

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

by

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*A mini-dissertation submitted in partial fulfilment of the requirements for the degree of Master
of Philosophy (in Human Rights), Nelson R. Mandela School of Law, University of Fort Hare*



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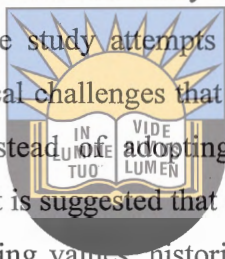
Supervisor: Prof. Nasila Selasini Rembe

Co-Supervisor: Dr Khulekani Moyo

December 2014

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due to a number of factors chief among them being the exclusion of socio-economic rights as justiciable under the now repealed Lancaster House Constitution (LHC).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.



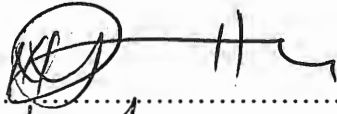
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Keywords: constitutional protection, socio-economic rights, 2013 Constitution, domestic framework, role of the courts and judicial remedies.

DECLARATION

I, **Ntandokayise Ndhlovu** (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.

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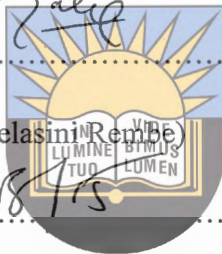
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DEDICATION

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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LIST OF ABBREVIATIONS

LHC	Lancaster House Constitution
UDHR	Universal Declaration of Human Rights
ICESCR	International Covenant on Economic, Social, and Cultural Rights
ICCPR	International Covenant on Civil and Political Rights
VCLT	Vienna Convention on the Law of Treaties
CRC	Convention on the Rights of the Child
ZSC	Zimbabwe Supreme Court
ZCC	Constitutional Court of Zimbabwe
ZLHR	Zimbabwe Lawyers of Human Rights
ZRP	Zimbabwe Republic Police
ZHRC	Zimbabwe Human Rights Commission
CESCR	Committee on Economic, Social and Cultural Rights
OPT-ICESCR	Optional Protocol to the International Covenant Economic Social Cultural Rights
CJ	Chief Justice
NHRI	National Human Rights Institutions



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Zimbabwe

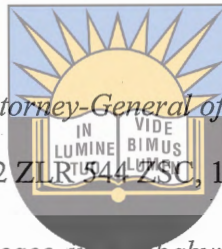
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CHAPTER 1

Introduction to the study: research outline and context

1 An overview

1.1 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 inconsistency. Furthermore, the preamble states that "all commit to the Constitution as the fundamental law of the land."

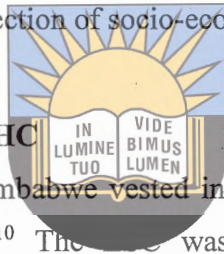
² Libenberg "The Protection of Economic and Social Rights in Domestic Legal Systems" in Eide *et al Economic Social Cultural Rights* (2001) 55-84.

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.

⁴ See Lenington *Constitutional Law of Zimbabwe* (2001).

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 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 (*pacta sunt servanda*).⁹ The next section briefly discusses the few cases that were adjudicated before the constitutional protection of socio-economic rights.



1 1 1 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 point of appeal of 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

⁵ International Covenant on Economic Social and Cultural (1966) UN Doc A/6316 (hereafter "ICESCR"). Zimbabwe ratified the ICESCR on 13 May 1991.

⁶ African Charter on Human and Peoples' Rights (1981) OAU Doc. CAB/LEG/67/3 hereinafter (Banjul Charter).

⁷ Convention on the Rights of the Child (1989) UN Doc A/44/49. Zimbabwe became a state party on the 11th September 1989.

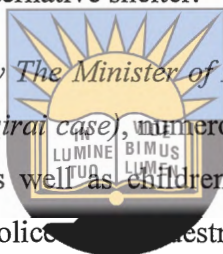
⁸ Convention on the Elimination of All Forms of Discrimination against Women (1979) UN Doc A/34/46 (hereinafter "CEDAW").

⁹ Vienna Convention on the Law of Treaties (1969) UN Doc A/Conf.39/27 (hereinafter the "VCLT"). Article 26 of the VCLT requires states to perform their treaty obligations in good faith (*pacta sunt servanda*).

¹⁰ See section 79 (1) LHC 1980.

¹¹ *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 *World Development* 1785 -1805. See also Mapfumo *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.¹² 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.¹³ 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.¹⁴ 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.¹⁵ 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.¹⁶ In the *Batsirai* case, members of the Zimbabwe Republic Police destroyed an orphanage in Hatcliffe Extension and unlawfully evicted the inhabitants.¹⁷ 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.¹⁸ 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.¹⁹ Legal remedies proved fruitless on the violations of socio-economic rights despite many being left homeless, jobless and some even dropping out of school.²⁰

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

¹² See Zimbabwe Lawyers for Human Rights "Public Interest Litigation- Litigation Relating to *Murambatsvina*" (2005). Available at http://www.zlhr.org.zw/index.php?option=com_alphacontent&view=alphacontent&Itemid=76 (accessed 20/12/2013).

¹³ See Zimbabwe Lawyers for Human Rights "Public Interest Litigation- Litigation Relating to *Murambatsvina*" (2005).

¹⁴ *Dare Remusha Cooperative v The Minister of Local Government, Public Works and Urban Development and others* HC 2467/05.

¹⁵ *Ibid.*

¹⁶ *Batsirai Children's Care v The Minister of Local Government, Public Works and Urban Development and others* HC 2566/05.

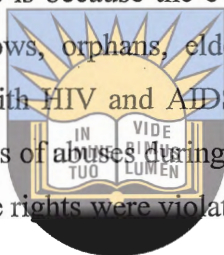
¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ *Ibid.*

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.

²³ See The Zimbabwe Human Rights NGO Forum: *Human Rights Monthly* No 37 (2006).

²⁴ The Zimbabwe Human Rights NGO Forum: *Human Rights Monthly* No 37 (2006).

²⁵ Human Rights Watch "Clear the Filth": Mass Evictions and Demolitions in Zimbabwe", A Human Rights Watch Background Briefing, (2005). Available at <http://www.hrw.org/sites/default/files/reports/zimbabwe0905.pdf>, (accessed 18/12/2013).

²⁶ Zimbabwe: Human Rights in Crisis Shadow Report to the African Commission on Human and Peoples' Rights (2007). Available at <http://www.ibanet.org/Document/Default.aspx?DocumentUId=f8929fc0-ed6c-40c7-a99a-bb7ed16237d3> (accessed 18/12/2013).

²⁷ Tibaijuka, "Report of the Fact-Finding Mission to Zimbabwe to assess the Scope and Impact of Operation *Murambatsvina* by the UN Special Envoy on Human Settlements Issues in Zimbabwe Report of the Fact-Finding Mission to Zimbabwe to assess the Scope and Impact of Operation *Murambatsvina* by the UN Special Envoy on Human Settlements Issues in Zimbabwe (2005). Available at <http://www2.un.habitant.org/documents/zimbabwe.pdf> (accessed 20/10/2013).

