{quote}
We as African judges must firmly uphold our constitutions and the rights of all our citizens… If we should fail in our duty, society may not take our judgements seriously and posterity may not forgive us. Confidence in the judiciary could vanish. Respect for law and order may diminish and even break down. If it should, anarchy would take over. People may take law into their hands and violence would be the order of the day.\textsuperscript{211}
\end{quote}

It follows that the protected rights present the judiciary with an important opportunity to recreate its image as the upholder and guardian of human rights. The judiciary must adopt

\begin{itemize}
\item \textsuperscript{205} Klare (1998) 168.
\item \textsuperscript{206} See High Court Orders First Family to Stop Farm Evictions and High Court Saves Mazowe Families from Police Evictions available on http://allafrica.com/stories/201404020217.html (accessed 27/05/2014).
\item \textsuperscript{207} See section 74 of the 2013 Constitution.
\item \textsuperscript{208} See 46 (2) of the 2013 Constitution. See also section of 176 of the 2013 Constitution.
\item \textsuperscript{209} Dumbutshena “Judicial Activism in the Quest for Justice and Equity” in Ajibola and Van Zyl (eds) The Judiciary in Africa (1998) 188.
\item \textsuperscript{210} Dumbutshena (1998) 188.
\end{itemize}
new ways of thinking and innovative ways to engage with the new Constitution. For example section 165 (7) of the Constitution mandates judges to take reasonable measures to maintain and enhance their professional knowhow, skills and qualities and in particular keep themselves abreast with developments in domestic and international law. Additionally, courts must shy away from legal formalism and be forward-looking and position themselves as the true upholders of the Constitution and the law, and ensure that vulnerable groups enjoy the constitutionally protected rights. As such, the Bill of Rights is particularly significant as it creates the possibility for ordinary, poor and disadvantaged communities to challenge the exercise of public power that undermine their rights. In addition, it is important to state that, all the effective protection of all constitutional protected rights is dependent on the strength of the judiciary which in turn lies on the impartiality and independence thereof. Accordingly the judiciary must be free from all executive and political pressures. The next section discusses the manner in which constitutionally protected socio-economic rights should be interpreted by the courts.

3.2 Interpreting socio-economic rights

3.2.1 Interpreting socio-economic rights: the role of underlying values

The Constitution is founded on very important values. These include the values of human dignity, openness, justice, equality and freedom. The values in the Constitution play an important role in interpreting socio-economic rights if these rights are to amount to legal rights enforceable in a court of law. Section 46 of the Constitution is important in this regard. Section 46 (1) (a) provides that, when interpreting the rights in the Bill of Rights, courts and any other similar forum, must give full effect to all the rights and freedoms enshrined in the Constitution. Of importance is section 46 (1) (b) which stipulates that when interpreting protected rights, courts and similar bodies must promote the values that underlie a democratic society based on human dignity, openness, justice, equality, and freedom and in particular, the values and principles set out in section 3 of the Constitution. Section 3 provides that Zimbabwe is founded on the respect of the following values and principles, supremacy of the Constitution, rule of law, fundamental rights and freedoms, inherent dignity.

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212 See section 165(1) (c) of the 2013 Constitution.
215 Section 3 2013 Constitution.
and human worth and equality of all among others. Liebenberg has explained that human

dignity as a value further requires a burden of justification to be placed on the state in cases

involving a deprivation of human needs. Accordingly, section 3 constitutes an endorsement

by the Constitution to the values of democracy, human dignity, equality and freedom in the

interpretation of all constitutionally protected rights in the Bill of Rights including socio-

economic rights. For this reason, section 46 enjoins the courts to play an active role in

promoting those values in their interpretative and adjudicative roles in socio-economic rights
cases.

It is thus important for the courts in their interpretation of socio-economic rights provisions in

the Bill of Rights to execute their constitutional mandate in a way that promotes and gives

substantive meaning to the founding values enunciated in section 3. This is because the status

of socio-economic rights as justiciable rights in the Constitution vests in the judiciary an

important role in interpreting these rights taking into context founding values that underlie a
democratic society. Furthermore, the judiciary is mandated to ensure a contextual

interpretation that pays due regard to the historical background and all the provisions of the

Constitution particularly the values and national objectives in Chapter 2 of the

Constitution.

For instance, human dignity as a founding value should be used by the courts to generate

concern for protecting and interpreting socio-economic rights. Otherwise it is not possible to

respect people’s dignity and human worth, while consigning them to a life which subverts

their dignity by denying them sufficient food, shelter, health provision, education and social

security and appropriate relief for that matter. This undermines the raison d etre of the

founding values and socio-economic provisions in the Constitution. Equality as a founding

value enjins the state to ensure that there is no discrimination in respect of access to socio-

economic rights. Human dignity as a founding value requires the courts to interpret socio-

economic rights in a manner that will ensure equal distribution of resources and redress the

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216 See section 3 of the 2013 Constitution which contains founding values and principles.
217 See Liebenberg “The Value of Human Dignity in Interpreting Socio-economic Rights” 2005 South African

Journal of Human Rights 1-32. Liebenberg states that the concept of human dignity requires society to respect

the resources to redress the conditions that perpetuate their marginalisation.
218 See section 3 of the 2013 Constitution.
219 See section 46 (1) (d) of the 2013 Constitution. The objectives in Chapter 2 of the 2013 Constitution direct
the state to take all practical and reasonable measures to ensure the provision of necessities of life such as
shelter, education, social security, and food security among others.
220 See Liebenberg “The Value of Human Dignity in Interpreting Socio-Economic Rights” 2005. See also Rao
conditions that perpetuate unequal distribution of resources. It is therefore incumbent upon the judiciary to ensure that any interpretation of socio-economic rights is informed by founding values such as human dignity and equality. This affirms the central role assigned by the Constitution to the founding values. Failure to interpret socio-economic rights without regard to the fundamental constitutional values such as human dignity, equality, accountability, good governance, rule of law and supremacy of the Constitution by the courts will likely make the Constitution worth infinitely less than its paper. In the South African case of *Soobramoney v Minister of Health (KwaZulu-Natal)* (Soobramoney case), which is no less relevant to our new Constitution, the South African Constitutional Court affirmed that the 1996 South African Constitution commits judges in their interpretation of socio-economic rights to change the deplorable conditions and poverty in which people live, in order to give effect to the values of human dignity, freedom and equality. The next section discusses the importance of international law and foreign law as interpretative tools.

3.2.2 Interpreting socio-economic rights: international law as an interpretive tool

International law forms part of Zimbabwean law only when it has been incorporated into domestic law through an Act of parliament. This means that Zimbabwe is a dualist state as opposed to a monist state. Dualism stresses that, “international and municipal law differ so radically in the matter of subjects of the law, its sources and its substance, that a rule of the international law can never *per se* become a part of the law of the land; it must be made so by the express or implied authority of the state.” Monism provides that international law applies directly in the domestic legal order without the need for incorporation. Dualism under the 2013 Constitution is evident from a number of constitutional provisions. Notably, section 34 of the Constitution calls for the domestication of international instruments and specifically stipulates that the state must ensure that all international conventions, treaties and agreements to which Zimbabwe is a party are incorporated into domestic law. Section 327 of the Constitution further echoes the fact that Zimbabwe is a dualist state. Section 327 (2) (a) provides that an international treaty does not bind Zimbabwe until it has been approved by parliament and does not form part of the law of Zimbabwe unless it has been incorporated.

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221 See Liebenberg 2005 1-32.
222 Ibid.
223 See *Soobramoney v Minister of Health (KwaZulu-Natal)* 1998 1 SA 765 (CC) para 8.
224 See sections 34 and 327(2) (a) (b) of the Constitution.
226 Ibid., 42-50.
into the law through an Act of parliament. However, in contrast, customary international law forms part of the law of Zimbabwe unless it is inconsistent with the Constitution and an Act of parliament.227

Despite adopting the dualist approach towards international treaties, the 2013 Constitution demonstrates a clear determination to ensure that Zimbabwean laws and the Constitution itself should be interpreted to comply with international laws, particularly in the field of human rights. The Bill of Rights refers directly to international law and thus must be subjected to a special interpretative regime which pays due regard to international law.228 Section 46 (1) (c) of the Constitution requires that when interpreting the Bill of Rights, courts must take into account international law and all treaties and Conventions which Zimbabwe is a party to in their rights interpretation. The major treaties to which Zimbabwe is a party that enshrine socio-economic rights include the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Elimination of Discrimination against Women, the Convention on the Rights of the Child and the African Charter on Human and Peoples’ Rights (African Charter). The effect of section 46 is that Zimbabwean courts are obliged to make use of and have recourse to such instruments and interpretative guidance of quasi-judicial bodies established under such instruments in their judicial enforcement of socio-economic rights. In essence, section 46 of the Constitution, “signals the Constitution’s openness and receptiveness to the norms and values of the international community.”229 In addition, section 46 expresses Zimbabwe’s aspiration to be part of the international community, to adhere to its normative standards and to contribute to the development of international law based on domestic experiences of human rights.230 Despite Zimbabwe being a dualist state, the use of international law for the purposes of interpreting the Bill of Rights in terms of section 46 must be distinguished from the binding status of international law in domestic law in that, courts must refer to both binding and non-binding international instruments. This is because section 46 of the Constitution refers to interpretive guides which the courts must take into account but not bound to follow.231

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227 See section 326 (1) of the 2013 Constitution.
228 See the main sources of international law in article 38 of the Statue of the International Court of Justice.
231 See section 46 of the 2013 Constitution which stipulates that courts and any other similar forums must consider international law and may consider foreign law in their interpretation of constitutionally entrenched rights.
For a meaningful interpretation, it is argued that such international law must include both binding and non-binding international law to the extent that it is not contrary to the integrity and spirit of the Constitution.\(^{232}\) This means that for better interpretation of rights, courts are enjoined to consider not only binding instruments but also to take into account those principles laid down in conventions to which Zimbabwe is not a party to. These include the European Convention on Human Rights and Fundamental Freedoms and the American Convention on Human Rights and General Comments by treaty bodies which are not binding but instead provide guidance and clarity on the nature, content and scope of socio-economic rights.\(^{233}\) Such interpretation is to inform a substantive and generous interpretation of socio-economic rights that provides guidance and purpose taking into account international human rights law norms. In General Comment 9 on the domestic application of the Covenant, the Committee on Economic Social and Cultural Rights (CESCR) stipulated that in general, legally binding international human rights standards should operate directly and immediately within the domestic legal system of each state party, thereby enabling individuals to seek enforcement of their rights before national courts and similar forums.\(^{234}\) In the past, Zimbabwean courts have been willing to refer to international law in interpreting rights. The ZCC recently illustrated that it is also adopting a flexible and generous approach towards international human rights instruments in a case that involved the right to freedom of expression.\(^{235}\) In the case of *Nevanji Madanhire, Nqaba Matshazi v Attorney-General of Zimbabwe*, the ZCC referred to a number of international law instruments as interpretative tools in its adjudication of the case.\(^{236}\) The court referred to the International on Covenant on Civil and Political Rights,\(^{237}\) United Nations Resolutions,\(^{238}\) and the Human Rights Committee General Comment 34 in its determination of the case.\(^{239}\)

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\(^{233}\) The Supreme Court of Zimbabwe has previously paid due respect to international instruments relating to human rights for example in *S v Juvenile* 1989 2 ZLR 61 (SC).


