SELECTED ASPECTS OF THE 2013 ZIMBABWEAN CONSTITUTION AND THE DECLARATION OF RIGHTS

Second Revised Edition

Edited by

Admark Moyo

RAOUL WALLENBERG INSTITUTE

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ISBN 978-91-86910-57-0

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Printed by DP printmedia

Supported by

Sweden
Sverige

Raoul Wallenberg Institute of Human Rights and Humanitarian Law
Stora Gråbrödersg. 17 B
P.O. Box 1155
SE-221 05 Lund, Sweden

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Acknowledgements

The Raoul Wallenberg Institute of Human Rights and Humanitarian Law (RWI) together with the book's editor Dr. Admark Moyo would like to extend its heartfelt gratitude to the Swedish International Development Cooperation Agency (Sida) and the Embassy of Sweden in Harare, Zimbabwe for believing in this project and financing it so that the second revised edition of the volume you are holding in your hands could see the light of day.

Moreover, to all the authors who took the time to faithfully contribute with new and revised content, we would like to extend our deepest thanks.

With courtesies aside, we now leave you the reader to enjoy the book's informative content and find guidance in its telling pages.

Preface

In 2023, Zimbabwe will celebrate the tenth anniversary of the 2013 Constitution. As we draw close to this important milestone, it is imperative to make critical reflections on the legacy, to date, of this transformative document and what lies ahead for the state and the ordinary people in the struggle for the realisation of human rights. The Constitution is transformative in many dimensions. First, it protects the full range of human rights, from the traditional civil and political rights to socio-economic, cultural and group rights. The Constitution is partly grounded on the cultural and historical background of the majority of the people. It is a socially and culturally relevant document in the sense that it embodies the cultural aspirations of the people, not only by claiming that the country is founded on diverse cultural, religious and traditional values, but also by expressly protecting cultural rights, including the rights of linguistic, ethnic and religious minorities. The promise and legitimacy of the Constitution may well depend on these seemingly unimportant rights that put individuals, cultures and communities at the centre of constitutional conversations. Yet, the potential clashes between culture and tradition, on the one hand, and Western values and human rights, on the other, should not be underestimated. The road ahead may require courts to strike a delicate balance between ensuring that individual rights are not trampled upon in the name of culture and ensuring that diverse cultures, traditions and legal pluralism continue to thrive.

Second, the Constitution enshrines the horizontal application of human rights thereby legally binding natural and juristic persons to respect, protect and promote the realisation of human rights and the achievement of equality. This is a first in our context as the fulfilment of human rights obligations has historically been characterised as exclusively a public function. The framers of the Constitution realised that many violations of rights occur in the private sphere and that to fully enjoy rights the Declaration of Rights should regulate relationships that have historically been assumed to be outside the province of the law. This approach breaks the public private divide and brings the state into the private sphere – including the family, school and workplace – to protect weaker members of society, including women, children, the elderly, employees and many more. It follows that very few aspects of life squarely fall into the private realm of life, and no matter how 'hidden' violations of rights may be, the state is under a constitutional duty to provide remedies for victims of such violations.

Third, the Constitution protects the right substantive equality in a manner that allows the state to take affirmative action measures to bridge existing inequalities between the rich and the poor. Everyone matters under the current constitutional and legal framework, from the poor peasants in the rural areas to children living in the streets, women, persons with disabilities and many other disadvantages groups in our society. This claim is codified by the right to equal protection and benefit of the law, and the prohibition of discrimination on the basis of many grounds. Given the prevailing disparities in wealth, power and privilege, affirmative action becomes a

tool for unlocking the system and ensuring that the material, developmental, educational and other needs of the poor are catered for. Accordingly, the Declaration of Rights places disadvantaged groups at the heart of the struggle for social justice and creates space for them to ground their claims in the law and the Constitution. A backward looking approach to analysing the role of rights in achieving social transformation casts the Constitution both as memory and as promise. It is memory in the sense that it seeks to address the injustices of the past by conferring on all people rights that were historically denied to them. In addition, the Constitution is a promise in the sense that it establishes an enabling legal and human rights framework that is required to push the country in an egalitarian direction that addresses historical injustices and allows everyone to thrive and achieve their full potential.

Finally, the Constitution establishes a wide range of independent and quasi-independent administrative, judicial and quasi-judicial institutions that have the mandate to protect, promote and monitor the implementation of human rights. It sets forth the mandates of Zimbabwe's independent commissions that are required to investigate and receive complaints about violations of fundamental by state and non-state actors. The future of the Constitution and human rights may well depend on how equipped and resourced these institutions are to defend the Constitution, protect human rights and give effective relief for breaches thereof. In our context, despite the abundance of constitutional provisions strengthening the role of the judiciary and the emergence of independent commissions, too many victims of human rights violations lack adequate recourse to justice for any number of reasons ranging from discrimination on one or multiple grounds, to costly legal procedures, fear of repercussions or reprisals, lack of rule of law in the communities and the physical distance between the courts and those seeking effective remedies for breaches of their rights. While rights on paper are essential in cementing citizens' rights and spelling out state obligations, actual implementation and awareness of basic rights are indispensable for the Constitution to transform people's lives. If human rights are to be worth the paper they are written on, these challenges must be resolved and the relevant justice delivery mechanisms must be decentralised enough to be easily accessible to the majority of people living in remote parts of the country.

This book is a product of the Zimbabwe Human Rights Capacity Development Programme, financed by the Swedish International Development Cooperation Agency (Sida) and implemented by the Raoul Wallenberg Institute of Human Rights and Humanitarian Law (RWI) and local partners in close cooperation with the Embassy of Sweden in Harare, Zimbabwe. The Programme is supportive of Swedish priorities for development cooperation with Zimbabwe, by seeking to promote human rights, democratic development, strengthened rule of law and gender equality. Moreover, it seeks to contribute to reform initiatives in Zimbabwe aimed at the progressive realisation of a culture of human rights, where fundamental rights and freedoms, including those of women, children and other vulnerable groups are respected. This is aligned to Zimbabwean national objectives, as set out in the Constitution, to protect constitutional rights and freedoms and promote their full

realisation to establish, enhance and promote a sustainable, just, free and democratic society.

At the time of writing, the main implementing partners of the Programme, in addition to RWI, are: Centre for Applied Legal Research, Harare; College of Business, Peace, Leadership and Governance at Africa University, Mutare; Faculty of Law at Midlands State University, Gweru; Herbert Chitepo School of Law at Great Zimbabwe University, Masvingo; Faculty of Law at University of Zimbabwe, Harare; Faculty of Law at Zimbabwe Ezekiel Guti University, Bindura; Council for Legal Education in Zimbabwe; Zimbabwe Human Rights Commission; Zimbabwe Prisons and Correctional Services; and Zimbabwe Anti-Corruption Commission.

This second edition of the book builds upon the initial steps taken by partners to build evidence and develop knowledge resources on human rights in the country. It revisits the chapters discussed in the first edition to ensure that recent developments are part of the conversation and also adds a number of new chapters in areas that were not explored in the first edition. It is beyond doubt that the book is an important addition to the resources that will shape the theory and practice of Zimbabwean constitutional and human rights law for a considerable time.

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Part I – Introduction and Preliminary Constitutional Considerations

1 Introduction

Admark Moyo*

This book examines the nature and scope of selected aspects of the 2013 Zimbabwean Constitution and the Declaration of Rights. Composed of 19 chapters examining the constitutional landscape for the protection of human rights in Zimbabwe, the book is designed for a broad audience ranging from undergraduate and postgraduate students, academia, civil society organisations, legal practitioners, judges, key government ministries, institutions and agencies, among many others. The book explains the scope of several provisions of the Constitution and their implications for the conduct of both state and non-state actors. While it does not, for instance, explain the nature and content of all the rights in the Declaration of Rights, this book acts as a prelude to a more comprehensive book to be developed by many authors from different legal backgrounds in the near future. Nonetheless, the chapters that form part of this volume provide invaluable guidance to its readers.