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.

1 1 2 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.²⁸ 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.²⁹ 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,³⁰ which is arguably the most authoritative and formal document which helped build the momentum towards the constitutionalisation of socio-economic rights.



1 1 3 Zimbabwe Social Charter of 2008

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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).³¹ 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.”³² 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

²⁸ Constitutional Commission *Draft Constitution of Zimbabwe* (1999), sections 17-32. Available at <http://web.archive.org/web/20000824120354/http://www.gta.gov.zw/constitutional/Draft+Constitution/Contents.Draft.Const.htm> (accessed 28/05/2013).

²⁹ Zimbabwe Lawyers for Human Rights *et al* Economic Social Cultural Rights in Zimbabwe (2009) 2 (hereinafter “ESCR in Zimbabwe”).

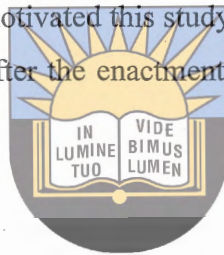
³⁰ Kubatana Zimbabwe Social Charter, adopted at the Peoples Convention in Harare on the 9th of Feb 2008. Available at <http://www.kubatana.net/html/archive/cact/080209pc.asp> (accessed 29/02/2014).

³¹ Zimbabwe Social Charter (2008).

³² See sections 2-4 of the Zimbabwe Social Charter (2008).

principles.³³ 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.³⁴

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 2013³⁵ and joins a few other Constitutions (Kenyan³⁶ and South African³⁷) 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 primarily 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).

³⁴ *Ibid.*, section 3 Zimbabwe Social Charter (2008).

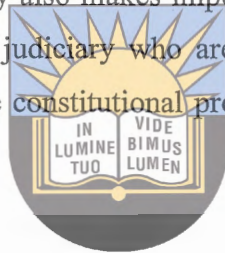
³⁵ 2013 Constitution, Chapter 4 contains the Declaration Rights (Bill of rights) including socio-economic rights as justiciable rights.

³⁶ The Constitution of Kenya (2010) available at www.kenyanlaw.org. Chapter 4 contains a set of socio-economic rights as justiciable rights.

³⁷ The Constitution of the Republic of South Africa (1996), chapter 2 contains a Bill of Rights which entrenches 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.

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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.



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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.



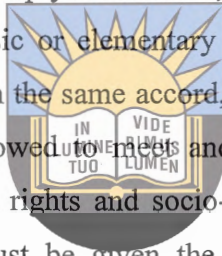
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CHAPTER 2

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.³⁸ 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.³⁹ Civil and political rights and socio-economic rights are interrelated, indivisible and interdependent⁴⁰ 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.⁴¹



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Zimbabwe's independence Constitution, the Lancaster House Constitution (LHC) did not provide for socio-economic rights.⁴² 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.⁴³ The new Constitution (2013 Constitution) corrects this anomaly of neglecting socio-economic rights by firmly protecting these rights in the same

³⁸ Centre for Economic and Social Rights, "CESR's Basic Primer on ESC Rights Definition of What are Socio-Economic Social and Cultural Rights?" Available at <http://www.cesr.org/article.php?id=275> accessed (09/01/2014).

³⁹ Centre for Economic and Social Rights, "CESR's Basic Primer on ESC Rights Definition of What are Socio-Economic Social and Cultural Rights?" Available at <http://www.cesr.org/article.php?id=275> accessed (09/01/2014).

⁴⁰ Article 5 of Vienna Declaration and Programme of Action (1993) adopted by the World Conference on Human Rights in Vienna. See also Whelan *Indivisible Human Rights: A History* (2010) Chapter 5.

⁴¹ See Constitution of the Republic of Zimbabwe Amendment No 20 2013 (hereinafter 2013 Constitution) chapter 3 of the 2013 Constitution of Zimbabwe.

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



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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).

⁵¹ Water Act 31/1998 Chapter 20:24 (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.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.⁵⁵ Recent developments in human rights law have established that all human rights impose at least four levels of duties on the state.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.⁵⁷ In the case of *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.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.⁵⁹



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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

⁵⁴ Committee on Economic, Social and Cultural Rights, General Comment 14, *The Right to the Highest Attainable Standard of Health* U.N. Doc. E/C.12/2000/4 (2000), General Comment 9 para 2-5.

⁵⁵ See Liebenberg *Socio-Economic Rights under a Transformative Constitution* (2010) 83.

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.

⁵⁷ See *Social and Economic Rights Action Centre (SERAC) and another v Nigeria* (2001) AHRLR 60 (ACHPR 2001) para 46 (hereinafter *SERAC* case).

⁵⁸ See *SERAC* case para 44-48.

⁵⁹ See Leckie "Another Step Towards Indivisibility: Identifying the Key Features of Violations of Economic Social and Cultural Rights" 1998 *Human Rights Quarterly* 91. See also CESCR General Comment 12, General Comment 15, and General Comment 11. See also the *SERAC* case.

rights.⁶⁰ 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.⁶¹ 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.⁶²



2 1 1 Obligation to respect

The obligation to respect entails the duty not to interfere with the enjoyment of socio-economic rights.⁶³ 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.⁶⁴

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.⁶⁵ In essence, the state is enjoined to respect right holders, their freedoms, autonomy, resources and liberty of action.⁶⁶ 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-

⁶⁰ See section 44 of the 2013 Constitution. See also Shue *Basic Rights: Subsistence, Affluence, and U.S Foreign policy* (1980).

⁶¹ See also Ssenyonjo *Economic Social and Cultural Rights in International Law* (2009) 23-25.

⁶² See article 56 of the Constitution. See also article 2 (2) of International Covenant on Economic, Social and Cultural Rights (1966).

⁶³ Ssenyonjo (2009) 23-25.

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

⁶⁷ Ssenyonjo (2009) 24.

⁶⁸ *Ibid.*

⁶⁹ Langford "Judging Resource Availability" in Squires, Langford & Thiele (eds) *The Road to a Remedy: Current Issues in the Litigation of Economic, Social and Cultural Rights* (2010) 96.

⁷⁰ See Craven *The International Covenant on Economic, Social, and Cultural Rights: A Perspective on Its Development* (1998) 112.

⁷¹ See for example CESCR General Comment 15 para 24.

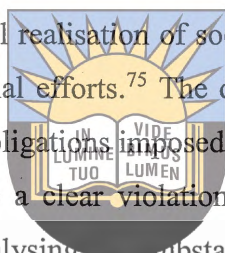
⁷² Ssenyonjo (2009) 24.

framework to safeguard socio-economic rights against violations by third parties.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.⁷⁴ The next section explores the obligation to fulfil.