\(^{235}\) *Nevanji Madanhire, Nqaba Matshazi v Attorney-General of Zimbabwe* CCZ 2/14. See also *Farai Daniel Madzimbamuto v The Registrar General and others* CCZ 5/14.

\(^{236}\) See *Nevanji* case.

\(^{237}\) International Covenant on Civil and Political Rights (1966) UN Doc A/6316.

\(^{238}\) See *Nevanji* case.

A similar guidance in the use of international law as an interpretive guide is found in the South African case of *S v Makwanyane*. The Constitutional Court of South Africa recognised immediately the significance of international law in the process of interpreting municipal law especially fundamental rights. That Court held that international agreements and customary international law provide a framework within which the Bill of Rights could be evaluated and understood and for that purpose, decisions of tribunals dealing with comparable instruments may provide guidance as to the correct interpretation of the provisions of the Bill of Rights. The Constitutional Court of that country further held that such international law includes binding and non-binding international law. Our courts must therefore adopt a similar approach as that of South Africa and avoid a narrow application of international law. The ICESCR, its Optional Protocol and General Comments adopted by the CESC are of particular relevance to the interpretation of socio-economic provisions in the Constitution. This is because the Bill of Rights is partly modelled on the ICESCR. Thus for a flexible interpretation, courts must consider using these instruments in the domestic enforcement of socio-economic rights. Additionally, as Zimbabwean courts are given power of judicial review of legislation under the Constitution, it is thus inevitable that international law will be invoked not only as a guide to statutory interpretation but also as a challenge to the validity of legislation.

International human rights norms are of significance to Zimbabwe in that justiciable socio-economic rights are new provisions in the Constitution. Hence, international law and agreements protecting socio-economic rights as justiciable rights will be a useful guide in the process of interpreting these rights by our courts. This resonates with section 12 (1) (b) of the Constitution, which provides that, respect for international law must form the bases of Zimbabwean’s foreign policy. This further echoes with section 327 (6) of the Constitution which provides that, when interpreting any legislation, every court and tribunal must adopt a reasonable interpretation of the legislation that is consistent with any international convention, treaty or agreement which is binding on Zimbabwe, in preference to an alternative interpretation inconsistent with that convention treaty or agreement. The same message is echoed in section 326 (2) of the Constitution with regard to customary law.

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240 *S v Makwanyane* 1995 6 BCLR 665 (CC) para 35.
241 Ibid.
242 Ibid.
243 See section 175 of the 2013 Constitution.
244 See also section 326 (2) of the 2013 Constitution in relation to the interpretation of rights that is consistent with customary international law over an unreasonable interpretation.
international law. Thus legislation that affects people’s socio-economic rights should be interpreted, as far as reasonably possible, to be in conformity with applicable international law such as the ICESCR and the African Charter, among others.\textsuperscript{245} This provides additional impetus for the courts to interpret socio-economic legislation in ways that take into account widely accepted international normative values, and principles.\textsuperscript{246} For that reason, courts must understand the process of interpreting and giving full force and effect to human rights norms as a dialogic process which includes a range of national and international actors and principles.\textsuperscript{247} This suasion informs the courts, especially the (ZCC?)\textsuperscript{248} to inculcate a culture of inclusive interpretation of socio-economic rights taking into account relevant principles of international human rights law. The next part discusses foreign law as an interpretative guide.

### 3 2 3 Interpreting socio-economic rights: comparative foreign law as an interpretative tool

Section 46 (1) (e) of the Constitution provides that when interpreting the Bill of Rights, courts may refer to relevant foreign law. This is different from the international law provision which appears peremptory as compared to foreign law which appears as affording discretion on the judges. Liebenberg commenting on a similar provision under the 1996 South African Constitution argues that, despite many criticisms against application of foreign law and judgments both positive and negative, foreign law offers many opportunities that deepen and enrich constitutional jurisprudence.\textsuperscript{249} This is a sign of globalisation and universalism where the meaning accorded to fundamental human rights norms may be influenced by a cross-cultural dialogue extending across national boundaries.\textsuperscript{250} Roach opines that “a globalised world is one where people, including judges, engage in the multiple and on-going conversations across borders. It is hopefully a world characterised by a sense of openness, modesty and willingness to learn from others.”\textsuperscript{251} Thus recourse to foreign law as an interpretive guide is significant to the courts acting under the 2013 Constitution, particularly in the process of interpreting socio-economic rights. This is because socio-economic rights have been marginalised for a long time and lot of conceptual and practical challenges arise in

\textsuperscript{245} Liebenberg (2010) 105.
\textsuperscript{246} \textit{Ibid.}, 105.
\textsuperscript{247} \textit{Ibid.}, 101.
\textsuperscript{248} See sections 162 and 166 of the 2013 Constitution.
\textsuperscript{249} Liebenberg (2010) 119-120.
\textsuperscript{250} \textit{Ibid.}, 119-120. See also Kapindu “Courts and the Enforcement of Socio-economic Rights in Malawi: Jurisprudential Trends, Challenges and Opportunities” 2013 1 \textit{African Human Rights Law Journal} 125-151.
adjudicating these rights. These challenges include institutional competence of the courts, separation of powers, nature and content of these rights, model of review, and remedial framework among others. Courts in Zimbabwe must therefore be willing and ready to learn from experiences, pitfalls, challenges and successes of similarly placed jurisdictions particularly South Africa with its constitutionally entrenched socio-economic rights. This is because socio-economic provisions in the Constitution may have been inspired by the similar provisions in the 1996 South African Constitution. Due to a shared common law heritage, our courts have always referred and cited South African judgements and our courts are expected to cite socio-economic rights from that jurisdiction for interpretative purposes. In the Nevanjie case, the ZCC cited relevant foreign law albeit not in relation to socio-economic rights. The ZCC referred to the South African case of Hoho v The State in interpreting the right to freedom of expression.252

However, the use of foreign precedent requires circumspection and acknowledgement that such transplants require great care and management.253 Foreign law must be of persuasive value. Such great care towards the use of foreign law must not however inhibit the courts in considering useful and positive foreign law to the extent that such law is not adverse to the spirit and purport of the Bill of Rights.254

3 2 4 Purposive interpretation through the prism of the Bill of Rights

Section 46 (2) of the Constitution provides that when interpreting any legislation and when developing common law or customary law, every court must promote and be guided by the spirit and objectives of the Bill of Rights. The directive contained in section 46 (2) of the Constitution makes it clear that legislation, common law and customary law fall within the ambit of the entire Bill of Rights and the Constitution itself.255 Put differently, the Constitution is the supreme law through which all law must be tested and in particular all laws should be measured through the prism of the Bill of Rights.256 The consequence of this provision is that any law that is retrogressive in respect of the enforcement and

252 See Hoho v The State 2008 ZASCA 98 (SCA).
254 Ibid., para 26.
255 In S v Makwanyane and Others para 109, the Constitutional Court of South Africa held that law (legislation, common law and customary Law) which fall foul of the spirit, purport and objects of the Bill of Rights may be struck down as invalid.
256 For example see the South African case of Pharmaceutical Manufacturers Association of SA and another, In re Exparte Application of President of the RSA and others 2000 3 BCLR 241(CC) in which the court held the Constitution as the supreme law against which all law must be tested.
implementation of socio-economic rights in the Constitution would not pass constitutional muster and must be declared invalid.

Socio-economic rights are new in the Constitution compared to civil and political rights that have been a feature in the LHC since 1980. Consequently, these rights ought to be approached with a purposive, objective and substantive interpretation that allows for their full and effective protection through the courts. Otherwise any formalistic and rigid approach detracts from the object, purpose and spirit of the Bill of Rights. In *Bull v Minister of Home Affairs*, the Zimbabwe Supreme Court (ZSC) held that while courts must always address themselves to the actual language used in a constitutional provision, narrow and pedantic interpretations must be avoided.\(^{257}\) This is consistent with human rights provisions which must be construed generously and purposively so as to eschew the austerity of tabulated legalism.\(^{258}\)

The purposive approach will often be one which calls for a generous interpretation to be given to a right to ensure that individuals secure the full protection of the Bill of Rights.\(^{259}\) This was echoed in the case of *In Re Munhumeso and Others*.\(^{260}\) In that case, the ZSC held that all constitutional provisions bearing upon a particular subject are to be considered together and construed as a whole in order to give effect to the objective and purpose of the constitutionally protected rights.\(^{261}\) However, this is not always the case, and the context may indicate that, to give effect to the purpose of a particular provision, a narrower or specific meaning should be given to it.\(^{262}\)

Under the 2013 Constitution, courts bear the primary obligation to ensure that, socio-economic rights are interpreted in a way that responds to the demands of the Bill of Rights and the socio-economic needs of the people, especially the disadvantaged, indigent and impoverished. This is in line with the argument by the late former Chief Justice Dumbutshena who argued that the judiciary in a developing country should play an activist role in transforming the society.\(^{263}\) Dumbutshena further stated that the judiciary has the opportunity to create social justice in society and that justice can help to transform the socio-economic

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257 *Bull v Minister of Home Affairs* 1986 1 ZLR 202 (ZSC) 211.
258 See *Rattigan and other v The Chief Immigration Officer and others* 1995 1 (BCLR) 125.
259 *Soobramoney* case para 17.
260 *In Re Munhumeso and Others* 1995 1 SA 551 (ZSC).
261 Ibid.
262 Ibid., para 559. The Court held that rights and freedoms are not to be diluted or diminished unless necessity or intractability of language dictates otherwise.
needs of the disadvantaged ones. Of importance is the point Dumbutshena makes that courts can transform societies if they accept judicial activism as a way of promoting justice, equality and social justice. Consequently, under the Constitution, courts are one of the key institutional players in the transformative process from that of socio-economic deprivation to that of equal distribution of resources. This will be done, if the courts adopt new concepts of justice and means of interpretation of rights that will enable disadvantaged societies and vulnerable groups to live full lives and to share the benefits of the socio-economic resources.