The book is divided into five parts. Part I consists of three chapters: this introduction; a discussion on the basic tenets of Zimbabwe's new constitutional order; and an analysis of the relationship between constitutional values, national objectives and the Declaration of Rights. Part II of the book unpacks three key concepts that are central to the vindication and application of human rights. These include the relationship between international and national law and its relevance to the interpretation of fundamental rights and freedoms; the role of foreign law in the development of domestic law – as viewed primarily from the perspective of domestic courts – and an analysis of the constitutional provisions governing the limitation of rights under the Constitution. In Part III, the book discusses the rights of selected vulnerable groups such as women, children, persons with disabilities and linguistic minorities in four respective chapters. This selection of specific vulnerable groups does not necessarily imply any rank ordering thereof. While we acknowledge the rights of other vulnerable groups such as veterans of the liberation struggle, the elderly, ethnic, religious and linguistic communities and many others, the selection of the specific groups under study was influenced both by the availability of authors and the explicit constitutional protection of the rights of a particular group.

Composed of three chapters, Part IV locates and discusses some of the emerging issues under the 2013 Zimbabwean Constitution. These include the constitutional protection of socio-economic rights; the protection of environmental rights under the Constitution; children's environmental rights; the interaction and tension between foreign investment and the property rights of indigenous communities; and the relationship between the constitutional state and traditionalism. In Part V, the book examines some of the mechanisms that can be used to enforce the fundamental rights and freedoms protected in the Constitution. This includes an analysis of the provisions governing standing or access to court, the role of the Zimbabwe Human

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Rights Commission in the protection and promotion of human rights and an overview of the African human rights system. Part V also concludes the discussion with forward-looking remarks on the future of constitutional and human rights law.

Having given a general outline of the parts and chapters of the book, it is now imperative to explore, in some detail, the scope of each chapter in this book.

Summary of Chapters

In ***chapter 2***, Admark Moyo explains the meaning and reach of the basic legal principles that are relevant to a fuller understanding of the provisions of the new constitutional dispensation. These include the principles of the supremacy of the Constitution, the rule of law, democracy and accountability, the separation of powers and checks and balances. The discussion of the separation of powers and the independence of the judiciary takes place against the backdrop of the centrality of impartial courts in the enforcement of the Constitution and the enjoyment of fundamental rights and freedoms by the citizenry. Arguably, the provisions of the Declaration of Rights can only be properly understood as an integral part of the Constitution as a whole, hence the need for a detailed explanation of the basic tenets of the new constitutional order. Both the Declaration of Rights and the entire Constitution are important ingredients of the new constitutional project of transforming Zimbabwean society as well as the country's social, political and economic systems and institutions.

In ***chapter 3,*** Admark Moyo explores the relationship between constitutional values, national objectives and the Declaration of Rights. Chapter 3 serves as the background to the analysis, interconnectedness and operationalisation of the founding values and principles, national objectives and the Declaration of Rights. It begins with an exploration of the meaning and scope of constitutional values and principles, particularly the founding values and principles referred to in section 3(2) of the Constitution. The chapter demonstrates that constitutional values and principles perform a pivotal function in the interpretation, application and limitation of the fundamental rights and freedoms entrenched in the Constitution. In addition, it is also shown that constitutional values and principles guide courts, albeit indirectly, in the interpretation of legislation and the development of the common law or customary law. At this level, these values and principles perform a secondary role, but they still inform the interpretive or analytical processes of the courts.

Apart from serving as an introduction to constitutional values and principles law and the manner in which they are relevant to the enforcement of fundamental rights, chapter 3 also explores the nexus between fundamental human rights and the so-called national objectives. It is shown that a proper engagement with the applicable provisions tends to suggest the existence of a symbiotic relationship between fundamental human rights proper and national objectives that are not strictly enforceable. The relevant constitutional provisions – particularly sections 8(2) and 46(1)(d) of the Constitution – appear to imply that regard must be had to the national objectives when interpreting the fundamental rights or freedoms in the Declaration of Rights. Furthermore, chapter 3 also investigates the relationship between

fundamental rights and the values that underlie a democratic society based on human dignity, justice, equality and freedom. While the Constitution does not expressly govern this relationship, the interpretation and limitation clauses make constant reference to values and imply that they are an important consideration in constitutional adjudication.

More importantly, chapter 3 introduces the Declaration of Rights as an important part of the Constitution, an epitome of the constitutional revolution that took place during the final years of the inclusive government. The provisions of the Declaration of Rights are meant to facilitate social and economic transformation and to ensure that the state rescues poor citizens from poverty, degradation and marginalisation. Apart from largely grounding the Constitution's transformative vision, the Declaration of Rights codifies monumental milestones that range from the indivisibility and interconnectedness of human rights; the protection of social and economic rights; the liberalisation of *locus standi*; the horizontal application of the Declaration of Rights and the demise of the public-private divide; substantive equality and the positive duty to address the injustices of the past; and the protection of the rights of vulnerable groups. Together, these monumental milestones make the Declaration of Rights an epitome of Zimbabwe's constitutional revolution.

In ***chapter 4***, Admark Moyo explores the interaction between international law and national law, from the standpoint of the constitutional provisions governing this interaction. The chapter starts by unpacking the foundational tensions between the doctrines of monism and dualism, including the manner in which these doctrines have influenced the two theories – incorporation and transformation – that continue to shape the manner in which international human rights law is applied in domestic courts. Further, the chapter analyses the different ways in which international law influences the outcome of cases at the domestic level. This is achieved through domestic provisions that require courts to take into account international law that is binding on Zimbabwe; the principle of consistent interpretation; and the rise of 'worldly' judges who 'embrace' the obligation to apply international law, sometimes with limited or no awareness of what this obligation entails. Further, the chapter explores the ways in which the Constitution anticipates conflicts between domestic law and international law to be resolved and fully explains the ambit of the applicable constitutional provisions. This inquiry is generated by the fact that the Constitution treats different types of international law differently with regards to their legal position in the realm of domestic law.

In ***chapter 5***, Nkosana Maphosa provides a synopsis, examines the utility, breadth and pitfalls of section 46(1)(e) of the Constitution in an open and just democratic society founded on values such as dignity, equality, freedom and justice. Accordingly, chapter 6 examines the contribution and discontents of foreign law in constitutional interpretation, especially of the Declaration of Rights. Cast against a burgeoning constitutional framework, both foreign and comparative law possesses enormous interpretive value, and could therefore engender better constitutional rights protections. Arguments for the practical contributions of foreign law abroad are emphasised in the scholarship and are also indicated in the Constitution's text. By virtue of section 46 of the 2013 Constitution, courts have discretion to apply foreign

law. This provision creates a tremendous window of opportunity to amplify constitutional meaning and contemporaneously bolster the protection of fundamental human rights and freedoms. The emerging body of constitutional jurisprudence indicates that the apex Court has relied extensively on foreign decisions, particularly from South Africa, Canada and India, to develop its own jurisprudence. Although this makes sense given the embryonic nature of our constitutional system, the approach of the Court nonetheless calls for evaluation.

Chapter 5 illuminates the foundations and role of foreign law in constitutional interpretation and provides a framework for further legal examination. Importantly, it creates a useful epoch to evaluate the 'good' and the 'bad' of foreign law in constitutional interpretation. Also, the chapter discusses the topic under the general guise of constitutional borrowing or transplantation. Thus, it emphasises the point that the application of foreign precedent should generally be qualified given differences in culture, history, ideology, economy, politics and many other factors. Importantly, it deploys selected case studies to demonstrate that courts seem to apply foreign law as if it is binding at the domestic level notwithstanding its discretionary nuance envisaged in the Constitution. The main argument is that the Constitutional Court should consider developing canons on the application of foreign decisions. Lastly, the chapter reiterates the importance of evaluating some of the troublesome uses of foreign law such as aggression.