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.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.⁷⁶



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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.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.⁷⁸ Such a task may involve highly technical issues that are beyond the expertise of the courts.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

⁷³ See van Boven, Theo C. Flinterman, Cees Westendorp, Ingrid (eds) *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, Maastricht, January (1997), Guideline 15. See also *SERAC* case para 46.

⁷⁴ See section 45(2) of the 2013 Constitution on the applicability of the Bill of Rights to non-state actors.

⁷⁵ See Eide *et al* 172.

⁷⁶ See Pejan "The Right to Water: The Road to Justiciability" 2004 36 *The George Washington International Review* 1181 1186.

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.

⁷⁸ See *n.* 76 above.

⁷⁹ *Ibid.*

proactively engage in a course of action meant to strengthen access to the constitutionally protected socio-economic rights.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.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.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.⁸³ The obligation to promote is closely linked to the right to access to information also enshrined in the Constitution.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.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.⁸⁶

⁸⁰ Ssenyonjo (2009) 25.

⁸¹ *Ibid.*

⁸² *Ibid.*

⁸³ See section 7 of the 2013 Constitution which mandates Zimbabwe to ensure the promotion and sufficient public awareness of the Constitution.

⁸⁴ See section 62 of the 2013 Constitution.

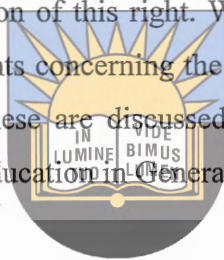
⁸⁵ See Committee Economic Social Cultural Rights *Human Rights Education and Public Information Activities Relating to the ICESCR* 1996 UN Doc E/1996/22 Chapter iv para 324.

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.⁸⁷ Although section 75 (1) (b) is internally qualified and subject to progressive realisation, primary or elementary education is capable of immediate realisation.⁸⁸ 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 13.⁸⁹



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 13.⁹⁰ 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.⁹¹ 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.⁹² 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.⁹³

⁸⁷ See also section 75 (4) 2013 Constitution.

⁸⁸ Section 75 (1) (a) 2013 Constitution.

⁸⁹ Committee on Economic, Social and Cultural Rights, General Comment 13 *The Right to Education* (1999) U.N. Doc. E/C.12/1999/10 (CESCR General Comment 13).

⁹⁰ See CESCR General Comment 13.

⁹¹ CESCR General Comment 13 para 6. See also Tomaševski *Human Rights Obligations: Making Education Available, Accessible, Acceptable and Adaptable, Right to Education Primers No. 3* (2001).

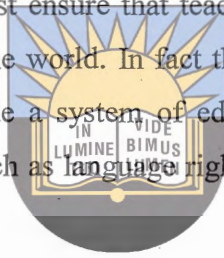
⁹² See CESCR General Comment 13 para 6.

⁹³ *Ibid.*

Physical accessibility enjoins Zimbabwe to ensure that educational facilities are within safe, physical reach and reasonably convenient, whether geographically or through modern day technology.⁹⁴ Financial accessibility further enjoins the government to ensure that education is affordable to all particularly the vulnerable and marginalised.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

Acceptability⁹⁶ means that the form and substance of education including curricula and teaching methods must be relevant, culturally appropriate and of high standard.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.⁹⁸



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2 2 1 1 3 Adaptability

Adaptability⁹⁹ 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.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.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.¹⁰²

⁹⁴ See Biegon & Musila (eds) *Judiciary Watch Report Judicial Enforcement of Socio-economic Rights under the New Constitution: Challenges and Opportunities for Kenya* (2011) 228.

⁹⁵ CESCR General Comment 13 para 6.

⁹⁶ *Ibid.*

⁹⁷ *Ibid.*

⁹⁸ See Biegon & Musila (2011) 228 above.

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.* see also ESCR in Zimbabwe (2009) 71.

¹⁰¹ Section 75 (2) 2013 Constitution.

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.¹⁰³ 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.¹⁰⁴ 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.¹⁰⁵ Similarly, several socio-economic rights such as labour rights in the Constitution¹⁰⁶ can only be exercised and realised in a meaningful way after a minimum level of education has been achieved.¹⁰⁷ Noteworthy is the growing consensus that tolerance and respect of human rights shall be major characteristics of educated human beings.¹⁰⁸ 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.



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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.¹⁰⁹ 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

¹⁰³ See also Goswami “ICT in Education and its Barriers,” *International Journal of Advanced Research in Computer Science and Software Engineering* (2013). Available at www.ijarcsse.com (accessed 17/10/13).

¹⁰⁴ Melchiorre on behalf of the Right to Education Project (a partnership between Action Aid International, the Global Campaign for Education and Amnesty International) *The missing link: Using the Dynamics of Human Rights Advocacy to Enhance Gender Equality in Education for Girls and Women in Situations of Extreme Poverty*, Dakar Senegal (2010). Available at <http://www.right-toeducation.org/sites/r2e.gn.apc.org/files/The%20missing%20link.pdf>. (accessed 17/10/2013).

¹⁰⁵ Nowak “The Right to Education” in Eide *et al* (eds) *Economic, Social and Cultural Rights* (2001) 245.

¹⁰⁶ See section 65 of the 2013 Constitution.

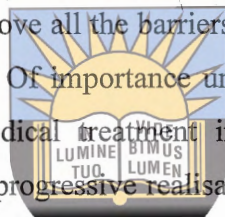
¹⁰⁷ Nowak *The Right to Education* (2001) 245.

¹⁰⁸ *Ibid*.

¹⁰⁹ Currie and de Waal *The Bill of Rights Handbook* (2005) 566-598.

attainable standard of health for all Zimbabweans especially the vulnerable groups.¹¹⁰ The recognition of the right to healthcare will empower courts to review health policies and programs put in place by the government.¹¹¹ 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.¹¹² 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.¹¹³ 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.¹¹⁴ Of importance under the right to health is that no person may be refused emergency medical treatment in any health care institution.¹¹⁵ Nevertheless this right is also subject to progressive realisation taking into account available resources.¹¹⁶ 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 hampered by bureaucratic requirements or other formalities.¹¹⁷ 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.¹¹⁸ 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.¹¹⁹ Currie and De Waal have explained that not to be refused emergency medical treatment may be applied horizontally entailing a duty for



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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.

¹¹³ *Jordaan et al Understanding Social Security Law* (2009) 26-27.

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.

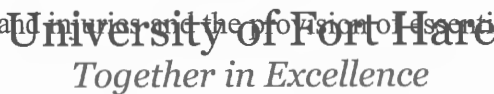
¹¹⁷ Currie & De Waal *The Bill of Rights Handbook* (2013) 595.

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.