In *Smyth v Ushewokunze and another*, the ZSC held that in arriving at the proper meaning and content of a right guaranteed in the Bill of Rights, it must not be overlooked that it is a right designed to secure protection and that the endeavour of the courts should always be to expand the reach of a fundamental right and not to attenuate its meaning and content. What is to be done, the ZSC, held, is to accord the rights a generous and purposive interpretation with an eye to the spirit as well as to the purpose of the provision and the entire Bill of Rights. For this reason, courts must take full account of the changing conditions, social norms and values, so that the provisions in the Bill of Rights remain flexible and enough to keep pace with and meet the newly emerging problems and challenges. Ultimately, the intention of the courts must be to shy away from legal formalism and make human rights provisions a practical reality through a purposive interpretation through the prism of the Bill of Rights taking into account founding values. In the process of interpreting socio-economic rights courts must choose a model of review that appropriately gives effect to the protected rights. The next section explores the model of review provided for under the 2013 Constitution.

264 Ibid.
265 Ibid.
266 Ibid.
267 *Smyth v Ushewokunze and another* 1997 2 ZLR 544 (ZSC), 1998 3 SA 1125 (ZS).
268 Ibid.
269 Ibid.
3.3 Model of review under the 2013 Constitution

3.3.1 Reasonableness approach

The Constitution refers to the realisation of socio-economic rights through “reasonable legislative and other measures.” In Grootboom judgment, the Constitutional Court of South Africa explained what the reasonableness approach entails. That Court held that, in reviewing the positive duties imposed by socio-economic rights provisions on the state, the central question that the court asks is whether the means chosen are reasonably capable of facilitating the realisation of the socio-economic rights in question. In the words of the Court, “a court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted or whether public money could have been better spent. The question would be whether the measures that have been adopted are reasonable.”

The socio-economic provisions under the Constitution provides for negative and positive duties for Zimbabwe. The Constitution in section 44 places an overarching obligation on the state to respect, promote, protect and fulfil the rights in the Bill of Rights. Section 44 of Constitution establishes that all rights in the Bill or Rights impose a combination of negative and positive duties on the state. Negative duties impose on the state the obligation not to interfere with the existing socio-economic rights. Positive duties are explicit from the qualification of these rights which requires the state to “take reasonable and others measures, within its available resources, to achieve the progressive realisation of these rights.” For instance section 76 (1) of the Constitution provides for the right of access to healthcare while section 76 (4) internally limits it. However, the right to health care in subsection 1 provides for a positive duty on the state to take reasonable legislative and other measures, within the limits of available resources to achieve the progressive realisation of the right to health. Thus, through their positive nature, socio-economic rights in the Constitution present the Zimbabwean courts with a number of practical challenges. Firstly to define the specific content of socio-economic rights as protected in the Constitution and secondly to issue out appropriate remedies for the violation of these rights.

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270 See chapter 2 of this study.
271 Government of Republic of South Africa and Others v Grootboom and Others 2000 11 BCLR 1169 (CC) para 41.
272 Ibid., para 41.
273 See chapter two of this study.
274 See section 44 of the 2013 Constitution.
3311 Reasonableness as interpreted by South African Courts

Since the Bill of Rights in the 2013 Constitution is modelled along that of the 1996 South African Constitution, it is important to draw lessons from the jurisprudence of that country on how courts in that jurisdiction have applied reasonableness as the model of review of positive duties imposed by socio-economic rights. The Constitutional Court of South Africa adopted the reasonableness model in a number of its first socio-economic rights cases and these include the *Government of Republic of South Africa and Others v Grootboom and others* 275 (*Grootboom case*), *Minister of Health and Others v Treatment Action Campaign (TAC) cases*, and *Khosa and others v Minister of Social Development*. For example in the TAC case, the Constitutional Court of South Africa held that the failure to take measures by the state without delay to permit and facilitate the use of anti-retroviral drug Nevirapine throughout public health care facilities in South Africa for the purposes of preventing mother to child transmission (MTCT) of HIV was unreasonable as it violated the right to healthcare in that country.276 In the *Grootboom case*, the housing programme was declared to be unreasonable for its failure to provide relief for people who have no access to land, no roof on their heads, and who were living in deplorable conditions.277 In essence, the focus of the Constitutional Court of South Africa has been limited to evaluating the reasonableness of the government programmes while explicitly rejected the minimum core approach.

Although some scholars have highly criticised reasonableness as a model of review for socio-economic rights, it fits well with the doctrine of separation of powers and has brought some positive changes in jurisdictions where it has been applied.278 Liebenberg has however suggested means in which reasonableness approach could be strengthened especially in respect of vulnerable groups who often lack access to essential socio-economic services.279

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275 See the *Grootboom case*.
276 See the *Minister of Health and Others v Treatment Action Campaign and Others* 2002 5 SA 703 (CC).
277 *Grootboom case* para 99.
278 In *The Certification of the Constitution of the Republic of South Africa* 1996 4 SA 744 (CC) (Certification judgment) the Constitutional Court of South Africa reasoned that, “in relation to the separation of powers, it is true that the inclusion of socio-economic rights may result in courts making orders which have direct implications for budgetary matters. However, even when a court enforces civil and political rights such as equality, freedom of speech and the right to a fair trial, the order it makes will often have such implications. A court may require the provision of legal aid, or extension of state benefits to a class of people who formerly were not beneficiaries of such benefits. In our view, the Court reasoned, it cannot be said that by including socio economic rights within the bill of rights, a task is conferred upon the courts so different from that ordinarily conferred upon them by the Bill of Rights that results in a breach of the separation of powers.”
Firstly vulnerable litigants seeking access to socio-economic rights may benefit from having the burden of proving the reasonableness of government measures placed on the state.\textsuperscript{280} In essence, this will give a presumption of unreasonableness of government measures in circumstances where individuals and groups cannot gain access to basic necessities of life.\textsuperscript{281} Thus, the obligation and onus would be on the government to justify why the exclusion is reasonable in any given circumstances. Second, the reasonableness review standard could be strengthened by requiring a compelling government purpose for failure to ensure that vulnerable groups have access to basic needs.\textsuperscript{282} The political branches must be required to demonstrate through evidence and argument to the courts that its resources are inadequate and thus unable to fulfil constitutional obligations. Liebenberg has argued that it is not sufficient for the courts to assert that it is impossible to give everyone access to a core service immediately.\textsuperscript{283} Instead, the government must show that it has good reasons for failing to meet its constitutional obligations.\textsuperscript{284} Likewise, it is argued in this study that Zimbabwean courts would be required to scrutinise all the evidence provided by the government with a view of assessing whether it presents a compelling justification for failing to provide basic needs.\textsuperscript{285} Lastly, even though the government may justify its failure of meeting its socio-economic obligations, it should also show that there are no less restrictive means of achieving its purposes that limits access to essential levels of the socio-economic rights.\textsuperscript{286} It follows from the above that if our courts adopt the reasonableness approach as the model to review government programmes and policies in respect of giving effect to constitutionally protected socio-economic rights, courts must ensure that this approach acts as a yardstick through which courts measure the conduct of the government in fulfilling socio-economic obligations in the Constitution.

Furthermore, courts considering socio-economic rights cases in other jurisdictions have employed many of the reasonableness tests commonly used in administrative law, comparing the seriousness of the violation of a right with the importance of the state justification.\textsuperscript{287}

\textsuperscript{280} See Liebenberg in Squires et al (2010) 83. See also CESCR General Comment 3.
\textsuperscript{281} Ibid., 83.
\textsuperscript{282} Ibid.
\textsuperscript{283} Ibid case para 35.
\textsuperscript{284} Liebenberg in Squires et al (2010) 83. See also CESCR General Comment 3.
\textsuperscript{285} Ibid., 83.
\textsuperscript{286} Ibid., 84.
as a standard for the government to conduct policy and draft legislation that will promote the protection and realisation of socio-economic rights. The approach must be used by the courts to assess governmental conduct.\textsuperscript{288} Where government does not meet the required constitutional standard of reasonableness, courts must require the government, to revise its policy to provide for those in need and to remove anomalous restrictions. Accordingly, the most important point under the reasonableness approach is that the government justifications will be subject to scrutiny by the courts and in turn the government must present convincing reasons why particular sectors of the society are excluded from accessing basic socio-economic services.\textsuperscript{289} This will inculcate a culture of justification which is one of the underlying principles of constitutional review.\textsuperscript{290}

The standard of scrutiny that must be employed by the courts in Zimbabwe must be more than simply enquiring whether the policy was rationally conceived and applied in good faith.\textsuperscript{291} For example in the \textit{Grootboom and TAC} cases, the South African Constitutional Court indicated that evidence in particular cases may show that there is a minimum core of the particular service that should be taken into account in determining whether the measures adopted by the state are reasonable.\textsuperscript{292} Accordingly, the reasonableness approach must go beyond the scrutiny of the adopted measures and enquire into the degree and extent of the denial of the socio-economic right.\textsuperscript{293} Furthermore, such an approach must incorporate two interests protected by socio-economic rights. Firstly, in determining whether the means provided for realising of socio-economic rights are reasonable, the courts in Zimbabwe must ensure that, measures put in place by the government cater for the more basic interest of survival.\textsuperscript{294} Secondly, the courts must ensure that the medium and long term measures towards the realisation of socio-economic rights are extensive and extend beyond the mere survival and basic needs.\textsuperscript{295}