In ***chapter 6***, Valantine Mutatu unpacks the concept of limitations of rights under the Zimbabwean Constitution and distinguishes between internal and external limitations. Limitations are internal when they are contained in the very provision that protects the right. They are often characterised by the use of the words 'as prescribed by the law', 'arbitrarily or without just cause', 'in accordance with the law', 'subject to any other provisions of this Constitution', 'progressive realisation within available resources' and many more. In the realm of socio-economic rights, internal limitations are often manifested by the textual claim that these rights are to be realised 'progressively' and 'within available resources'. These claw back clauses determine how far the interpretation and application of a particular right can go. External limitations occur when rights are limited or restricted by means of provisions that fall outside of the 'right enabling clause'. As seen in section 86(2) of the Constitution, external limitations are usually sheltered under the roof of a general limitation clause that provides that all the rights protected in a particular instrument or Constitution can be limited only in terms of a law of general application. This means that the law must be sufficiently clear and precise that those affected by it can ascertain the extent of their rights and obligations; must be publicised so that it is known and must apply to the generality of the population, instead of a targeted person or group.

In addition, the chapter emphasises that the limitation of rights should be fair, necessary, reasonable and justifiable in an open and democratic society based on a range of values. It broadly unpacks what these constitutional adjectives mean and discusses the factors that should be considered in determining whether a limitation is fair, necessary, reasonable and justifiable in an open and democratic society.

These factors include the nature of the right or freedom concerned, the purpose of the limitation; the nature and extent of the limitation; the relationship between the limitation and its purpose; the need to ensure that the enjoyment of rights and freedom by any person does not prejudice the rights and freedom of others; and the availability of less restrictive means to achieve the purpose of the limitation. Ultimately, these factors call for a proportionality enquiry or value judgment that balances the legitimate government purpose sought to be achieved and the means used to achieve it. In determining the proportionality between the harm done by the infringing law and the benefits thereof, a court weighs up competing values and interests. In this exercise, the court must determine whether the means used by the state to limit a right or freedom are the least restrictive for the achievement of the legitimate objective being pursued. Accordingly, it is justifiable for the state to limit a right if there is no risk of direct, serious and proximate harm to compelling interests such as national defence or security, public safety, public morality, public order, public health, regional or town planning, or the general public interest.

In ***chapter 7***, Rosalie Katsande and Tariro Tandi navigate the legal landscape for the promotion of gender equality and women's rights in Zimbabwe. They argue that the adoption of the 2013 Zimbabwean Constitution heralded the dawn of a new era with regards to gender equality. This claim draws support from the 'new' Constitution which clearly espouses values and principles of gender equality in a manner that signals a departure from the retrogressive provisions of the Lancaster House Constitution that allowed discrimination in areas governed by personal law. One of the key values clearly stipulated is that the Constitution is the supreme law of the land and any law that is inconsistent with it is void to the extent of the inconsistency. This is referred to as trumping sense constitutional supremacy, meaning that the Constitution takes precedence over all other laws, customs and practices that perpetuate the marginalisation of women. Chapter 7 also explores the manner in which women's rights are secured in Zimbabwe and draws upon legislation at local, regional and international level. The chapter is located within equality and non-discrimination and the broader human rights discourses. It outlines the major areas that are significant to the enjoyment by women of their rights. The critical areas of the chapter include an analysis of the foundations of gender equality and non-discrimination, the nexus between gender equality, women's rights and feminism and a comparative analysis of gender equality provisions under the old and the current Constitution. In doing so, the chapter examines the right to equality and non-discrimination as important principles that should be observed in a society that strives for the promotion and protection of human rights.

In ***chapter 8***, Christina Peta and Admark Moyo discuss the legal status of the rights of persons with disabilities (PWDs) in Zimbabwe. To begin with, the authors explore the broad social and historical context within which the disability discourse should take place. This includes an analysis of the historical development of the rights of PWDs both at the international plane and in the Zimbabwean context. The chapter is located within a conceptual framework of the intersectional model, as well as the other key models of disability (charity, medical, social and human rights models). The authors argue that intersectionality is important because it helps us to

understand that disability does not function in isolation, but is always intimately interconnected with other identity markers such as culture, age, sexuality and gender to frame the experiences of PWDs. It is shown that intersectionality addresses the issue of difference, and that in domesticating international human rights conventions, there is need to pay close attention to all relevant facets of the local context.

In the human rights discourse, models of disability are important because they represent structures that assist us to explain the ways in which public thinking and responses to disability are framed as well as to assess the pertinence of such responses. Thus, the authors also discuss the charity, medical, social and human rights models of disability and thereafter discuss the subject of intersectionality. In addition, the authors discuss measures that need to be taken by the state to promote the rights of PWDs in relation to the provisions of section 83 of the Constitution, albeit referencing the Convention on the Rights of Persons with Disabilities (CRPD) at a broader level. Section 83 of the Constitution articulates the commitment of the state to addressing some of the major barriers that result in PWDs not being able to be self-reliant, to live with their families, to be protected from exploitation and abuse, to have access to medical treatment and to enjoy access to quality education.

In ***chapter 9***, Admark Moyo discusses the constitutional protection of children's rights in Zimbabwe. Historically, the Lancaster House Constitution did not help at all in efforts made towards dismantling the idea that children are merely objects of social and parental control. This is because it shielded oppressive customary laws from constitutional provisions designed to advance equality and therefore ensured the ongoing observance of traditional norms that violate children's rights. The new Constitution – adopted in 2013 – calls for a change of perspective as it portrays children as ends entitled to protection, provision and participation rights. It also constitutionalises a number of children's socio-economic rights. More importantly, it is clear that the constitutionalisation of children's rights is a direct response to legal developments at the international level. Whilst the exact scope and meaning of the rights entrenched in the new Constitution has not been fully, if at all, explored, it is beyond doubt that these rights have significant implications for the protection, participation and autonomy of children. Due to space constraints, sporadic reference is made to equivalent provisions of international and regional instruments entrenching children's rights to ensure that readers have full knowledge of positive developments at the international and domestic levels.

Chapter 9 is divided into several broad sections and begins by identifying and discussing various categories of children's rights in national and international law. These categories include protection, provision and participation rights. It then proceeds to identify participation and protection as dominant or overarching themes in children's rights and demonstrates that the concept of the evolving capacities of the child can be used to reconcile these seemingly oppositional themes. It is demonstrated that the degree to which every child is entitled to protection or autonomy largely rests on the evolving capacities of the child. The most substantive section of chapter 9 describes in great detail the scope and legal content of each of the rights enumerated in section 81(1)–(3) of the Constitution. All the rights of the child set out in section 81(1)–(3) of the Constitution are examined in the order in

which they appear in the Constitution. In doing so, the chapter analyses whether the manner in which the courts have interpreted children's rights is consistent with the letter and spirit of the relevant constitutional provisions.

Innocent Maja analyses the constitutional framework for the protection of language rights of linguistic minorities in Zimbabwe in ***chapter 10*** of this textbook. He underlines the significance of language rights by observing that language reflects one's cultural identity and constitutes a means of the transfer of knowledge from one generation to the next. Language rights also prevent discrimination against linguistic minorities and curb linguistic assimilation or loss. Given that most linguistic minorities are numerically inferior, politically non-dominant, marginalised and poor, these vulnerable groups need the 'hand' of the law to protect their language rights in a functioning multilingual democracy. Finally, the constitutional protection of language rights contributes towards the preservation of the identity of linguistic minorities and, if supported by concrete measures, makes it possible for linguistic minorities to communicate effectively with government authorities.