¹²² UN Special Rapporteur on the Right to Health *Report on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health* [year]. Available at [www.ohchr.org/EN/issues/right to health index.aspx](http://www.ohchr.org/EN/issues/right%20to%20health/index.aspx) (accessed 15/10/13). See also Committee on Economic, Social and Cultural Rights, General Comment 14, *The right to the Highest Attainable Standard of Health* (2000) U.N. Doc. E/C.12/2000/4 (CESCR General Comment 14 para 11).

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.¹²⁷ Furthermore, Zimbabwe must ensure that everyone has an equal opportunity to attain the highest standard of health.¹²⁸ 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.¹²⁹

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.¹³⁰ According to 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.¹³¹ 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.¹³² Economic accessibility entails that health facilities, goods and services must be affordable for all.¹³³ 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.¹³⁴ 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.¹³⁵



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¹²⁷ Ssenyonjo (2009) 331.

¹²⁸ See CESCR General Comment 14 para 9.

¹²⁹ Ssenyonjo (2009) 331.

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.*

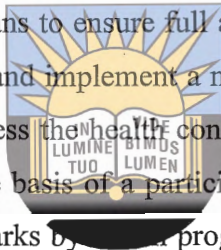
¹³⁴ *Ibid.*

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.¹³⁶ 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.¹³⁷ 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.¹³⁸ 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.¹³⁹ 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.



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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.¹⁴⁰

¹³⁶ See UN Office of the High Commissioner for Human Rights (OHCHR), *Fact Sheet No. 33, Frequently Asked Questions on Economic, Social and Cultural Rights*, (2008). Available at: <http://www.refworld.org/docid/499176e62> (accessed 05/01/2014).

¹³⁷ The concept of progressive realisation is discussed in Chapter 2 and in this chapter

¹³⁸ See Fact sheet 33 (2008). See also CESCR General Comment 14 para 12 (d).

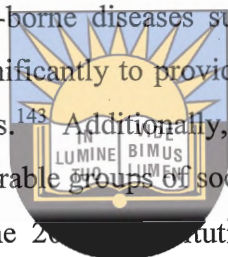
¹³⁹ General Comment 14 para 12 (d). It is submitted here also that it is the duty of the national key institutions to ensure the government complies with its constitutional obligations in an endeavour to progressively release socio-economic rights.

¹⁴⁰ Mukandavire *et al* "Estimating the Reproductive Numbers for the 2008-2009 Cholera Outbreaks in Zimbabwe" 2011 *Emerging Pathogens Institute, University of Florida*.

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 2009 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 11¹⁴⁵ and 12¹⁴⁶ 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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¹⁴¹ See Committee on Economic, Social and Cultural Rights, General Comment No15 *The Right to Water* (2002) UN Doc E/C.12/2002/11 (CESCR General Comment 15 para 12).

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.”

¹⁴⁶ 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.

2 2 3 1 2 Availability

The availability component enjoins state apparatus to ensure sufficient and continuous supply of both personal and domestic water.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.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.

2 2 3 1 3 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.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.¹⁵¹ With regard to economic accessibility, water services must be affordable particularly by the vulnerable and marginalised segments of society.¹⁵² Information accessibility entails the right to receive and impart information concerning water services.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.

2 2 3 1 4 Quality

There is no doubt that sufficient water alone is not enough to ensure a human right to water.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.¹⁵⁵ This fulfils the safety component of the right to water and this further recognises the fact that even

¹⁴⁸ See CESCR General Comment 15 para 12.

¹⁴⁹ *Ibid.*, 15 para 12 (a). See also Howard & Bartram *Domestic Water Quantity, Service Level and Health* (2003). Available at http://www.who.int/water_sanitation_health/diseases/WSH03.02.pdf accessed 10/05/2014). See also Gleick "Basic Water Requirements for Human Activities: Meeting Basic Needs" 1996 21 *Water International* 83-92.

¹⁵⁰ CESCR General Comment 15 para 12 (c).

¹⁵¹ *Ibid.*, para 12 (c) (i).

¹⁵² *Ibid.*, para 12 (c) (ii).

¹⁵³ *Ibid.*, para 12 (iv).

¹⁵⁴ *Ibid.*, para 12 (c) (iv).

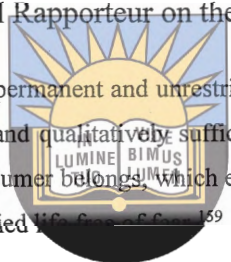
¹⁵⁵ *Ibid.*, para 12 (b).

though many people may receive this basic water requirement or more, in some cases the water delivered may not be of adequate quality.¹⁵⁶ Additionally, General Comment 15 stipulates that water for personal and domestic use must be of an acceptable colour, odour and taste.¹⁵⁷ The next section discusses the right to food.

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.¹⁵⁸ The former UN Special Rapporteur on the right to food opined that,

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.¹⁵⁹



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 fundamental 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.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.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.¹⁶²

¹⁵⁶ Moyo *Water as a Human Right under International Human Rights Law: Implications for the Privatisation of Water Services*, chapter 4 (LLD thesis 2012 Stellenbosch).

¹⁵⁷ *Ibid.*, chapter 4.

¹⁵⁸ Section 77 of the 2013 Constitution.

¹⁵⁹ UN Special Rapporteur on the Right to Food *Report on the Human Right to Food (year)*. Available at <http://www.ohchr.org/EN/issues/pases/food/.index.aspx> (accessed 05/01/2014).

¹⁶⁰ Committee on Economic, Social and Cultural Rights, General Comment 12 *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 *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.

¹⁶¹ See the *SERAC* case.

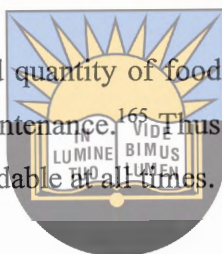
¹⁶² Section 15 of the 2013 Constitution provides for food security among other things and obliges the state to encourage people to grow and store sufficient food, secure the establishment of adequate reserves and encourage

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.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.¹⁶⁴

2 3 4 1 The essential elements of the right to food

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.¹⁶⁵ Thus Zimbabwe must ensure that food is both available in good quality and affordable at all times.



2 3 4 1 2 Availability

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In terms of availability, Zimbabwe must ensure that all people have the ability to obtain food themselves directly, or processing and distribution systems exist to make food available in accordance with demand.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.¹⁶⁷

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.¹⁶⁸ This means that the implementation of protective policies and laws must ensure food is safe and uncontaminated.

and promote adequate and proper nutrition through mass education and other appropriate means. This resonates with the obligation to promote.

¹⁶³ See section 65 2013 Constitution.

¹⁶⁴ See CESCR General Comment 12 para 6-8.

¹⁶⁵ *Ibid.*, para 6-8.

¹⁶⁶ *Ibid.*

¹⁶⁷ *Ibid.*

¹⁶⁸ *Ibid.*

2 3 4 1 4 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



2 4 5 Socio-economic rights of arrested and detained persons

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2 4 5 1 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 detained 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.