South African courts’ adjudicating on similar constitutional provisions to ours have set out the following standard for government measures and programmes to be reasonable. The

\begin{itemize}
\item \textsuperscript{289}Liebenberg in Squires \textit{et al} (2010) 82.
\item \textsuperscript{290}Ibid.
\item \textsuperscript{291}Ibid., 79.
\item \textsuperscript{292} See \textit{Grootboom} case para 33 and \textit{TAC} case para 34.
\item \textsuperscript{293} \textit{Grootboom} case para 33.
\item \textsuperscript{294} Bilchitz 2002 490. See also Bilchitz 2003 11-14
\item \textsuperscript{295} \textit{Ibid.}, 490.
\end{itemize}
government programmes must be comprehensive coherent, coordinated,\textsuperscript{296} they must be balanced and flexible, and make appropriate provision for short, medium and long term needs,\textsuperscript{297} they must be reasonably conceived and implemented,\textsuperscript{298} and they must be transparent, and the contents must be made known to the public.\textsuperscript{299} The consequences of the reasonable test is that the applicants are not entitled to immediate relief, rather they are entitled to reasonable action by the state that will place them in a position to receive the tangible goods and services.\textsuperscript{300} The court in \textit{Grootboom} case further stated that in appropriate circumstances, the minimum core will be one of the underlying determinants of the reasonable approach. The next section discusses another possible model, the minimum core approach.

3.3.2 Minimum core obligation

The minimum core obligation is defined as the threshold which all states must meet immediately in the process of realising socio-economic rights.\textsuperscript{301} In terms of the minimum core obligation, there lies an obligation to ensure the satisfaction of at the very least, minimum essential levels of the rights that are incumbent upon each state party to the ICESCR. The minimum core which is espoused in the CESCR’s General Comment 3, provides that a state party in which any significant number of people is deprived of essential foodstuffs, essential primary healthcare, basic shelter and housing or of the most basic forms of education is \textit{prima facie} failing to discharge its obligations under the ICESCR.\textsuperscript{302} The minimum core concept suggests that there are degrees of fulfilment of a right and that a certain minimum level of fulfilment takes priority over a more extensive realisation of the right.\textsuperscript{303} In essence, this approach appreciates that everyone must be subjected to life that upholds his dignity. Bilchitz observes that the purpose of the minimum core obligations approach is to ensure that regardless of resources, people have access to basic needs required

\textsuperscript{296} \textit{Grootboom} case para 39-40.
\textsuperscript{297} \textit{Ibid.}, para 43.
\textsuperscript{298} \textit{Ibid.}, para 40-43.
\textsuperscript{299} \textit{TAC} case para 123. See also Liebenberg “The Interpretation of Socio-Economic Rights’ in Woolman \textit{et al} Constitutional Law of South Africa 2ed (2009) 33-34.
\textsuperscript{300} For example in South Africa the application of the reasonable test did in fact result in orders of tangible goods and services, for example in \textit{Grootboom} decision led to the change of housing policies by the government, in \textit{Khosa} the decision of the court led to the awarding of social grants to permanent residents and in \textit{TAC} case provision of Nevirapine to pregnant mothers.
\textsuperscript{301} \textit{TAC} case, para 10.
\textsuperscript{302} CESCR General Comment No 3 para 3.
\textsuperscript{303} Chowdhury “Judicial Adherence to a Minimum Core approach to Socio-economic Rights-A Comparative Perspective” (2009) 1 Cornell Law School Inter-University Graduate Student Conference Papers, Paper 27. Available at \url{http://scholarship.law.cornell.edu/lps_clacp/27} (accessed 15/02/14).
for survival.\textsuperscript{304} It is worth noting however that resource availability remains a paramount
determinant of the proper and effective protection and implementation of socio-economic
rights.\textsuperscript{305}

Some scholars have stated that the minimum core approach is the better model of review in
protecting and implementing socio-economic rights compared to the reasonableness approach
which is provided for under the Constitution.\textsuperscript{306} This is because instead of questioning the
reasonableness of the state measures for realising these rights, it speaks to the real content of
the specific rights.\textsuperscript{307} Furthermore, the scholars who support the minimum core approach
argue that this approach gives a better understanding to the government as to what obligations
arise from each legal right and in turn enable individuals to hold the government accountable
for not meeting the minimum guaranteed by a legal right.\textsuperscript{308}

It must however be noted that in practice, it has not been the case South Africa for example
has rejected this approach as being rigid and vague.\textsuperscript{309} The minimum core approach seems
problematic because it disregards the constitutional requirement that internal qualification of
socio-economic rights maybe realised progressively taking into account available
resources.\textsuperscript{310} This is opposite to the reasonableness approach that is influenced by two
factors. The factors include the internal qualification of socio-economic rights that these
rights are subject to progressive realisation taking into consideration of available resources,\textsuperscript{311}
and secondly that reasonableness is judged in the light of the social, economic and historical
context and considerations.\textsuperscript{312} These two factors that underlie reasonableness approach
appreciate that socio-economic rights cannot be realised immediately where resources do not
allow for that. Socio-economic rights in the Constitution are internally qualified as
subsections of these rights makes it clear that the obligation imposed by socio-economic
rights are defined by three key elements and these are “the obligation to take reasonable

\textsuperscript{305} See Liebenberg (2010).
\textsuperscript{306} See for example Bilchitz (2002). See also Bilchitz (2003).
\textsuperscript{307} See CESCR General Comments.
\textsuperscript{308} See Chowdhury (2009).
\textsuperscript{309} See TAC and Grootboom cases.
\textsuperscript{310} See TAC case para 39. See also Young “The Minimum Core of Economic and Social Rights: A Concept in
\textsuperscript{311} See Chapter 2 of this study. See similar provisions relating to socio-economic rights of sections 26 (2) and
27 (2) of the 1996 South African Constitution.
\textsuperscript{312} See Squires et al 2010.
measures”, “to achieve the progressive realisation” of the rights, “within available resources”.  

The minimum core as with the reasonableness approach has its own limitations and our courts must be careful in over emphasising this approach. For example, Liebenberg highlights a number of difficulties posed by the minimum core approach. These include the approach’s impact on democratic institutional functioning (including supposed infringement by courts on separation of powers and participatory democracy), its linkage to survival standard does not guarantee clarity and certainty in defining priority claims and the standard is unduly reductionist in the context of a transformative constitutionalism which seeks to promote the achievement of social justice. Additionally, the minimum core approach has been labelled as rigid and plagued by complexities and inherent paradoxes and thus adopting such an approach may bring more confusion than solutions. The Constitutional Court of South Africa argued that it is not clear whether the minimum core obligations should be defined with reference to specific groups or generally. Additionally, some of the reasons of the rejection of this approach by the Constitution Court of South Africa are in relation to its incompatibility with the institutional competencies of the courts in budgetary matters. However, the rejection of the minimum core obligation as a model of review and the adoption of the reasonableness approach by the Constitutional Court of South Africa has invited a lot of criticism from academic scholars. Dugard and Wilson for example provides that, what the Court has been reluctant to do since Grootboom case is to exercise the power the Constitution assigns it explicitly to determine the interests socio-economic rights themselves exist to protect and advance. Reasonableness and procedural fairness are not sufficient to define these interests. They simply act as a prism through which the enforceability of these interests can be considered on the facts of a particular case. At best, they simply embroider the entitlements already guaranteed in Section 33 of the Constitution. 

Nonetheless as held in the South African case of Grootboom, in certain instances, minimum core will be a strong determinant of the reasonableness of the steps taken by the

313 See sections 75 (4), 76 (4) and section 77 of the 2013 Constitution.
316 See Young 2008.
317 Grootboom case para 31.
318 See TAC case para 70-71.
government. This way courts will be able to overcome the problem earlier identified, that of defining the precise content of the protected socio-economic rights. Furthermore, courts will be able to ensure that no one is deprived of the floor base levels of the constitutionally protected rights. In instances where people are deprived of the basic necessities of life, courts must ensure that the government has taken all practical and reasonable measures to remedy the situation.

Despite the inadequacies of the two models discussed above, our courts must position themselves as to the proper model of review to ensure that the duties imposed by the constitutionally protected socio-economic rights are fulfilled. This is because for the judiciary acting under the Constitution particularly socio-economic rights is a constitutional invitation to engage in transformative constitutionalism, from a pre and post-colonial injustices to a more just society where there is equal distribution of resources. Accordingly, the inclusion of the long marginalised socio-economic rights in the Constitution is intended at advancing the plight and socio-economic life of the people to uplift their dignity. Although the Constitution does not mention the minimum core, the inclusion of socio-economic rights itself is an endorsement that the Constitution aims to transform the Zimbabwean society from a society based on socio-economic deprivation to the one based on equal distribution of resources to all. In essence, it is aimed at transforming their lives for the better. Thus it is not possible to respect people’s dignity while denying them, at the very least, the basic needs for human survival.