At international law, argues the author, the protection of language rights takes many forms. First, the prohibition of language based discrimination outlaws language preferences that unreasonably or arbitrarily exclude individuals from taking part in certain public activities. States should be guided by the principle of proportionality in designing their language legislation, policies and practices. Proportionality demands that states be guided by principles of inclusion and reasonableness in their language preferences. However, substantive equality also demands that states undertake affirmative action to correct historical disadvantage and discrimination on the basis of language. The second premise casts language as a marker of the identity of linguistic minorities as communities and, depending on a range of factors, the right to use one's language in the private and public spheres of activity. At the domestic level, the language rights of linguistic minorities are embodied in the founding values and principles of the Constitution. The Constitution entrenches, among others, the principles of accommodation of cultural diversity (of which language is an intrinsic part), fundamental human rights and freedoms, and equality. It also explicitly obliges the state to consider diversity of languages in fostering national unity and recognises the rights of linguistic groups as a foundation of good governance.

More importantly, chapter 10 argues that the conferral of 'official language' status on 16 languages – at least 13 of which are used by ethnic and linguistic minorities – is an important step in the right direction. Further, section 6(3) of the Constitution provides that "agencies of government at every level must (a) ensure that all officially recognised languages are treated equitably; and (b) take into account the language preferences of people affected by governmental measures or communications". The author argues that this provision confirms the language history of Zimbabwe in terms of which there has never been equal treatment of official and non-official languages. It also allows the state to adopt affirmative action to promote the use of historically marginalised languages. This interpretation is supported by section 6(4) of the Constitution which binds the state to promote and advance the use of all languages used in the country, including sign language, and to create conditions for the development of those languages. In addition, the Constitution protects language

related rights such as equality and non-discrimination in the context of language use; freedom of expression (which is largely through language use); the right to use one's language and to participate in the cultural life of one's choice; the right of an accused person to have trial proceedings interpreted into a language that they understand; and language rights in the context of education.

Regardless of these transformative provisions, the challenge is that the Constitution neither expressly mentions anything about the use of the 16 languages in the business of government nor establishes any criteria for the determination of how official languages ought to be used in the country. In addition, the Constitution merely obliges the state to promote the use of all languages, not to actually use all official languages. On the one hand, the duty to promote is very permissive and confers on the political organs of the state wide discretion to decide when, how and to what extent to promote particular languages. On the other hand, the duty to use an official language is peremptory and leaves no room for politicians to delay the use of the language concerned. On the whole, while there exists constitutional protection of the rights of linguistic minorities, gaps still exist in the implementation of the relevant provisions of the Constitution. The equitable use of historically marginalised languages remains a pipe dream.

Penned by Khulekani Moyo, ***chapter 11*** discusses a wide range of socio-economic rights as provided for in the Constitution. These include the rights to freedom from arbitrary eviction,[1] access to health care,[2] sufficient food, clean water[3] and education.[4] The Declaration of Rights also protects select socio-economic rights of vulnerable groups such as children,[5] women,[6] the elderly,[7] persons with disabilities[8] and veterans of the 1970s liberation struggle.[9] The author does not attempt to explain in detail the scope and content of all these rights but discusses general themes and approaches to the enforcement of socio-economic in the Zimbabwean context. The chapter is divided into three parts. The first part provides an overview of the socio-economic rights protected in sections 74 to 84 of the Constitution. Second, the chapter discusses and evaluates the role of international and comparative law as interpretive guides in giving meaning to the socio-economic rights protected in the Declaration of Rights. This is followed by a discussion of the institutional competence concerns and their impact in the judicial enforcement of socio-economic rights.

In addition, chapter 11 focuses on the horizontal application of the Declaration of Rights, especially with regard to its meaning and implications for the enforcement of socio-economic rights. The fourth section analyses the models of reviewing the

[1] Section 74 of the Constitution.
[2] Section 76 of the Constitution.
[3] Section 77 of the Constitution.
[4] Section 75 of the Constitution.
[5] Section 81 of the Constitution.
[6] Section 80 of the Constitution.
[7] Section 82 of the Constitution.
[8] Section 83 of the Constitution.
[9] Section 84 of the Constitution.

positive duties imposed by socio-economic rights, namely the reasonableness approach and the minimum core approaches. Further, the chapter also explores the role of concepts impacting the enforcement of socio-economic rights, namely the 'progressive realisation' and 'availability of resources' and a recommendation on the proper interpretation of such concepts in enforcing socio-economic rights. It also evaluates the framework provided for under the Constitution for remedying human rights infringements and the role of the courts in crafting appropriate remedies.

In ***chapter 12***, James Tsabora builds on the general discussion in the previous chapter and makes a critical analysis of the scope of the environmental rights clause in Zimbabwe's 2013 Constitution. First, the author begins the analysis by noting that environmental rights and duties are constitutionally extended to 'everyone', meaning that these rights can be enjoyed by natural or juristic persons. Further, environmental rights require state and non-state actors not to create conditions or circumstances that would negate other persons' enjoyment of the same rights. Accordingly, these rights address not only the relationship between the state and a person (vertical relationship), but also the relationship between private persons (horizontal application) and prohibits private actions that adversely impact on other persons' environmental rights.

Second, chapter 12 identifies and discusses five constitutive elements of environmental rights. These include the prevention of pollution; intra-generational equity; sustainable development; the principle of wise use of natural resources; and, finally, the progressive realisation of environmental rights. These norms and principles guide the development of the content of laws at all levels of government and are largely reflected in the legislation giving effect to the environmental rights clause. Clearly, these critical norms or principles are specifically mentioned for purposes of guiding the content and outputs of environmental laws. In unpacking the scope and relevance of these principles, the author also demonstrates linkages between the norms embedded in the constitutional environmental rights clause and the standards in the framework legislation, the Environmental Management Act (EMA). The author emphasises that the EMA, as sectoral specific legislation, comprehensively expands the scope of environmental rights by, among others, entrenching public participation, sustainable management of resources, sustainable development, pollution prevention, intra-generational equity and access to environmental information.

There are a number of key takeaways from chapter 12 of this anthology. To begin with, it recognises the importance of conducting business in a manner that protects the rights of present and future generations, generally known as the principle of intergenerational equity. This ensures that future generations are not exposed to extreme risks of environmental harm. In addition, it demonstrates that the Constitution codifies central normative concepts to guide the formulation and content of national environmental conservation framework legislation. Framework legislation should achieve prevention of pollution and ecological degradation; promote conservation; secure ecologically sustainable development; and secure equitable use of natural resources whilst promoting economic and social development. To be valid, environmental laws and regulations must incorporate these important norms.

Before closing, the author discusses in some bit of detail the circumstances under which environmental rights may be limited and the constitutional provisions regulating the limitations exercise.

Globally, environmental degradation disproportionately affects vulnerable groups, thereby causing short, long term and potentially irreversible impacts. In ***chapter 13***, Rongedzayi Fambasayi, Josephine Chiname and Rejoice Katsidzira argue that environmental degradation is a human rights crisis predominantly affecting children. Accordingly, all actions to address its impacts on children should be viewed from a child rights perspective. Chapter 13 also explores whether and, if so, how the Zimbabwean environmental legal and policy frameworks, as governance instruments, conform to normative child rights standards and protect children's rights as prescribed by international law. The analysis is carried out against the backdrop of international and African regional law and constitutional imperatives to respect, promote, protect and fulfil children's rights, particularly in the context of environmental governance.

The central hypothesis of chapter 13 is that integrating a child rights perspective into environmental management could better inform and guide environmental and climate change responses, thereby enhancing the respect, protection, promotion and fulfilment of children's rights, specifically the right to an environment that is not harmful to health. The chapter observes that environmental governance institutions such as the Environmental Management Agency and processes such as Environmental Impacts Assessments are not sensitive to children's rights, and few or no mechanisms exist to ensure children's participation in environmental governance. It argues that the constitutionalisation of children's rights in Zimbabwean presents children with a powerful tool to require the government to take precautionary measures to ensure respect for and protection of children's rights from environmental harm and climate change.