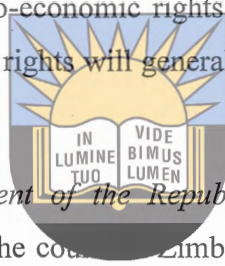
¹⁶⁹ See Brand "The Right to Food" in Brand and Heyns (eds) *Socio-Economic Rights in South Africa* (2005) 158.

¹⁷⁰ O de Schutter UN Special Rapporteur on the right to food *The right to food* (2008). Available on www.ohch.org/EN/issues/food/pages/food/index (accessed 05/01/2014).

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 court 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

¹⁷² Ssenyonjo *Economic, Social Cultural Rights International Law* (2009) 59.

¹⁷³ *Ibid.*

¹⁷⁴ See Committee on Economic, Social and Cultural Rights General Comment No 3 *The Nature of States Parties' Obligations* (1990) UN Doc E/1991/23, (CESCR General Comment 3 para 9).

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.

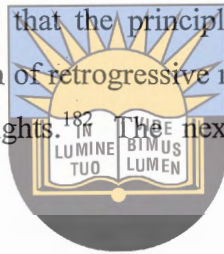
¹⁷⁷ See CESCR General Comment 3.

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.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.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.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.¹⁸² The next section discusses the general limitation clause.



2.6 Limitations clause

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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.¹⁸³ Section 86 of the Constitution provides that the fundamental rights and freedoms set out in the Bill of Rights may be limited only:

...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

¹⁷⁹ Riedel *Economic, Social and Cultural Rights* in Krause & Shenin (eds) *International Protection of Human Rights: A Textbook* (2009) 129.

¹⁸⁰ See Currie & de Waal *The Bill of Rights Handbook* (2013).

¹⁸¹ See CESCR General Comment 3 para 9.

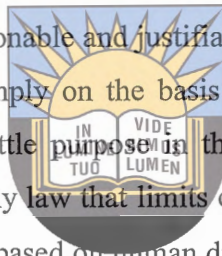
¹⁸² *Ibid.*, para 9. See also CESCR General Comment 13 para 45, see also CESCR General Comment 14 para 32.

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



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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

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.



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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.¹⁸⁹ 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.¹⁹¹

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.¹⁹² 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.¹⁹³ Consequently, individuals and groups who allege the infringement of their socio-economic

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.

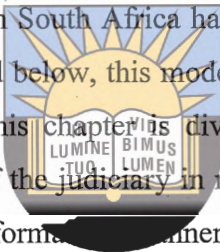
¹⁹¹ See the Preamble 2013 Constitution.

¹⁹² Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 24.

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.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 enshrined 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.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.



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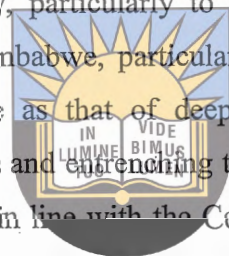
3 1 Role of judiciary under the Constitution

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

¹⁹⁴ CESCR, General Comment 3 *The Nature of States Parties' Obligations* U.N. Doc. E/1991/23 (General Comment 3 para 3.

¹⁹⁵ See section 3 of the 2013 Constitution.

it.¹⁹⁶ This means that all branches of government submit to the Constitution and every conduct must be consistent with the constitutional prescripts. 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.



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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.

¹⁹⁷ Musila "Testing Two Standards of Compliance: A Modest Proposal on the Adjudication of Positive Socio-Economic Rights under the New Constitution of Kenya" (2012) 66.

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,

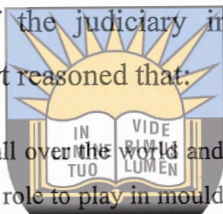
¹⁹⁹ See section 164 (3) of the 2013 Constitution.

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.²⁰¹ 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.²⁰²

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 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.²⁰³



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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.²⁰⁴ 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

²⁰¹ Langa "Transformative Constitutionalism," Prestige Lecture delivered at Stellenbosch University (South Africa) (2006) 10-11. Available at <https://web.up.ac.za/sitefiles/file/Faculty%20of%20Law%20Documents/2011/Langa%20%20Transformative%20Constitutionalism.PDF> (accessed 07/06/2014).

²⁰² Langa (2006).

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.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.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,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.²⁰⁸ This is because in interpreting socio-economic rights provisions under the Constitution, judges should realise the entire judiciary cannot remain aloof from social and economic needs of the vulnerable and impoverished.²⁰⁹ Accordingly, through their activism, judges must nudge the government to move forward and improve the social and economic conditions of the poor.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:

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.²¹¹

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

²⁰⁵ Klare (1998) 168.

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).

²⁰⁷ See section 74 of the 2013 Constitution.

²⁰⁸ See 46 (2) of the 2013 Constitution. See also section of 176 of the 2013 Constitution.

²⁰⁹ Dumbutshena "Judicial Activism in the Quest for Justice and Equity" in Ajibola and Van Zyl (eds) *The Judiciary in Africa* (1998) 188.

²¹⁰ Dumbutshena (1998) 188.

²¹¹ Justice B Ajibola "Welcoming Addresses" in Ajibola and van Zyl (eds) *The Judiciary in Africa* (1998) xv.

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.²¹² 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.²¹³ 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.²¹⁴ 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

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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.²¹⁵ 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

²¹² See section 165(1) (c) of the 2013 Constitution.

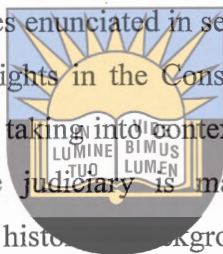
²¹³ Liebenberg *Socio-Economic Rights Adjudication under a Transformative Constitution* (2010) 34.

²¹⁴ Mavedzenge & Coltart *Constitutional Law Guide Towards Understanding Zimbabwe's Fundamental Socio-Economic and Cultural Human Rights* (2014).

²¹⁵ Section 3 2013 Constitution.

and human worth and equality of all among others.²¹⁶ 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.²¹⁷ 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.²¹⁸ 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.²¹⁹



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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 enjoins the state to ensure that there is no discrimination in respect of access to socio-economic rights. Human dignity²²⁰ 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

²¹⁶ See section 3 of the 2013 Constitution which contains founding values and principles.

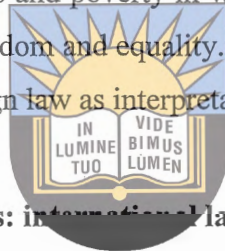
²¹⁷ See Liebenberg "The Value of Human Dignity in Interpreting Socio-economic Rights" 2005 *South African Journal of Human Rights* 1-32. Liebenberg states that the concept of human dignity requires society to respect the resources to redress the conditions that perpetuate their marginalisation.