3.3.3 Integrated approach

The judiciary in Zimbabwe should draw understanding of its role in enforcing socio-economic rights vis a vis the doctrine of separation of powers. The courts must consider adopting an integrated approach that will enhance the realisation of rights. Such an approach employs both reasonableness approach and the minimum core approach. This is because on one hand, the text of the Constitution refers to “reasonable legislative and other measures” and on the other the Constitution espouses values of human dignity, equality and freedom that signify that no one must be denied of the basic necessities of life. Furthermore, the Optional Protocol to the ICESCR (OPT-ICESCR) seems to endorse both “reasonableness” and minimum core approaches, an indication that these are not mutually exclusive but can be

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320 See Grootboom case para 33.
321 See ECSCR General Comment 3.
322 See Wilson & Dugard (2011) 664-682.
employed together to comprehensively and mutually support each other with the result that socio-economic rights are effectively implemented and realised.\textsuperscript{323} In particular article 8 (4) of the OPT-ICESCR provides that, “when examining communications… the Committee, shall consider the reasonableness of the steps taken by the state party to the ICESCR. In doing so, the committee shall bear in that the state party may adopt a range of possible policy measures for the implementation of socio-economic rights.”\textsuperscript{324} While it is appreciated that domestic courts do not have the advantage to access the extensive material for state reports received by the CESCR, adopting an integrated approach which is inclusive of both minimum core and reasonableness approach will help the courts define the constitutionally protected rights in precise terms including the basic minimum essentials for a dignified life.\textsuperscript{325} This will further ensure that that the entrenched socio-economic rights have practical benefits for the worse off in society. In addition, an integrated approach will breathe life into the abstract socio-economic provisions and ensure that the state has clear guidelines within which to structure its legislative, policy and programmatic implementation framework.\textsuperscript{326} 

The next section briefly explores the separation of powers doctrine, the remedial framework for violations of socio-economic rights as some of the conceptual and practical challenges that are likely to arise in the judicial enforcement of socio-economic rights.

3.4 Separation of powers

The doctrine of separation of powers requires the functions of government to be classified as legislative, executive or judicial and requires each function to be performed by separate branches of government.\textsuperscript{327} Currie and De Waal stated that the doctrine of separation powers provides that the functions of making law, executing the law and resolving disputes through the application of law should be kept separate and, in principle should be performed by different institutions.\textsuperscript{328} Thus in the process of adjudicating socio-economic rights, the judiciary will have to define how it understands its role in the tripartite scheme of government. This is because by their very nature, socio-economic rights are likely to invite courts to issue positive orders, an exercise that will inevitably encroach into the sphere of the

\textsuperscript{323} See the preamble of the Optional Protocol-ICESCR (2008) adopted as a UN General Assembly resolution A/RES/63/117.
\textsuperscript{324} See article 8 (4) of the Optional Protocol to the ICESCR.
\textsuperscript{326} Ibid.
\textsuperscript{327} Currie and de Waal The Bill of Rights Handbook 5 ed 2005 18-19
\textsuperscript{328} Ibid.
executive and the legislative arms of the government. However, the extent of the courts’ interference will be determined by how they define and interpret the doctrine of separation of powers as it applies to the socio-economic rights.

Similarly placed jurisdictions such as South Africa have approached the issue of separation of powers with extreme caution. For example, the Constitutional Court of that country has restrained itself from dealing with budgetary and resource allocation issues. Rather it has mainly focused on evaluating the reasonableness of government programmes and policies as discussed above. In the TAC, the Constitutional Court of South Africa clearly observed that, the Constitution contemplates rather a restrained and focused role for the courts, namely to require the state to take measures to meet its constitutional obligations and to subject the reasonableness of these measures to evaluation.\textsuperscript{329}

Nevertheless, the separation of powers doctrine is not absolute and our courts must be willing to issue positive orders against the political organs of the government when it is explicit that its resource allocation does not conform to the demands of the Constitution. Our courts however, must be cautious and aware of the risk of political backlash that such orders may ignite.\textsuperscript{330} Nonetheless, in a democratic society based on constitutional supremacy, courts are constitutionally mandated to ensure the proper protection of all rights, including socio-economic rights. Accordingly, courts must not shy away from carrying out their constitutional mandate where the actions of the government do not conform to the obligations imposed by socio-economic rights protected in the Constitution.

Additionally, under constitutional supremacy, all three arms of government, namely the executive, legislature and the judiciary derive their powers from the Constitution.\textsuperscript{331} However, the judiciary acquires a much more prominent and active role in a constitutional supremacy. This is because it has an important role of reviewing actions taken by the political organs of the government to ensure that they stay within the constitutional bounds. In essence, the courts must recognise their primary role as that of deepening constitutional democracy, entrenching rule of law, re-affirming respect for human rights and most importantly, the protection of the long marginalised socio-economic rights. Thus, despite the doctrine of separation of powers, which requires division of public power between the three

\textsuperscript{329} TAC case para 38.
\textsuperscript{330} Ibid.
\textsuperscript{331} See section 2 of the 2013 Constitution.
arms of government, our courts must not be overzealous or passive but ensure that the actions of the political organs adhere to the constitutional boundaries.

At the end of court’s adjudication of socio-economic rights, particularly where the court makes an order in favour of the applicant, the next step is to craft an appropriate remedy. This is significant in the rights discourse because individuals do not litigate human rights for nothing. They litigate to repair harm caused and in respect of socio-economic rights to deter future violations as well. The next section explores the remedial framework provided for in the Constitution.

3.5 Remedial framework: crafting judicial remedies for violations of socio-economic rights

Another challenge that is likely to face Zimbabwean courts under the new Constitution is to craft appropriate remedies for the violations of socio-economic rights. Section 175 (6) (b) of the Constitution gives Zimbabwean courts the power to make any order that is just and equitable, including an order limiting the retrospective effect of the declaration of invalidity for any period to allow the competent authority to correct the defect. It is contended that the test for the effectiveness of the court’s remedies, under this new Constitution is whether the remedy is appropriate. Appropriate relief thus constitutes any suitably remedy that is just and equitable. In addition section 85 of the Constitution stipulates that, a court may grant appropriate relief including a declaration of rights and an award of compensation.

Thus, once the courts have completed adjudicating socio-economic rights claims, a constitutional duty arises that of crafting an appropriate remedy. This is consistent with the very notion of human rights that relief should be accorded to all whose rights are violated. Furthermore, crafting judicial remedies is the most significant part of the judicial process because litigants do not litigate rights just for the sake of it, but rather to seek relief that will vindicate their rights. Awarding remedies for violations of civil and political rights is relatively easy since the nature of these violations simply requires that the victim be put in the position he would have been in were it not for the violation. As has been the trend in Zimbabwe and indeed in other jurisdictions, this requires mainly compensatory orders such

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332 Section 175 (6) (b) 2013 Constitution.
as damages. It must however be noted that, awarding remedies for violations of socio-economic rights is more complex.\textsuperscript{335} This is because socio-economic violations are systemic in nature and often reflect underlying structural failures that result in historical denial of rights for large numbers of individuals and groups.\textsuperscript{336} Therefore, Zimbabwean courts need to craft appropriate remedies in respect of socio-economic rights that will have a wider impact, touching on and transforming the lives of both the litigants and similarly situated people who are not before the courts.

The choice of the remedies by the courts will be influenced by two theories of justice, namely corrective and distributive justice theories.\textsuperscript{337} On one hand, the corrective justice theory focuses on the restoration of the victims to their positions had it not been for the violation whereas distributive justice, on the other hand, is manifested in distribution of resources.\textsuperscript{338} Thus distributive justice theory is more suitable to be applied in socio-economic rights cases. This is because courts relying on distributive justice look beyond the interests of the parties before it to the larger picture, the future and on the plight, needs and interests of the community as a whole.\textsuperscript{339} In such cases, courts are thus capable of crafting remedies while taking into account factors that may impact on the implementation of such remedies.\textsuperscript{340}

The Constitution does not explicitly provide for a blue-print distributive justice theory. Nevertheless, an argument may be advanced that the Constitution ascribe to the distributive justice theory. This is because it protects socio-economic rights and it is founded on significant values of human dignity, social justice, openness and equality. These values inform the distributive justice theory in that they are meant to ensure equal distribution of resources. Section 3 (2) (j) of the Constitution also stipulates that there must be fair and equal distribution of national resources including land. Thus, in respect of socio-economic rights, our courts must craft remedies that respond to people’s needs, poverty, resource deprivation and social marginalisation. In essence, the range of remedies that our courts will craft to remedy violations of socio-economic rights must accustom to a distributive conception of justice. Additionally, the judiciary must utilise this opportunity to forge new tools and shape

\textsuperscript{335} Biegon (2012) 49.
\textsuperscript{336} Ibid.
\textsuperscript{337} Section 3 (2) (j) of the Constitution seems to be endorsing distributive justice theory and section 175 (6) (b) Constitution seems to endorsing corrective justice theory.
\textsuperscript{339} Ibid.
\textsuperscript{340} Ibid.
innovative remedies where necessary to ensure socio-economic rights are well protected and enforced.341

The crucial decision for courts in Zimbabwe is whether to rely on declaratory relief or injunctions to enforce socio-economic rights. Declarations are based on good faith and to ensure compliance with the Constitution, courts assume that government will take prompt measures without the need of judiciary intervention.342 Sections 175 (6) (b) and section 85 of the Constitution discussed above seem to endorse declaratory relief as a form of remedy. What is apparent from these two sections is that the Constitution does not refer to injunctions as a form of a remedy. Declarations proceed on the assumption that governments will take prompt and competent steps to comply with courts’ declarations of constitutional entitlements and that continued supervision and subsequent intervention by the courts will not be necessary to ensure compliance with the Constitution.343 A declaration of constitutional entitlement will often be made in general terms allowing governments’ considerable flexibility and latitude in selecting the precise means to be used.344 Conversely, injunctions (structural) generally contemplate the possibility of continued judicial involvement.345 This is because they are ultimately enforceable through contempt proceedings that can result in the imposition of fines or even jailing of government officials.346 Unlike declarations, injunctions are specifically worded and require government to report back.

The Constitution gives courts very wide remedial powers to grant appropriate relief for any constitutional violation including the violation of socio-economic rights. Many scholars agree that structural interdicts are the most effective remedies for violation of socio-economic rights, especially where the state has a long history of non-compliance with court decisions.347 This is because courts retain supervisory jurisdiction over the implementation of their decisions and thus Zimbabwean courts must consider using structural injunctions.348 Injunctions (particularly structural) require the government to report back to the court at

341 See the South African case of Fose v Minister of Safety and Security 1997 3 SA 786 (CC) para 19.
345 Ibid.
346 Ibid.
347 Ibid. See also Liebenberg (2010) 426.
348 On the structural injunctions, see for example Liebenberg (2010) 426. See also Mbazira (2009)
regular intervals about the steps taken to comply with the Constitution.\textsuperscript{349} The court orders the respondent to report back to it on the implementation of its decision and as such allows courts to overseer progressive protection of socio-economic rights. For that reason, Zimbabwean courts must not only limit themselves to declarations as the form of just, appropriate and equitable remedy but grant any appropriate relief that is capable of securing the protection, fulfilment and enforcement of the rights in question. In certain instances, more innovative remedies may have to be developed to vindicate the Constitution.