James Tsabora and Mutuso Dhliwayo examine, in ***chapter 14***, the interaction between indigenous land tenure systems and other competing claims from the side of foreign investment. They argue that the human rights framework created by the Constitution has important implications for the security of rights of both domestic and foreign investors interested in conducting business in the country. Similarly, the constitutional regime also impacts on the security of the land rights of indigenous communities held under customary law systems of tenure in Zimbabwe, particularly in view of the manner in which such rights are usually suppressed in favour of other investment projects. From a contemporary economic perspective, the legal protection of property and business interests has been hailed as a critical component in attracting investment and instilling business confidence in a country's economic system. Against this background, the authors interrogate the essence and substance of the constitutional clauses governing property rights of foreign investment and the rights of indigenous communities. The ultimate aim is to explore whether the constitutional framework reconciles the conflicting land rights and interests of foreign investment and indigenous communities.

Apart from the introduction and conclusion, chapter 14 is divided into seven sections of which the first deals with the constitutional regulation of property rights. The second section addresses issues relating to the land rights and interests of indigenous communities in areas that usually host large scale investment projects. Large scale investments occupy and make use of huge tracts of land to set up physical and technological infrastructure for operational purposes. In the third section, the authors demonstrate that the mere use, possession or occupation of land without freehold title to such land can grant the user, possessor or occupant a legally recognisable and enforceable right or interest in land. The fourth section briefly discusses the constitutional regime regulating compensation for compulsory acquisitions of property, including land, and the fifth section analyses the legal regime governing compensation for compulsory acquisition property under the Mines and Minerals Act. Using the diamond mining consolidation case as an entry point, the sixth section discusses the protection of mining investments from seizure by the state. The seventh section identifies and briefly explains the main findings of the research and, in some instances, proposes the way forward.

The authors argue that in the dust created by the rush to attract foreign investment most African governments deliberately ignore the security of land tenure of indigenous communities that host such investments. Large investment projects in sectors such as mining, road and dam construction and other infrastructure developmental projects have huge impacts on the land rights and interests of indigenous communities. Investment projects are therefore known to bring not only social, economic and environmental cost to host communities but also introduce land tenure insecurity in such areas. As such, one of the greatest issues generated by the presence of foreign investment projects in host communities directly relates to the insecurity of land rights of indigenous community groups. Ordinarily customary based tenure systems provide holders with a very weak level of protection of land rights and interests. In contrast, the investment licenses and special grants held by mostly foreign investment are strongly backed by legislative provisions that trump, in most instances, rights granted under customary law. African governments have struggled to strike the requisite, albeit delicate, equilibrium between rights of indigenous communities hosting foreign investment projects and the rights of foreign investors.

In ***chapter 15***, James Tsabora unpacks the relationship between, on the one hand, the modern constitutional state and, on the other, traditional political systems and institutions. The author portrays the 2013 Constitution of Zimbabwe as a compromise between traditionalism and the new constitutionalism. The Constitution establishes the traditional institutional governance system under Chapter 15 of the Constitution, which in turn engenders opportunities for antagonism and adversity. For this reason, the nexus between the republican state and the governance system created by Chapter 15 of the Constitution demands scrutiny. The fact that 17 of the 18 chapters of the 2013 Constitution are reserved for the modern state system, with only one dedicated to traditional political institutions, seems to suggest the superiority of the modern state system. The major assumption that underpins chapter 15 is that the structural relationship between the modern state system and

the traditional political institutional system is shaped and influenced by the need to align the interests of traditional institutions with the national constitutional value system.

Apart from the introduction and conclusion, chapter 15 is divided into three sections. To begin with, the chapter explores the pre-colonial, colonial and post-independent traditional political governance system as an indigenous value system that existed prior to, during and after colonialism. The main argument sustained in this part is that the interactive relationship between the modern state and traditional institutions is born out of Zimbabwe's political and social history, and is a necessary part of modern governance. In the second section, the author analyses the place and role of the traditional institutions in the 2013 Constitution, and the extent that these institutions interact, relate and compete with those of the modern state system. This part thus evaluates the contribution of traditional political structures and customary legal regimes to the functions and responsibilities of modern government in general and the arms of the state in particular. The third and final part is an overview of the main findings from the analyses in the three parts. This is followed by a conclusion on the general implications of the relationship between the traditional political governance system and republican system of state and government envisaged in the Constitution.

In ***chapter 16***, Admark Moyo explores the relationship between the provisions governing standing and access to court, on the one hand, and the enjoyment of human rights and fundamental freedoms, on the other. There has been a significant paradigm shift, especially in light of the broad provisions of section 85(1) of the Constitution, towards the liberalisation of *locus standi* in Zimbabwe. The liberalisation of standing allows a wide range of persons who can demonstrate an infringement of their rights or those of others to approach the courts for relief. It is intended to enhance access to justice by individuals and groups without the knowledge and resources to vindicate their rights in the courts. To this end, the drafters of the Declaration of Rights acknowledged that restrictive standing provisions defeat the idea behind conferring entitlements upon the poor and the marginalised. The majority of the people intended to benefit from the state's social provisioning programmes often do not have the resources, the knowledge and the legal space to drag powerful states, transnational corporations or rich individuals to court in the event that a violation of their rights occurs.

Chapter 16 is composed of seven substantive sections. It begins by discussing, in some detail, the meaning of access to justice and delimits the reach of the research by confining the term to mean access to courts as the primary dispute resolution forum. This entails an inquiry into the scope of constitutional provisions governing access to courts and the right to a fair hearing. It is shown that the right of access to court is an essential ingredient of access to justice and human rights in modern democracies. In the second section, the chapter briefly explains the scope of the standing provisions of the Lancaster House Constitution and the extent to which they limited access to justice and the rule of law. The third section critically analyses the scope of section 85 of the Constitution, including its limitations, strengths and implications for access to justice in Zimbabwe. The author argues that the

liberalisation of standing, particularly the constitutionalisation of public interest litigation, represents a major shift from restrictive standing rules and evidences an intention to widen the pool of citizens who exercise the right of access to court in this country.

The fourth section is devoted to a discussion of the dirty hands doctrine and the positive changes brought by the current Constitution. In the sixth section, the chapter describes the constitutional provisions regulating the formulation of rules of all domestic courts. These provisions lay out principles which should guide the formulation and content of all court rules. In this section, the author discusses the extent to which the applicable principles promote access to justice, the rule of law and the enjoyment of human rights in Zimbabwe. Referral by lower courts of constitutional issues, which arise in the course of litigation, to the Constitutional Court is discussed in the sixth part of the chapter. It is argued that the conditions governing referral of constitutional issues that arise during court proceedings are stringent and are seemingly inconsistent with the spirit and purpose behind the broad standing provisions entrenched in the Constitution. This is particularly so because whether or not the Court hearing the matter gives a litigant leave to take up the matter with the Constitutional Court, the litigant ordinarily has the right of direct access to the Constitutional Court.

Intersections and overlaps between standing, access to justice and human rights are explored in the seventh part of the chapter. The author argues that a liberal approach to standing requires courts to place substantial value on the merits of the claim and underlines the centrality of the rule of law by ensuring that unlawful decisions are challenged by ordinary citizens and straightened by the courts. When a court refuses to entertain a matter on the basis that the petitioner does not have standing in terms of the applicable rules, the same court is essentially both neglecting its duty to assess the validity or constitutionality of the impugned conduct or legislation and undermining the rule of law.