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 "Three Concepts of Dignity in Constitutional Law" 2011 *Notre Dame Law Review* 83-271.

conditions that perpetuate unequal distribution of resources.²²¹ 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.²²² 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.²²³ 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.²²⁴ 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.”²²⁵ Monism provides that international law applies directly in the domestic legal order without the need for incorporation.²²⁶ 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

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.

²²⁵ See Dugard *International Law: A South African Perspective* 4ed (2011) 42.

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

²²⁷ See section 326 (1) of the 2013 Constitution.

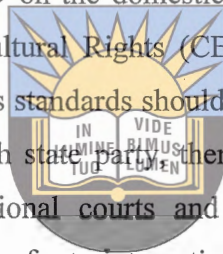
²²⁸ See the main sources of international law in article 38 of the Statue of the International Court of Justice.

²²⁹ See Liebenberg (2010) 101. See Liebenberg commenting on the effect of section 39 of the 1996 South African Constitution which is similar to section 46 of the 2013 Constitution.

²³⁰ Liebenberg (2010) 101.

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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²³² de Bourbon "Human Rights Litigation in Zimbabwe: Past Present and Future" 2003 *African Human Rights Law Journal* 1-27. Available at

http://www.ahrlj.up.ac.za/images/ahrlj/2003/ahrlj_vol3_no2_2003_adrian_de_bourbon.pdf (accessed 30/02/14).

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).

²³⁴ The Constitution endorses a dualist approach; see section 34 of the 2013 Constitution. See Committee on Economic, Social and Cultural Rights, General Comment 9 *The Domestic Application of the Covenant* (1998) U.N. Doc. E/C.12/1998/24.

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.

²³⁹ Human Rights Committee, Draft General Comment No. 34 (2010) U.N. Doc. CCPR/C/GC/34/CRP.2.

A similar guidance in the use of international law as an interpretive guide is found in the South African case of *S v Makwanyane*.²⁴⁰ 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.²⁴¹ The Constitutional Court of that country further held that such international law includes binding and non-binding international law.²⁴² 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 CESCR 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 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.²⁴³

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.²⁴⁴ The same message is echoed in section 326 (2) of the Constitution with regard to customary

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.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.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.²⁴⁷ This suasion informs the courts, especially the (ZCC?)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.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.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.”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



²⁴⁵ Liebenberg (2010) 105.

²⁴⁶ *Ibid.*, 105.

²⁴⁷ *Ibid.*, 101.

²⁴⁸ See sections 162 and 166 of the 2013 Constitution.

²⁴⁹ Liebenberg (2010) 119-120.

²⁵⁰ *Ibid.*, 119-120. See also Kapindu “Courts and the Enforcement of Socio-economic Rights in Malawi: Jurisprudential Trends, Challenges and Opportunities” 2013 1 *African Human Rights Law Journal* 125-151.

²⁵¹ Roach “The Challenges of Crafting Remedies for Violations of Socio-Economic Rights on Remedies” (2012) *Cambridge University Press*.

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



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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).

²⁵³ *Sanderson v A.G EC* 1997 12 BCLR 1675 (CC) para 26.

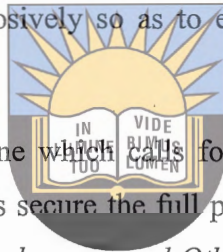
²⁵⁴ *Ibid.*, para 26.

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 Ex parte 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

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).

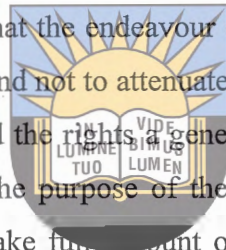
²⁶¹ *Ibid.*

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.

²⁶³ Dumbutshena *The Judiciary in Africa* 1998 188-194.

needs of the disadvantaged ones.²⁶⁴ 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.²⁶⁵ 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.²⁶⁶

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.²⁶⁷ 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.²⁶⁸ For this reason, courts must take full account of the changing conditions, social norms and values, so that the provisions of 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.²⁶⁹ 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.



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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.”²⁷⁰ 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.²⁷¹ 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.”²⁷²

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.²⁷⁴ Section 44 of Constitution establishes that all rights in the Bill of 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.

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.

3 3 1 1 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

²⁷⁵ See the *Grootboom case*.

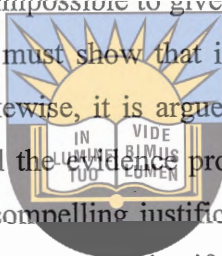
²⁷⁶ See the *Minister of Health and Others v Treatment Action Campaign and Others* 2002 5 SA 703 (CC).

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."

²⁷⁹ See Liebenberg in Squires *et al* (2010) 83.

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.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.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.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.²⁸³ Instead, the government must show that it has good reasons for failing to meet its constitutional obligations.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.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.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.



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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.²⁸⁷ Therefore the concept of reasonableness, if adopted by the courts in Zimbabwe, must operate

²⁸⁰ See Liebenberg in Squires *et al* (2010) 83. See also CESCR General Comment 3.

²⁸¹ *Ibid.*, 83.

²⁸² *Ibid.*

²⁸³ See *TAC case* para 35.

²⁸⁴ Liebenberg in Squires *et al* (2010) 83. See also CESCR General Comment 3.

²⁸⁵ *Ibid.*, 83.

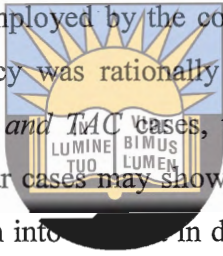
²⁸⁶ *Ibid.*, 84.

²⁸⁷ Brand "Socio-Economic Rights in Practice in South Africa" Unlock Democracy. Available at <http://www.unlockdemocracy.org.uk/?p722>. (accessed 25/March/ 2014).

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.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.²⁸⁹ This will inculcate a culture of justification which is one of the underlying principles of constitutional review.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.²⁹¹ For example in the *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.²⁹² Accordingly, the reasonableness approach must go beyond the scrutiny of the adopted measures and inquire into the degree and extent of the denial of the socio-economic right.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.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.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



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²⁸⁸ Coomans "Reviewing Implementation of Social and Economic Rights: An Assessment of the "Reasonableness" Test as Developed by the South African Constitutional Court (2005) 15. Available at http://www.zaerv.de/65_2005/65_2005_1_a_167_196.pdf (accessed 25/March/ 2014)

²⁸⁹ Liebenberg in Squires *et al* (2010) 82.

²⁹⁰ *Ibid.*, 82.

²⁹¹ *Ibid.*, 79.

²⁹² See *Grootboom* case para 33 and *TAC* case para 34.

²⁹³ *Grootboom* case para 33.