It is argued that in many instances the violations of socio-economic rights may be too diffused or nebulous, the conventional litigation and remedies are inadequate for these rights as monetary damages may not be able to repair the constitutional harm.\textsuperscript{350} Furthermore, declaratory orders are likely to be ineffective because the constitutional violations of socio-economic rights are often too widespread to stop government inaction in a single court order.\textsuperscript{351} Hirsch argues that, to have any meaningful effect, the court would have to direct reform at the state institution itself.\textsuperscript{352} He argues that, even if there was a solution to put an end to a systematic violation with a single order, it is often inappropriate or at least less desirable to adopt the quick-fix solution than address reform of institutions systematically.\textsuperscript{353} As such, traditional remedies such as declarations and general injunctions, though extremely useful, do not address the threat of existing and on-going violations of constitutional rights by a delinquent state institution in certain contexts.\textsuperscript{354} It follows that injunctions (structural injunctions) are the most favourable way to bring about far reaching institutional and structural reform over a period of time in a manner ideally determined by the political organs of government.\textsuperscript{355} This will in turn allow our courts to review and assess the means employed by the government whether they are reasonable and as such adequate for protecting socio-economic rights.

It follows from above that, due to deficiencies of declaratory orders our courts must consider structural injunctions as appropriate, just and equitable remedies, particularly in socio-economic rights cases. The reason emanates from the behaviour and attitude of the executive

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{350} Hirsch “A Defense of Structural Injunctive Remedies in South African Law” 2007 \textit{Oregon Review of International Law} 22.
\item \textsuperscript{351} Ibid.
\item \textsuperscript{352} Ibid.
\item \textsuperscript{353} Ibid., 23.
\item \textsuperscript{354} Ibid., 24.
\item \textsuperscript{355} Ibid., 24.
\end{itemize}
\end{footnotesize}
towards court decisions and judges especially human rights decisions in the past decade.\textsuperscript{356} The government organs have on a number of occasions disregarded court orders.\textsuperscript{357} Declarations, although useful, are often ineffective to curb violations of socio-economic rights.\textsuperscript{358} Consequently, structural injunctive relief is preferred to declaratory at least in respect of socio-economic rights. This is because declarations often suffer from vagueness, insufficient remedial specificity and an inability to monitor compliance and a recurring need for subsequent litigation to ensure compliance.\textsuperscript{359}

Thus the use of declarations alone will often inhibit the realisation and protection of fundamental rights and a constitutional goal of creating a just and equitable society which the Constitution is striving for. Consequently, the object of awarding remedy under the Constitution should not only be to grant relief to the litigant before the court but to deter future infringements and protect similarly placed persons who are not necessarily before the courts. For that reason, these constitutional remedies should be forward looking, community-oriented and structural rather than back-ward looking individualistic and corrective or retributive.\textsuperscript{360} In essence these remedies must fulfil the test envisioned by the Constitution that judicial remedies should be just, appropriate and equitable. Roach has however argued that courts must be careful in issuing such mandatory orders and thus should focus on the broad principles that guide the exercise of remedial discretion and not attempt to construct rigid rules or categories for the exercise of such discretion.\textsuperscript{361} Such a careful consideration by the courts will allow courts to respect the separation of powers by not usurping the powers of the political branches of government. Nevertheless, as was stated above that, courts in the new constitutional democracy, acquire a more active role. Therefore, where there is need to bring about compliance with the demands and needs of the Constitution, Zimbabwean courts must issue appropriate relief that is suitable to secure the


\textsuperscript{358} See the criticism against the Grootboom judgment and the TAC case where the Constitutional Court of South Africa relied on declarations and it believed that the government will execute its orders in good faith. However, in the TAC case, some litigants had to go back to go to enforce the judgment through contempt proceedings. This shows the inefficacy of the declarations in violations of socio-economic rights. See also Liebenberg (2010) 426.

\textsuperscript{359} Ibid.

\textsuperscript{360} Ibid.

\textsuperscript{361} Ibid.
protection of rights. The next section discusses legal standing mechanisms as provided for under the 2013 Constitution.

3.6 Legal standing (locus standi) and rights enforcement mechanisms

Closely linked to the litigation of rights is the question of locus standi. Locus standi entails the concern whether someone who approaches a court is the appropriate person to present the matter to the court for adjudication. The Constitution contains a very expansive, progressive and generous Bill of Rights which expands access to courts. Section 85 of the Constitution confers standing on a broad category of persons who allege that a right in the Bill of Rights has been infringed or threatened to approach a competent court for appropriate relief. These include, any person acting in their own interests; any person acting on behalf of another person who cannot act for themselves; any person acting as a member or in the interest of other persons; any person acting in the public interest and any association acting in the interests of its members. This broad approach, especially public interest litigation and class action is an efficient tool in ensuring proper enforcement of socio-economic rights by vulnerable groups who are unable to pursue judicial remedies on their own accord. For this reason, it can be contended that the rules of standing have been relaxed to allow third parties to institute suits claiming the violation of rights including socio-economic rights.

Under the now redundant LHC, standing was somewhat limited. Nevertheless the ZSC in Catholic Commission for Justice and Peace in Zimbabwe v Attorney General and others granted locus standi to human rights organisations and the Law Society of Zimbabwe. The ZSC held that it would be wrong for the ZSC to fetter itself by pedantically restricting the class of persons who may approach the Court for relief.

In a Constitution with an array of justiciable socio-economic rights, standing is a significant mechanism of enforcing these rights as well as an important mechanism for accessing courts. This is because the majority of litigants who in most cases are poor members of the community do not have access to individualised legal services. Therefore, to enforce their rights, these vulnerable people need human rights organisations and similar forums to litigate

362 Ibid., 73.
363 See section 85 (1) (a)-(e) of the 2013 Constitution.
364 See an example of class action and standing in South Africa in the case of Ngxuza v Permanent Secretary, Department of Welfare, Eastern Cape 2001 2 SA 609 (E).
365 See section 24 of the LHC.
367 Ibid., 242.
on their behalf. It is worth noting that to have standing, an applicant must not only allege that a fundamental right in the Bill of Rights is violated or threatened but also that he or she has sufficient interest in the remedy sought.\textsuperscript{368} Accordingly, human rights organisations and other civil society entities in Zimbabwe must ensure that they utilise this generous and flexible enforcement mechanism and litigate on behalf of the people as it is their interest and purpose to ensure that all rights are respected, promoted, fulfilled and protected by the state.

As held in the South African case of \textit{Ngxuza v Permanent Secretary, Department of Welfare, Eastern Cape}, the broad and generous approach to legal standing is critical to facilitate the ability of marginalised and poor communities to vindicate their socio-economic rights in circumstances where they have been unable to do so through other democratic means and processes.\textsuperscript{369} However, at the same time, it is also important that the rules pertaining to legal standing prevent abuse of the generous standing provisions by legal practitioners and civil society organisations that are not genuinely acting in the interests of the relevant communities or act in ways that marginalise the participation of affected communities in such litigation.\textsuperscript{370} Thus Zimbabwean courts must be able to make flexible and progressive determinations as to the rules of standing to various groups and civil society to allow fair representation of all the members of the society particularly the poor and the marginalised to enforce their socio-economic rights.

\textbf{3 6 1 Class action}

Section 85 (c) of the Constitution espouses class action which is a useful device for challenging violations which have a similar impact on a large dispersed group of people lacking the means to institute a number of individual actions. Liebenberg has explained that:

\begin{quote}
\noindent essentially a class action permits a single or small group of ‘representative plaintiffs’ to institute legal proceedings on behalf of a large group who share with the representative plaintiff the same cause of legal action and interest in the remedy sought. Apart from benefiting the beneficiaries of rights through co-ordinated and unified litigation, class actions also relieve the pressure on courts by avoiding piecemeal litigation or numerous joinder applications in a case concerning the same set of facts and legal questions.\textsuperscript{371}
\end{quote}

\begin{thebibliography}{9}
\bibitem{Currie} Currie & de Waal (2013) 178.
\bibitem{Ibid. 1} \textit{Ibid.} see also Liebenberg (2010) 88.
\bibitem{Ibid. 2} Liebenberg (2010) 88.
\bibitem{Ibid. 3} See Liebenberg “Forging New Tools for Vindicating the Rights of the Poor in the Crucible of the Eastern Cape” \textit{Public Lecture delivered at Rhodes University, Faculty of Law Faculty on 28 July 2014.}
\end{thebibliography}
As observed in *Ngxuza v Permanent Secretary, Department of Welfare, Eastern Cape (Ngxuza case)*, the following problems may arise in public interest litigation:

that only those who wish to be involved in the case are involved, that those who wish to be involved are given the chance to make the representations they may wish to make and that the party presenting the case adequately represents future interests. The problems are, however, not factors that militate against a broad view of standing. At most they require safeguards to ensure the broadest and most effective representation in and presentation of public interest litigation.372

Nevertheless, public interest actions and class actions are important tools through which systemic violations of socio-economic rights affecting a large section of the public can be challenged.373 This is because public interest actions are particularly useful when the affected communities are disadvantaged and do not have access to legal services. Additionally, public interest actions are also well suited, not only to the redress of past wrongs, but also to deter and prevent future rights violations.374 The next section discusses the complementary role of the Zimbabwe Human Rights Commission (ZHRC/Commission) in the domestic framework of protecting socio-economic rights.