Christopher Munguma analyses, in ***chapter 17,*** the role of the Zimbabwe Human Rights Commission (ZHRC) in the protection, promotion and enforcement of fundamental human rights and freedoms. Human rights commissions are important entities in the democratic space of many countries. They play the role of a watchdog, educator and at times they also have powers of enforcement. Such commissions can take up cases, investigate them, resolve complaints and refer some cases to courts for judicial pronouncement. Chapter 17 starts with a brief discussion of the history of the ZHRC, with particular focus on the developments that led to its formation. It proceeds to identify and explain the international normative framework and standards governing national human rights institutions under international law, with a view to establishing whether or not the ZHRC complies with these standards. After this, the chapter analyses the legal framework establishing Ghana's Commission of Human Rights and Administrative Justice and points out some of the lessons to be derived by ZHRC from the Ghanaian experience. Chapter 17 also analyses the structure and functions of the ZHRC. This part of the chapter discusses the provisions governing the independence of the ZHRC (including financial independence); security of tenure for commissioners; and accessibility,

accountability and mandate of the ZHRC. The discussion takes a comparative stance as the author investigates whether or not the relevant provisions comply with the Paris Principles as the main benchmarks at the international level. This is followed by an evaluation of the achievements of the ZHRC since its establishment.

In ***chapter 18***, Tarisai Mutangi gives a general overview of the African human rights system. The author begins by noting that Africa continues to deal with insurmountable human rights violations, which call for a robust system of human rights protection that can adequately respond to these challenges across the continent. It is against this background that one of the aims of the chapter is to review the African human rights system with a strong focus on demonstrating the legislative and institutional framework for the protection of human rights on the continent. The chapter begins with an outline of the history of the African human rights system, and moves on to examine the legislative framework of the system – with a focus on the African Charter on Human and Peoples' Rights, the African Charter on the Rights and Welfare of the Child and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women (Maputo Protocol). The discussion of the most important treaties is followed by a comprehensive examination of the soft law principles contained in non-binding documents.

The final part of the chapter focuses on the institutional frameworks that make it possible to interpret and expand on the binding treaties (frameworks) and principles contained in the non-treaty documents. The African Commission on Human and Peoples' Rights (the African Commission) and the African Court on Human and Peoples' Rights (the African Court) are mandated to oversee the implementation of the African Charter and the Maputo Protocol. To this end, the chapter discusses some of the important decisions that have been made by these institutions with a view to analysing whether or not there is progress being witnessed on the ground. Particular focus is also placed on the importance of complementarity between the African Commission and the African Court. Apart from the exposition of the developments that have taken place in the African Commission and the African Court, the chapter also analyses the roles of the African rapporteurs, working groups and committees in the enforcement of human rights.

Authored by Admark Moyo, ***chapter 19*** concludes the discussion by raising some of the key issues set to shape the development of constitutional and human rights law in Zimbabwe. It is forwarding looking and seeks to highlight key opportunities and challenges in the enjoyment of human rights in the future.

2 Basic Tenets of Zimbabwe's New Constitutional Order

Admark Moyo*

1 Introduction

This chapter begins with detailed discussions of the basic principles of constitutional law that are relevant to a fuller understanding of the provisions of the new constitutional dispensation. These include the principles of the supremacy of the Constitution, the rule of law, democracy and accountability, the separation of powers and checks and balances. The discussion of the separation of powers and the independence of the judiciary takes place against the backdrop of the centrality of impartial courts in the enforcement of the Constitution and the enjoyment of fundamental rights and freedoms by the citizenry. Arguably, the provisions of the Declaration of Rights can only be properly understood as an integral part of the Constitution as a whole, hence the need for a detailed explanation of the basic tenets of the new constitutional order. Both the Declaration of Rights and the entire Constitution are important ingredients of the new constitutional project of transforming Zimbabwean society as well as the country's social, political and economic systems and institutions. To be logical, holistic and informed, an analysis of the provisions of the Declaration of Rights must take place within the broader constitutional context.

2 The Supremacy of the Constitution

Zimbabwe law in all its forms is now founded in the value of the supremacy of the Constitution. What does this mean for Zimbabwean courts and other interpreters of the Constitution? In simple terms, this means that whenever a legal norm or rule of decision which is established by the Constitution comes into practical conflict with a legal norm or rule of decision stipulated by every form of non-constitutional law, the norm that is contained in the Constitution is to be given precedence by anyone whose duty is to enforce the provisions of the Constitution. Accordingly, legal norms or rules of decision which are embodied in parliamentary legislation, subordinate legislation, judicial decisions, the common law and customary law are subordinate to the Constitution as the supreme law of the land. In the context of statutory interpretation, domestic courts should – in the event of a clash between constitutional and non-constitutional norms – ensure that the Constitution's norm or rule of decision supersedes non-constitutional norms or rules.

Before the achievement of political independence in 1980, the doctrine of parliamentary sovereignty dominated discussions on constitutional law. In terms of this doctrine, Parliament has the authority to make any law it wishes to, and no person or institution, including the courts, may challenge the laws made by

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Parliament. This created room for Parliament to be a tyrant unto itself and to legislate unpopular or repressive laws with impunity. For purposes of our discussion on fundamental rights and freedoms, it is important to note that the courts had no power to review the conduct of and the laws made by Parliament. The doctrine of the supremacy of the Constitution stands in sharp contrast to the doctrine of parliamentary sovereignty in that the former is premised on the role of the courts in reviewing the constitutionality of legislation or the conduct of the political organs of the state. If it is the Constitution that is supreme and not Parliament, then the conduct of the later – including the laws it makes – are subject to the Constitution. Accordingly, it is possible for courts to review parliamentary legislation on substantive grounds and to declare it to be 'invalid' because it violates fundamental rights and freedoms.

The Constitution is recognised as the basic legal norm that is above all others.[1] Internal evidence of such supremacy abound. For instance, the preambular provisions partly provide that "[w]e the people of Zimbabwe … hereby make this Constitution and commit ourselves to it as the fundamental law of our beloved land".[2] From the onset, the Constitution sets itself out as the fundamental law to which all other laws must be aligned. In *Mudzuru and Another v. Minister of Justice, Legal & Parliamentary Affairs & Others,*[3] the Court commented on the nexus between the supremacy clause and the court's powers to issue a declaration of constitutional invalidity.[4] It held as follows:

> The rule of invalidity of a law or conduct is derived from the fundamental principle of the supremacy of the Constitution … A court does not create constitutional invalidity. It merely declares the position in law at the time the constitutional provision came into force or at the time the impugned statute was enacted. The principle of constitutionalism requires that all laws be consistent with the fundamental law to enjoy the legitimacy necessary for force and effect. It is for this Court to give a final and binding decision on the validity of legislation.[5]

Of colossal significance is the court's observation that not even itself is above the Constitution and that constitutionalism mandates that all laws be subject to and compliant with the supreme law. More compellingly, the court portrayed itself as a 'servant' of sorts, whose duty is to merely declare the position of the law and not to 'create' constitutional invalidity. As such, a law does not become constitutionally invalid when the court so declares, but instead, it becomes invalid the moment it, or the supreme law, is enacted.[6] The Court's is a confirmatory role where all it does is confirm that a law is inconsistent with the Constitution.