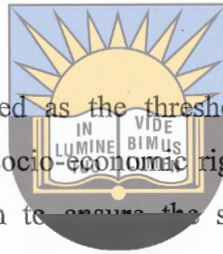
²⁹⁴ Bilchitz 2002 490. See also Bilchitz 2003 11-14

²⁹⁵ *Ibid.*, 490.

government programmes must be comprehensive coherent, coordinated,²⁹⁶ they must be balanced and flexible, and make appropriate provision for short, medium and long term needs,²⁹⁷ they must be reasonably conceived and implemented,²⁹⁸ and they must be transparent, and the contents must be made known to the public.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.³⁰⁰ The court in *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.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 *prima facie* failing to discharge its obligations under the ICESCR.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.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



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²⁹⁶ *Grootboom* case para 39-40.

²⁹⁷ *Ibid.*, para 43.

²⁹⁸ *Ibid.*, para 40-43.

²⁹⁹ *TAC* case para 123. See also Liebenberg "The Interpretation of Socio-Economic Rights' in Woolman *et al* Constitutional Law of South Africa 2ed (2009) 33-34.

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 *Grootboom* decision led to the change of housing policies by the government, in *Khosa* the decision of the court led to the awarding of social grants to permanent residents and in *TAC* case provision of Nevirapine to pregnant mothers.

³⁰¹ *TAC* case, para 10.

³⁰² CESCR General Comment No 3 para 3.

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 http://scholarship.law.cornell.edu/lps_clacp/27(accessed 15/02/14).

for survival.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.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.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.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.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.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.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,³¹¹ and secondly that reasonableness is judged in the light of the social, economic and historical context and considerations.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

³⁰⁴ Bilchitz (2003) 13-15.

³⁰⁵ See Liebenberg (2010).

³⁰⁶ See for example Bilchitz (2002). See also Bilchitz (2003).

³⁰⁷ See CESCR General Comments.

³⁰⁸ See Chowdhury (2009).

³⁰⁹ See *TAC* and *Grootboom* cases.

³¹⁰ See *TAC* case para 39. See also Young “The Minimum Core of Economic and Social Rights: A Concept in Search of Content” 2008 *Yale Journal of International Law* 113-174.

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.

³¹² See Squires *et al* 2010.

measures”, “to achieve the progressive realisation” of the rights, “within available resources”.³¹³

The minimum core as with the reasonableness approach has its own limitations and our courts must be careful in over emphasising this approach.³¹⁴ 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.³¹⁵ 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.³¹⁶ 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.³¹⁷ Additionally, some of the reasons of the rejection of this approach by the Constitutional Court of South Africa are in relation to its incompatibility with the institutional competencies of the courts in budgetary matters.³¹⁸ 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.³¹⁹

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.

³¹⁴ See Chowdhury (2009) 1. See also Young (2008).

³¹⁵ See Liebenberg “Socio-Economic Rights: Revisiting the Reasonableness/Minimum Core Debate” in Woolman and Bishop (eds) *Constitution Conversations* 2008 303-331315.

³¹⁶ See Young 2008.

³¹⁷ *Grootboom* case para 31.

³¹⁸ See *TAC* case para 70-71.

³¹⁹ See Wilson & Dugard “Taking Poverty Seriously: The South African Constitutional Court and Socio-Economic Rights” 2011 *Stellenbosch law Review* 669. See also *Mazibuko and Others v City of Johannesburg and Others* 2010 4 SA 1 (CC).

government.³²⁰ 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.³²¹

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 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.³²² 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

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.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 mind that the state party may adopt a range of possible policy measures for the implementation of socio-economic rights.”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.³²⁵ This will further ensure 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.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.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.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

³²³ See the preamble of the Optional Protocol-ICESCR (2008) adopted as a UN General Assembly resolution A/RES/63/117.

³²⁴ See article 8 (4) of the Optional Protocol to the ICESCR.

³²⁵ Orago *Poverty, Inequality and Socio-Economic Rights: A Theoretical Framework for the Realisation of Socio-Economic Rights in the 2010 Kenyan Constitution* (LLD thesis 2013 UWC) 291-292.

³²⁶ *Ibid.*

³²⁷ Currie and de Waal *The Bill of Rights Handbook* 5 ed 2005 18-19

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.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.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.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

³²⁹ *TAC* case para 38.

³³⁰ *Ibid.*

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.³³² 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.³³³ 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.³³⁴ As has been the trend in Zimbabwe and indeed in other jurisdictions, this requires mainly compensatory orders such

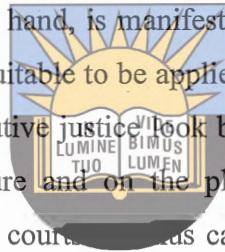
³³² Section 175 (6) (b) 2013 Constitution.

³³³ Biegon "The Inclusion of Socio-Economic Rights in the 2010 Kenyan Constitution: Conceptual and Practical Issues" (2012) 49 in *Kenyan Judiciary Watch Report*.

³³⁴ Mbazira *Litigating Socio-Economic Rights in South Africa: A Choice Between Corrective and Distributive Justice* (2009).

as damages. It must however be noted that, awarding remedies for violations of socio-economic rights is more complex.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.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.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.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.³³⁹ In such cases, courts are capable of crafting remedies while taking into account factors that may impact the implementation of such remedies.³⁴⁰



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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

³³⁵ Biegon (2012) 49.

³³⁶ *Ibid.*

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.

³³⁸ Mbazira "Enforcing the Economic, Social and Cultural Rights in the South African Constitution as Justiciable Individual Rights: The Role of Judicial Remedies" (2009) *PULP* 218-258.

³³⁹ *Ibid.*

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.

³⁴² Roach in Squires *et al* (2010) 113.

³⁴³ *Ibid.* See also Roach "The Challenges of Crafting Remedies for Violations of Socio-Economic Rights" (1976). Available at https://www.law.utoronto.ca/documents/Roach/challenge_crafting.pdf accessed (19/12/2013).

³⁴⁴ Roach in Squires *et al* (2010) 113.

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.³⁴⁹ The court orders the respondent to report back to it on the implementation of its decision and as such allows courts to oversee 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.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.³⁵¹ Hirsch argues that, to have any meaningful effect, the court would have to direct reform at the state institution itself.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 that addresses violations systematically.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.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.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

³⁴⁹ Roach "Crafting Remedies for violations of Economic, Social and Cultural Rights" in Squires *et al* (eds) *The Road to a Remedy: Current Issues in the Litigation Economic, Social and Cultural Rights* (2005) 113.

³⁵⁰ Hirsch "A Defense of Structural Injunctive Remedies in South African Law" 2007 *Oregon Review of International Law* 22.

³⁵¹ Hirsch 2007 23.

³⁵² *Ibid.*

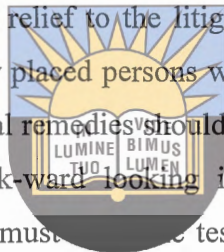
³⁵³ *Ibid.*

³⁵⁴ *Ibid.*, 24.