3 7 The complementary role of the Zimbabwe Human Rights Commission (ZHRC)

National Human Rights Institutions (NHRI) play a significant role in the promotion and protection of rights at the municipal level.375 One such key institution in Zimbabwe is the Zimbabwe Human Rights Commission created under section 234 of the 2013 Constitution.376 The ZHRC is an important player in the domestic framework for promotion and protection of socio-economic rights further ensuring indivisibility and interdependence of all rights.377

Under the Constitution, the ZHRC is mandated to ensure the promotion of educational and information programmes designed to enhance awareness and understanding of rights, including socio-economic rights.378 Additionally, the ZHRC is obligated to scrutinise the existing laws and policies to ensure that they are consistent with the Constitution, particularly the Bill of Rights.379 Furthermore, the ZHRC is mandated to enjoin relevant organs of state,
and non-state actors to provide it with information on the measures that they have taken towards the realisation of the rights in the Bill of Rights.\textsuperscript{380} Due to the long marginalisation of socio-economic rights in Zimbabwe, it is argued that this mandate must prioritise reports concerning the realisation and protection of socio-economic rights such as education, social security, food, water, housing, and health.\textsuperscript{381} This would enable the ZHRC to ensure that, it takes the government to task measures it has taken to realise these rights. In essence it will create a domestic reporting mechanism where the state periodically reports to ZHRC on the steps taken to promote and protect socio-economic rights.\textsuperscript{382}

Furthermore, the ZHRC has an investigative mandate to investigate human rights abuses and violations which task must be executed without fear or favour.\textsuperscript{383} The investigative mandate ensures that the ZHRC acts on behalf of the society and assist the citizens to hold the government to its human rights obligations through investigating state practices and by recommending remedial measures.\textsuperscript{384} Accordingly, this mandate will allow the ZHRC to position itself in the society to be a key player in ensuring that socio-economic rights in the Constitution are protected and implemented by the state.

3 8 Summary
The inclusion of socio-economic rights under the Constitution fulfils the legislative obligation imposed by the ICESCR and the Banjul Charter on Zimbabwe as a state party. Zimbabwe sought to set up a framework that would ensure socio-economic rights in the Constitution are promoted and protected, and where necessary, proper redress is provided. This framework include a pro-active judiciary that is independent and active appropriate national institutions such as Human Rights Commission.\textsuperscript{385} This chapter demonstrated that judicial enforcement of socio-economic rights is paramount to the realisation and protection of these rights. It was shown that a proactive judiciary which is independent and impartial is a key institutional player in the proactive framework for protecting socio-economic rights. This is despite the fact that there are conceptual and practical challenges that arise in the

\textsuperscript{380} See section 244 (1) (a) of the 2013 Constitution.
\textsuperscript{381} See a similar provision of section 184 (3) 1996 South African Constitution.
\textsuperscript{382} See section 244 of the 2013 Constitution.
\textsuperscript{383} See sections 243 (1) (f) and 233 of the 2013 Constitution.
\textsuperscript{384} Olowu (2009) 109.
\textsuperscript{385} See Article 26 of the African Charter on Human and Peoples’ Rights which stipulates that state parties to the present Charter shall have the duty to guarantee the independence of the courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the Charter.
enforcement of these rights, such as institutional competency of the courts, crafting appropriate judicial remedies for the violations of socio-economic rights, among others. Thus for effective enforcement of these rights under the Constitution, it was shown that courts must avoid pedantic and rigid interpretation of rights. Rather it was illustrated that a generous and purposive approach taking into account founding values, international human rights law norms and foreign law is beneficial towards the realisation of socio-economic rights. Additionally, this chapter demonstrated that courts must not solely depend on either reasonableness or minimum core approach but instead, courts must consider adopting an integrated approach that comprises both reasonableness approach and minimum core approach. Such an integrated approach will ensure that no one is deprived of the basic necessities of life at the same time allowing the government certain latitude to revise its laws and policies in line with the reasonable approach.

Additionally, it was shown in this chapter that, despite the separation of powers doctrine which is not absolute, the judiciary has an important role in policing political branches of government to ensure that they meet the obligations imposed by socio-economic rights. It was also illustrated in this chapter that crafting judicial remedies for violations of socio-economic rights is one of the practical challenges in the enforcement of these rights. This is because traditional remedies such as declaratory relief alone are not sufficient. Thus, this chapter demonstrated that structural injunctive relief with supervisory orders is more suited to curb the violations of socio-economic rights. Lastly, it was illustrated that other than courts, the ZHRC is also a key player in the protection and enforcement of socio-economic rights. The state must not interfere with the work of the ZHRC and must ensure that it consistently submit reports on measures it has taken to ensure that rights are realised and protected. This is because socio-economic rights will only thrive in an environment where there is respect for human rights, the rule of law, constitutional supremacy and good governance.
CHAPTER 4

Conclusions and recommendations drawn from the study

4.1 Conclusions

The Lancaster House Constitution (LHC) made a commitment towards the protection and enforcement of civil and political rights.\(^{386}\) Additionally, the LHC was more committed towards ushering in black majority rule.\(^{387}\) Nevertheless, it lacked an explicit and precise constitutional framework for the protection and enforcement of socio-economic rights. It must be stated however that, the non-entrenchment of socio-economic rights was not unusual because at the time of the adoption of the LHC, the constitutionalisation of socio-economic rights as justiciable rights was a rarity at the global level. As demonstrated in this study, the marginalisation of socio-economic rights was despite the fact that Zimbabwe is a party to an array of international and regional human rights instruments guaranteeing socio-economic rights. The main international and regional human rights instruments to which Zimbabwe is a party which protect socio-economic rights include the International Covenant on Economic Social and Cultural Rights, the Convention on the Rights of a Child, the African Charter on Human and Peoples’ Rights, among others. This study has showed that this historical anomaly of neglecting socio-economic rights led to heinous and systematic violations of socio-economic rights without any relief from the courts.\(^{388}\) Events such as Operation Murambatsvina, which attracted international attention from human rights organisations and the United Nations, attest to these violations and had a huge impact on the rights such as housing, health, education, water and food. Due to this anomaly, many challenges face ordinary Zimbabweans today as they lack access to basic means of human sustenance such as adequate housing, food, water, education and healthcare.

Similar to modern democratic constitutions, the 2013 Constitution creates a strong commitment to the protection of all rights by entrenching both civil and political rights and socio-economic rights in an indivisible and interrelated way. This represents a strong

\(^{386}\) See Chapter 3 of the Lancaster House Constitution, 1979.


\(^{388}\) The few cases discussed in Chapter 1 and 2 illustrate a deferring attitude that courts had in respect of socio-economic rights during the LHC era.
commitment to the interdependence and indivisibility\textsuperscript{389} of all rights in the domestic legal order. Furthermore, the full complement of socio-economic rights in the 2013 Constitution imposes the primary responsibility on the government of Zimbabwe to ensure everyone is able to access the basic necessities of life.\textsuperscript{390} However, one of the research questions in this study was whether, the constitutional protection is in itself enough to ensure proper protection of socio-economic rights. This study illustrated that constitutional protection of socio-economic rights must be strengthened by strong judicial and quasi-judicial enforcement mechanisms discussed in chapter three above. In this regard, it was argued that courts are key institutional players in the domestic framework for protecting socio-economic rights.

Chapter 2 sought to discuss the constitutionally protected socio-economic rights and the normative content thereof.\textsuperscript{391} In line with the General Comments developed by the Committee on Economic Social and Cultural Rights, socio-economic rights in the 2013 Constitution are enforceable rights with normative content.\textsuperscript{392} As such, socio-economic rights in the Constitution deserve the same level of protection as civil and political rights. It was shown that due to their polycentric nature, socio-economic rights are internally qualified and may only be realised progressively taking into account available resources.\textsuperscript{393} In other words, the state must use all the maximum available resources at its disposal to ensure that socio-economic provisions in the Constitution are protected. As discussed in chapter 2, the concept of progressive realisation constitutes an acknowledgement that, the full realisation of socio-economic rights will generally not be able to be achieved within a short period of time.\textsuperscript{394} Instead, Zimbabwe must move as expeditiously as possible towards the full realisation of these rights.

In chapter 2, it was argued that, where the state is failing to meet its constitutional obligations, it must prove that every effort has been made to ensure access to socio-economic rights. Otherwise, any arbitrary impairment of access to socio-economic rights by the state must be strongly justified in line with constitutional requirements before the courts’ of law. In addition, this study demonstrated the fact that socio-economic provisions in the Constitution

\textsuperscript{389} See Article 5 of the Vienna Declaration on the Programme of Action1993.
\textsuperscript{390} See chapter 2 on the discussion of the specific rights.
\textsuperscript{391} See chapter 2 of this study.
\textsuperscript{392} See chapter 2 section 2 2 above.
\textsuperscript{393} See chapter 2 of this study.
\textsuperscript{394} See Government of Republic of South Africa and Others v Grootboom and others 2000 11 BCLR 1169 (CC) case discussed in chapter 3 of this study.
are subject to progressive realisation as opposed to immediate realisation is not a sufficient argument to deny socio-economic rights to the citizens.

Chapter 2 also demonstrated that the socio-economic rights guaranteed in the Constitution impose four levels of obligations, namely; the obligation to respect, protect, promote and fulfil. These obligations ensure that on one hand the state removes all barriers that hinder the protection and promotion of socio-economic rights while on the other hand, the state puts in place reasonable measures to ensure the effective protection of rights. The use of typologies as an analytical tool has contributed immensely to the further clarification of the obligations that rights including socio-economic rights impose on the state. 395 This study showed that using the typologies of state obligations as an analytical tool has helped to dispel the notion that there are significant differences in the nature of various human rights. 396

Chapter 3 sought to discuss the role of the judiciary and the entire institutional framework for protecting socio-economic rights under the 2013 Constitution. The Constitution protects these rights as justiciable rights and makes the Bill of Rights the yardstick against which all laws must be measured. 397 Hence the Constitutional Court of Zimbabwe (ZCC), as the guardian and custodian of the Constitution and human rights must ensure that all rights in the Bill of Rights are effectively protected and fully realised. As a new court, the ZCC must further position itself as the champion of the Constitution and ensure that the entire judiciary is an avenue through which socio-economic rights are protected and promoted.