Apart from the *Mudzuru* decision, the Constitutional Court of Zimbabwe has also upheld the principle of constitutional supremacy in other matters. These include *Gonese & Another v. President of Zimbabwe & Others,*[7] where the Court denied the

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[1] *See Makani & Others v. Arundel School & Others* CCZ 7/16, p. 5.
[2] *See* Preamble to the Constitution.
[3] CCZ 12/2014.
[4] *See* section 176(5)(a) of the Constitution.
[5] *See Mudzuru and Another v. Minister of Justice*, p. 48.
[6] For comparative purposes, *see Ferreira v. Levin,* para 1006I-J.
[7] CCZ 10/2018.

respondents' contention that the applicants had tacitly waived their right of audience with the court. The Court reasoned that waiver of such a right could not be easily assumed especially considering that it was a constitutional matter, and the supremacy of the Constitution entailed that the applicants must be heard in the circumstances.[8] Similarly, in *Denhere v. Denhere & Another*,[9] where the applicant was contesting the property distribution portion of a High Court order of divorce, the Court had the following to say:

> The third factor is that *constitutional provisions are binding and the Court ought to be guided accordingly. Section 2 of the Constitution makes the Constitution the supreme law of the land.* In this regard, s 3 of the Constitution provides for the values and principles which should guide all institutions and persons in Zimbabwe. Section 85(1) ought, therefore, to be understood in the context of s 3 of the Constitution. The most relevant principles to the present matter are the supremacy of the Constitution, the rule of law, and fundamental human rights and freedoms. These principles are central to the approach that courts ought to take when *adjudicating all matters*.[10]

Overall, the principle of constitutional supremacy can be generally understood to imply not only that all other laws must be subject to constitutional provisions, but also that the courts, as servants or guardians of the Constitution, are obliged to apply and interpret all laws in a manner that is consistent with it and neither creates nor deletes any rights or obligations entrenched therein.

In the Zimbabwean context, there is need to differentiate between the supremacy of the Constitution as a value and as a rule. Section 3(1)(c) of the Constitution entrenches the supremacy of the Constitution as a value, and, technically, the doctrine of constitutional supremacy may not directly be relied upon when making decisions about the constitutional validity of legislation and other sources of law. Values do not create self-standing and enforceable rights and obligations.[11] Reading section 3(1)(c) – constitutional supremacy as a value – to mean the same thing with section 2(1) – constitutional supremacy as a rule – would not only create the problem of redundancy but also suggest that values are directly enforceable in our courts.

Trumping sense constitutional supremacy, that is the supremacy of the Constitution as a rule, is mainly protected in section 2(1) of the Constitution. This section provides that "[t]his Constitution is the supreme law of Zimbabwe and any law, practice, custom or conduct inconsistent with it is invalid to the extent of its inconsistency". In the context of women's rights, section 81(3) of the Constitution also provides that "[a]ll laws, customs, traditions and cultural practices that infringe the rights of women conferred by this Constitution are void to the extent of the infringement". Describing the powers of the courts and the remedies they may grant to aggrieved litigants, the Constitution stipulates that "[w]hen deciding a constitutional matter within its jurisdiction a court may declare that any law or conduct that is inconsistent with the

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[8] *Gonese v. President of Zimbabwe*, p. 13.
[9] Judgment no// CCZ 9/19.
[10] *Denhere v. Denhere & Another*,at pp. 10-11.
[11] *See Minister of Home Affairs v. National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO) and Others*, 2005 (3) SA 280 (CC) para. 21.

Constitution is invalid to the extent of the inconsistency".[12] These provisions codify trumping sense constitutional supremacy, create discrete legal rights and obligations for litigants and can be directly relied upon by persons seeking remedies for violations of their fundamental rights and freedoms. Trumping sense constitutional supremacy or the supremacy of the Constitution as a principle implies that the Constitution trumps any other source of law in the event of a direct conflict between the law in question and a constitutional provision.

If constitutional supremacy as a value meant the same thing as constitutional supremacy as a rule, the new Constitution's official supremacy clause, section 2(1), would not have been instantaneously followed by the provisions entrenching constitutional supremacy as a value, section 3(1)(c) of the Constitution. Section 2(1) and (2) of the Constitution, which is entitled "Supremacy of the Constitution", provides for an enforceable legal norm or rule of decision. In Professor Michelman's words, these provisions "lay down constitutional supremacy as a rule for the construction of a determinate hierarchical relation among legal norms emanating from various recognised sources of law … [W]e do not speak of values when rules of practice are what we have in mind. Values, rather, serve as reasons for rules, conversely, rules (if they are any good) serve to implement values."[13] Founding values give an outline, in broad terms, of the desired condition of Zimbabwean society while rules or principles give flesh to the values that are entrenched in the Constitution.

There is no doubt that the current Constitution makes a complete break with Zimbabwe's colonial history and ushers in a new constitutional dispensation. The common law and customary law have largely been reconstituted and their validity depends on their consistency with the Constitution. Thus, both the common law and customary law are accepted as valid sources of law subject to the Constitution. The Constitution has introduced a new legal culture and is therefore a foundational premise of legal reasoning because it has pervasive normative effect. It has almost affected all branches of the law. More importantly, the Constitution is founded on values previously denied people by the state and the law. As a rule, the supremacy of the Constitution suggests that all other sources of law should be consistent with the value, principles and rights stipulated in the Constitution.

Given the evident absence of jurisprudence on the scope of the supremacy of the Constitution, it is imperative to consider how courts in other jurisdictions have interpreted the same concept, particularly in light of the fact that the Constitution confers on courts the discretion to consider foreign law.[14] To this end, the bulk of lessons can be derived from the rulings of the South African Constitutional Court, especially given that the Zimbabwean Constitution is largely a transplant of the South

[12] Section 175(6)(a) of the Constitution of Zimbabwe Amendment Act No. 20 of 2013 (hereafter 'the Constitution').
[13] F. Michelman, 'The Rule of Law, Legality and the Supremacy of the Constitution', in S. Woolman and M. Bishop (eds.), *Constitutional Law of South Africa,* 2nd edition (2014) p. 11-1, at p. 11-35. Professor Michelman makes these remarks in the context of the equivalent provisions of the South African Constitution.
[14] Section 46(1)(e) of the Constitution.

African Constitution. In *Pharmaceutical Manufacturers Association of South Africa: In re: ex parte President of the Republic of South Africa*,[15] the Constitutional Court of South Africa held as follows:

> There are not two systems of law, each dealing with the same subject matter, each having similar requirements, each operating in its own field with its own highest court. There is only one system of law. It is shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control.[16]

This approach speaks of a unitary legal system in which there is a hierarchy of laws that implies the submission of common law doctrines to Declaration of Rights inspection.[17] On the whole, the patriarchal aspects of customary law or the common law will gradually be displaced by the egalitarian values and rights entrenched in the Constitution. Section 2(1) provides that "this Constitution is the supreme law of Zimbabwe and any law, practice, custom or conduct inconsistent with it is invalid to the extent of the inconsistency". This provision indirectly sets out a hierarchy of laws, with the Constitution affirming its supremacy at the top of the hierarchy. Accordingly, the laws that were in force on the date the Constitution became operative remain valid and binding to the extent of their consistency with the Constitution.[18] The Constitution governs the validity of legislation and other legal rules embodied in other sources of law. This becomes clear when section 2(1) is read together with section 192 of the Constitution which proclaims that the law to be administered by the courts of Zimbabwe is the law that was in force on the effective date, as subsequently modified. These provisions suggest that the Constitution bears ultimate authority over the content and application of all laws.

The doctrine of the supremacy of the Constitution suggests that the Constitution reaches all corners of the legal system and influences the content of all branches of the law. This view has support from the idea that the Constitution applies both horizontally and vertically.[19] The vertical and horizontal application of the Declaration of Rights, and the fact that the Constitution imposes positive and negative obligations on state and non-state actors, suggests that no relationship or conduct is immune from constitutional control.[20] Thus, the relevant provisions have serious implications for the family, juristic persons and the state. It suggests that such family relationships as the parent-child relationship are subject to constitutional control.

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[15] 2000 (2) SA 674 (CC).
[16] Para. 44.
[17] *See* F. Michelman, 'The Bill of Rights, the Common Law and the Freedom-Friendly State', 58 *Miami Law Review* (2003–2004) p. 401, at p. 406.
[18] The problem though is what happens when the incompatible/inconsistent laws remain on the statute books and are still being used. Sometimes it is also important to read in constitutional amendments rather than invalidate laws which just need minimal correction. Arguably alignment has taken place, it is just that it is not as yet clearly articulated.
[19] *See* section 45(1)–(3) of the Constitution.
[20] Section 2(2) read with section 44 of the Constitution.