³⁵⁵ *Ibid.*, 24.

towards court decisions and judges especially human rights decisions in the past decade.³⁵⁶ The government organs have on a number of occasions disregarded court orders.³⁵⁷ Declarations, although useful, are often ineffective to curb violations of socio-economic rights.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.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.³⁶⁰ In essence these remedies must meet the test envisioned by the Constitution that judicial remedies should be just, appropriate and equitable.



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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.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

³⁵⁶ Nyawanza "Justice Mungwira and Judicial Independence." Available at <http://www.newzimbabwe.com/pages/immigration8.13403.html> (accessed 06/06/2014).

³⁵⁷ Murombo "The Utility of Environmental Rights to Sustainable Development in Zimbabwe: A Contribution to the Constitutional Reform Debate" 2011 *African Human Rights Law Journal* 120-146.

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.

³⁵⁹ Roach in Squires *et al* (2010) 116.

³⁶⁰ *Ibid.*

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.³⁶² 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.³⁶³ 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.³⁶⁴ 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.³⁶⁵ 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.³⁶⁶ 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.³⁶⁷

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 *Ngxuzva v Permanent Secretary, Department of Welfare, Eastern Cape* 2001 2 SA 609 (E).

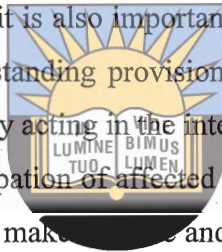
³⁶⁵ See section 24 of the LHC.

³⁶⁶ *Catholic Commission for Justice and Peace in Zimbabwe v Attorney General and others* 1993 1 ZLR 242.

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.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 *Ngxuzza 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.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.³⁷⁰ Thus Zimbabwean courts must be able to make 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.



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:

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.³⁷¹

³⁶⁸ Currie & de Waal (2013) 178.

³⁶⁹ *Ibid.* see also Liebenberg (2010) 88.

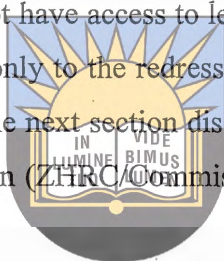
³⁷⁰ Liebenberg (2010) 88.

³⁷¹ See Liebenberg "Forging New Tools for Vindicating the Rights of the Poor in the Crucible of the Eastern Cape" *Public Lecture delivered at Rhodes University, Faculty of Law Faculty on 28 July 2014.*

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.



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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,

³⁷² See *Ngxuza case* at 619 E-F.

³⁷³ Liebenberg (2010) 88-89.

³⁷⁴ *Ibid.*, 88-89.

³⁷⁵ See also Olowu *An Integrative Rights Based Approach to Human Development in Africa* (2009) 108-110. See also other supporting institutions supporting democracy in Chapter 12 of the 2013 Constitution.

³⁷⁶ See section 242 of the 2013 Constitution.

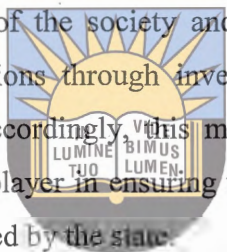
³⁷⁷ See Article 5, Vienna Declaration 1993.

³⁷⁸ See section 243 of the 2013 Constitution.

³⁷⁹ *Ibid.*, section 243. see also Ssenyonjo (2009) 190.

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.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.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.³⁸²

Furthermore, the ZHRC has an investigative mandate to investigate human rights abuses and violations which task must be executed without fear or favour.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.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.



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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.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 domestic framework for protecting socio-economic rights. This is despite the fact that there are conceptual and practical challenges that arise in the

³⁸⁰ See section 244 (1) (a) of the 2013 Constitution.

³⁸¹ See a similar provision of section 184 (3) 1996 South African Constitution.

³⁸² See section 244 of the 2013 Constitution.

³⁸³ See sections 243 (1) (f) and 233 of the 2013 Constitution.

³⁸⁴ Olowu (2009) 109.

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 providing 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.

³⁸⁷ Linington *Constitutional Law of Zimbabwe* (2001).

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 indivisibility³⁸⁹ 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.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.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.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.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.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

³⁸⁹ See Article 5 of the Vienna Declaration on the Programme of Action 1993.

³⁹⁰ See chapter 2 on the discussion of the specific rights.

³⁹¹ See chapter 2 of this study.

³⁹² See chapter 2 section 2.2 above.

³⁹³ See chapter 2 of this study.

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.

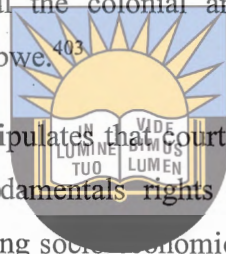
³⁹⁶ *Ibid.*, section 2 1.

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.⁴⁰⁰ 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.⁴⁰¹ 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.⁴⁰² 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.⁴⁰³



Section 46 (1) (a) of the Constitution stipulates that courts and similar tribunals must give full force as well as effect to all fundamental 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 empower 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 Constitution⁴⁰⁴ 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.⁴⁰⁵ 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 than others in this case freedom of expression was construed as less important than 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.

⁴⁰⁴ See sections 8 and 39 of the Constitution of South Africa, 1996.

⁴⁰⁵ Brand "Introduction to Socio-Economic Rights in the South African Constitution" in Brand & Heyns (eds) *Socio-Economic Rights in South Africa* (2005) 18.

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.⁴⁰⁶ This is because accessible and effective national remedies are the primary means of protecting socio-economic rights.⁴⁰⁷ This is in line with the requirement that domestic remedies must be exhausted before one embarks on the international procedures in search of relief.⁴⁰⁸ 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.



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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.⁴⁰⁹ 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 actions⁴¹⁰ 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 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.

⁴⁰⁷ Liebenberg "Domestic Protection of Economic, Social and Cultural Rights" in Eide *et al* (eds) *Economic, Social and Cultural Rights* (2001) 52.

⁴⁰⁸ See Committee on Economic, Social and Cultural Rights, *General Comment 9 The domestic application of the Covenant* (1998), UN Doc E/C.12/1998/24 (CESCR General Comment 9 para 4).

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 3.⁴¹¹ 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.⁴¹² The programmes and policies must be balanced and flexible, make appropriate provision 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.⁴¹³ 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.⁴¹⁴ It is therefore recommended that all government actors and private entities respect the orders and decisions of the courts.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 state 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.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,

⁴¹⁴ See Roach "Crafting Remedies for violations of Economic, Social and Cultural Rights" in Squires *et al* (eds) *The Road to a Remedy: Current Issues in the Litigation Economic, Social and Cultural Rights* (2005)112-121.

⁴¹⁵ See section 45 of the 2013 Constitution.

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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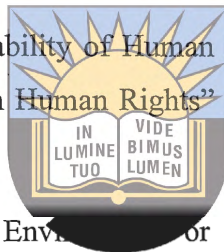
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