Chapter 3 further demonstrated that the judiciary is a key institutional player in the domestic framework for protecting socio-economic rights in the Constitution. This is despite the practical and conceptual challenges that are likely to arise in the judicial enforcement of socio-economic rights. 398 This study further illustrated that the constitutional protection of rights is not itself enough to ensure effective and proper protection of rights. In that regard it was argued that the judiciary has an important role to play in the domestic protection of these rights through substantive interpretation. In line with similarly placed jurisdictions such as South Africa, it was argued that the judiciary must adopt a purposive and contextual approach to the interpretation of rights as compared to a literal, narrow and pedantic approach. 399 Although the Constitution does not explicitly refer to a specific manner in which these rights

395 See chapter 2 section 2 1 above.
396 Ibid., section 2 1.
397 Section 46 of the 2013 Constitution. See also the supremacy clause in section 2 of the Constitution.
398 See chapter 3 above.
399 See chapter 3 sections 3 1-3 2 4 above.
should be interpreted, it was argued in this study that the all constitutionally protected socio-economic rights must be substantively interpreted. This means that in the process of rights interpretation courts must take into account founding values in the Constitution, national objectives, comparative foreign and international law, including all treaties and conventions imposing international human rights legal obligations on Zimbabwe. Additionally, a generous interpretation will ensure an approach that favours and promotes socio-economic rights and such an interpretation protects the restriction of these rights. A narrow or rigid interpretation of rights including socio-economic rights without regard to the above principles will deviate from the object and purpose of the Bill of Rights in the Constitution. A formalistic and rigid approach interpretation will derogate from integrity and vision of the entire Constitution which seeks to heal the colonial and post-colonial socio-economic marginalisation and deprivation in Zimbabwe.

Section 46 (1) (a) of the Constitution stipulates that courts and similar tribunals must give full force as well as effect to all fundamentals rights and freedoms enshrined in the Constitution. Of importance in interpreting socio-economic rights are sections 45 and 46 of the Constitution. This is because sections 45 and 46 give power to the courts to translate socio-economic rights into concrete legal claims. These two provisions determine how and under what circumstances fundamental rights, including socio-economic rights interact with existing law and conduct. Brand, commenting on the similar provisions under the South African Constitution stated that, these provisions indicate which kinds of legal claims can be launched through the courts on the basis of constitutional socio-economic rights, against whom and how such claims may be handled by courts. Section 46 (1) of the Constitution determines that a court when interpreting legislation or developing common law, must promote the spirit, and be guided by the objectives of the Bill of Rights, thus a general interpretive injunction on courts to infuse existing law with constitutional values.

400 See section 46 of the 2013 Constitution.
401 See chapter 3 of this study.
402 See the Nevanji Madanhire & Nqaba Matshazi judgment where the Zimbabwe Constitutional Court (ZCC) declared some defamation laws to be inconsistent with the right to freedom of expression. However, what is worrying about this judgement is that the court seems to construe other rights as more important that others in this case freedom of expression was construed as less important that the value of human dignity. In respect socio-economic rights the courts must ensure that for better implementation of socio-economic rights, it construes and interpret these rights as wide as possible. Nevanji Madanhire & Nqaba Matshazi v Attorney-General CCZ 2/14.
403 See Zimbabwe Social Charter (2008). See also the preamble to the 2013 Constitution and the founding values in section 3 of the Constitution.
Chapter 3 demonstrated that the Constitution provides broad powers to the judiciary such as the constitutional review powers, remedial powers, among others, in rights adjudication. Consequently, it was shown in this study that courts must use these powers to nudge the political branches of government to ensure the protection and enforcement of socio-economic rights. These judicial powers in the Constitution are informed by wide remedial powers that include the issuing of both declarations and mandamus and in certain instances issuing of supervisory orders to the extent that they do not violate the separation of powers doctrine. This is because accessible and effective national remedies are the primary means of protecting socio-economic rights. This is in line with the requirement that domestic remedies must be exhausted before one embarks on the international procedures in search of relief. Although courts are not the only avenue through which these rights are protected, they play an important role in developing the normative content of socio-economic rights through the adjudication process. It was however pointed out in chapter 3 however that independence of the judiciary is key towards the domestic protection of all rights including socio-economic rights in the Constitution.

4.2 Recommendations
One of the major developments in the 2013 Constitution is access to courts. This is because in many instances the poor and indigent often suffer from socio-economic deprivation and access to courts as compared to other citizens. Unlike the LHC which had narrow rights enforcement mechanisms, it was argued that the 2013 Constitution introduces generous enforcement mechanisms. The Constitution allows third parties who have due interests in socio-economic rights matters standing to litigate on behalf of others. The Constitution further allows public interest litigation and class actions among other means. This way the indigent, the poor and other vulnerable groups will be able to have access to courts and enforce their rights.

As part of the its unique contribution to scholarship, this study demonstrated that the judicial enforcement of socio-economic rights raises a number of conceptual and practical challenges

406 See chapter 3 section 3.6 above.
409 See chapter 3 section 3.7 above.
410 See section 85 of the 2013 Constitution.
such as crafting appropriate judicial remedies, institutional competency of the courts, and most of all choosing an appropriate model of review for socio-economic rights. The significant contribution of this dissertation however, is the development of an integrated model of review as discussed in chapter 3. This is because the two models of review, the reasonableness approach as applied by South African courts and the minimum core approach as formulated by the Committee on Economic Social and Cultural Rights have both pros and cons respectively. In chapter 3, a strong and persuasive case was made for courts in Zimbabwe to consider adopting an integrated method of review that is inclusive of both minimum core and reasonableness approaches. Accordingly, an integrated model of review will help the courts to define the content of socio-economic rights in the Constitution further developing jurisprudence that will act as guide for further litigation, adjudication of these rights, policy and legislation drafting. The rationale for such an integrated approach is the acknowledgement that, if the needs and interests of the most indigent and marginalised in society is not catered for, the entire corpus of the rights in the Bill of Rights becomes redundant. While adopting an integrated approach, it was discussed in chapter 3 that courts in Zimbabwe must set the following standard for any governmental programme to be reasonable; the programme must be comprehensive, coherent, coordinated. The programmes and policies must be balanced and flexible, make appropriate prevention for short, medium and long term needs of the people, it must be reasonably conceived and implemented and be transparent, and its contents made known effectively to the public. As such, any governmental measures that do not cater for the significant segment of the society and urgent needs of the vulnerable groups will be detrimental towards socio-economic provisions and must not pass the constitutional muster.

This dissertation also advanced the argument that the interpretation of all rights in the Bill of Rights including socio-economic rights must be informed by the founding values, national objectives, comparative foreign law and international human rights law principles and norms to the extent permitted by the Constitution. It is recommended therefore that courts are under a constitutional duty to avoid any legal centric, pedantic and narrow interpretation of socio-economic rights but must adopt a multi-disciplinary approach that takes into account historical background, social, economic, political factors and founding values that are deeply

411 See chapter 3 section 3 7 above.
412 See Grootboom case paras 39-44.
413 See the Grootboom case paras 39-44. See also Minister of Health and Others v Treatment Action Campaign and Others case para 123.
entrenched in the Constitution. Furthermore, the founding values, national objectives and socio-economic rights must guide the state and its functionaries in formulating and implementing laws and policy decisions that will lead to the establishment of a democratic society in which all those within a state’s jurisdiction have access to the basic necessities of life.

Nothing could be more demeaning to the dignity and effectiveness of the courts than to have a government that does not respect court orders.\textsuperscript{414} It is therefore recommended that all government actors and private entities respect the orders and decisions of the courts.\textsuperscript{415} This will ensure the public regain confidence in the judicial system in Zimbabwe. This further ensures that courts function fully without any fear or favour and issue out appropriate, just and equitable remedies. This way courts will be able to entertain socio-economic rights claims by citizens, who are in turn empowered to demand just and responsive conduct from all branches of government through the judiciary. For this reason, the broad range of socio-economic rights in the Constitution will ensure transparency, accountability and responsiveness in government by requiring the political organs to justify their decisions that impact upon the socio-economic lives of the people and whether they are reasonable and meet the demands of the Constitution. Additionally, as one of the once respected judiciaries in Africa in the 1980s, the judiciary must use socio-economic rights claims and other rights in the Bill of Rights as an opportunity to redeem its image as a champion of human rights in the region and beyond through rights based jurisprudence.

Chapter 3 also sought to illustrate that the Zimbabwe Human Rights Commission (ZHRC) is another key institutional player in the domestic framework for protecting socio-economic rights.\textsuperscript{416} The ZHRC is mandated with quasi-judicial powers and must be able to position itself as a vital player in protecting rights. As part of its authority, the ZHRC must ensure that it sensitises the society of its socio-economic rights and also ensure that the state submits reports to various treaty bodies on the measures it has taken to realise these rights.

It is also recommended that Zimbabwe must further invite judges and other stakeholders from similarly placed jurisdictions such as South Africa and Kenya who have been closely involved in the adjudication of socio-economic rights to share their knowledge, successes,

\footnotesize{\textsuperscript{414} See Roach “Crafting Remedies for violations of Economic, Social and Cultural Rights” in Squires et al (eds) \textit{The Road to a Remedy: Current Issues in the Litigation Economic, Social and Cultural Rights} (2005)112-121.\textsuperscript{415} See section 45 of the 2013 Constitution.\textsuperscript{416} See chapter 3 section 3 8 above.}
conceptual and practical challenges and share the insights on the means they have employed to ensure effective protection and enforcement of these rights in their respective jurisdictions.

This dissertation leaves scope for further in-depth research on the protection and enforcement of socio-economic rights in Zimbabwe. This study confined itself to the constitutional protection and judicial enforcement of socio-economic rights. This dissertation did not focus on other stakeholders that are likely to be involved in the domestic protection of socio-economic rights such as other governmental organs other than the judiciary and quasi-judicial bodies, non-state actors, civil society organisations and non-governmental organisations. Therefore, there is a scope of research in this regard. This study would have succeeded if it contributed towards ensuring that the judiciary is an avenue through which socio-economic rights are effectively protected and enforced.
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