3 The Rule of Law

The rule of a law is provided for as one of the founding principles in the Constitution and has been construed as having both substantive and procedural connotations. Substantively, the rule of law entails that the state "[can only] subject the citizenry to publicly promulgated laws, that the state's legislative function be separate from the adjudicative function, and that no one within the polity be above the law."[21] This conception portrays the rule of law as a barricade against absolute power and arbitrariness. Under adjectival law, the rule of law provides that government functionaries may only exercise powers or perform functions beyond those conferred upon them by the law. The rule of law allows individuals to mount challenges against the laws or conduct of the state and the courts are clothed with jurisdiction to determine such claims in light of laws of general application.

In the broadest terms, the rule of law requires that the state only subject the citizenry to publicly promulgated laws that the state's legislative function be separate from the adjudicative function, and that no one within the polity be above the law. The inclusion of the rule of law as a founding value in the Zimbabwean Constitution demonstrates its importance in determining the validity of legislation or conduct of public functionaries.[22] The South African Constitution too provides that the rule of law informs the foundation of the democratic state.[23] This indicates how the rule of law has assumed a pre-eminent role in the current constitutional dispensation. This prominence is further evidenced by the manner in which courts have invoked the rule of law as a mechanism primed to limit, regulate as well as give more precise meaning to how government power is exercised. This position was emphasised by the South African Constitutional Court in the case of *Fedsure Life Insurance Ltd and Others v. Greater Johannesburg Metropolitan Council and Others,*[24] when it stated that:

> The rule of law – to the extent at least that it expresses this principle of legality – is generally understood to be a fundamental principle of constitutional law. It seems central to the conception of our constitutional order that the legislature and the executive in every sphere are constrained by the principle that they may exercise no power or perform no function beyond that conferred upon them by law.[25]

The rule of law is a dynamic concept which should be employed to safeguard and advance the will of the people and the political rights of the individual and to establish social, economic, educational and cultural conditions under which the individual may achieve their dignity and realise their legitimate aspirations in all countries, whether

[21] *Economic Freedom Fighters v. Speaker of the National Assembly and Other; Democratic Alliance v. Speaker of the National Assembly and Others* 2016 (3) SA 580 (CC).
[22] Section 3(1)(b) of the Constitution.
[23] Section 1(c) of the Constitution of the Republic of South Africa, Act 108 of 1996.
[24] 1999 (1) SA 374 (CC).
[25] At para. 56.

dependent or independent.[26] Dicey, who articulated the principle, argued that the rule of law meant three things:

i) Absolute supremacy of the law as opposed to influence of arbitrary power. This is in contra-distinction in any system as discretionary power is inevitable but there can only be limits of that discretionary.
ii) Equality before the law implying that no person is above the law and everybody is subject to the ordinary law and jurisdiction of the courts.
iii) The ordinary courts are responsible for enforcing the ordinary laws of the land, the common law and statute in a manner that protects the basic rights of all so that these laws function as a constitution.[27]

Despite the prominence of the principle, no constitution explains how it will be achieved, thereby leaving the concept of the rule of law vague and elastic.[28] Fundamentally, it means that human rights and obligations must be determined by laws rather than by individuals or groups of individuals exercising arbitrary discretion. In the modern sense, the concept of the rule of law:

> refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.[29]

This idea of the rule of law was also recognised by Plato when he stated that "where the law is subject to some other authority and has none of its own, the collapse of the state, in my view, is not far off; but if law is the master of the government and the government is its slave, then the situation is full of promise and men enjoy all the blessings that the gods shower on a state".[30] From Plato's point of view, the principle of the rule of law encompasses, at the very least, the idea that not a single person or institution is above the law and that everyone is equally answerable to the same laws without any exception regardless of status or social standing. The question of what exactly the phrase 'rule of law' entails has also been addressed by Chinhengo J in *Commissioner of Police v. Commercial Farmer's Union*.[31] The learned judge acknowledged that:

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[26] M. Hamalengwa, C. Flinterman and E. Dankwa (eds.), *The International Law of Human Rights in Africa: Basic Documents and Annotated Mibliography* (1988) p. 37.
[27] A. V. Dicey (1959) referred to in P. De Vos *et al.* (eds.), *South African Constitutional Law in Context* (2014) p. 78.
[28] T. Carothers, 'Rule of Law Temptations', in J. J. Heckman, R. L. Nelson and L. Cabatingan (eds.), *Global Perspectives on the Rule of Law* (2013).
[29] United Nations Security Council, The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies, August 2004, para. 6.
[30] Constitutional Rights Foundation, 'Plato and Aristotle on Tyranny and the Rule of Law', 26:1 *Bill of Rights in Action* (2010), available at <http://www.crf-usa.org/bill-of-rights-in-action/bria-26-1-plato-and-aristotle-on-tyranny-and-the-rule-of-law.html>.
[31] 2000 (1) ZLR 503 (H).

> at the philosophical level there are different schools of thought as to what the rule of law encompasses. At the practical level, however, where a written constitution, amenable to amendment by the people is in existence, and statute law, old and new exist, and which the people's representatives can amend or repeal, an argument such as the one advanced by the [Commissioner of Police, to the effect that certain laws relating to land should not be enforced] is ... spurious. There is, in my opinion a middle view of the rule of law between the two extremes – that the law or the rule of law is partisan on the one hand and that it is neutral on the other hand. That middle view is that the rule of law represents a norm, a standard which ensures that any person may bring up a claim and have it determined within the framework of a body of principles which are applied to all persons equally. Viewed from this perspective the role of the State is to maintain law and order and mitigate conflict within the community and the instrumentality for the maintenance of law and order is the police. The rule of law must … be viewed as a national or societal ideal. [Accordingly], the rule of law means that everyone must be subject to a shared set of rules that are applied universally and which deal even handedly with people and which treat like cases alike.[32]

The rule of law expresses the idea that laws, even those made by a sovereign, are subject to a fundamental law, typically a higher law or constitution, and therefore can be held invalid by an independent court if that fundamental law is breached. The Zimbabwean executive is subject to the Constitution as highlighted by provisions in section 88(2)[33] and 90(2)(c).[34] The South African case of *Economic Freedom Fighters v. Speaker of the National Assembly and Others; Democratic Alliance v. Speaker of the National Assembly and Others*[35] underscored the fact that "the Constitution, the rule of law and accountability are the sharp and mighty sword ready to chop off the ugly head of impunity".[36] Resilience of these core principles are at the heart of democracy. In Zimbabwe, the president is granted immunity in section 98 of the Constitution whereas in South Africa there is no presidential immunity.[37] This shows that presidential immunity undermines the rule of law.

The question whether or not the rule of law as a principle has or is being respected is a controversial one. It will suffice to point out that a conception of the rule of law that is divorced from justice and just laws becomes a hollow concept. The same goes for implementation of unreasonable and iniquitous laws through the application of brutal state power, which in and of itself, does not promote the rule of law. On the contrary, it becomes rule by law if those in power use the laws to achieve their own ends and to perpetuate inequalities between the haves and the have nots. Pierre De Vos *et al.* explore this by bringing an example of the apartheid era in South Africa.[38] They posit that even during that time the people in power claimed that they were guided by the rule of law, but the laws were so draconian and oppressive that they

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[32] At p. 525.

[33] This is to the effect that the executive authority of Zimbabwe vests in the president who exercises it, subject to the Constitution, through the Cabinet.

[34] The Constitution here imposes the duty on the president to, *inter alia*, ensure protection of fundamental human rights and freedoms and the rule of law.

[35] 2016 (3) SA 580 (CC).

[36] At para 1. *See also* para. 75 where Mogoeng CJ pointed to the fact that the rule of law requires that no power is to be exercised unless it is sanctioned by law and no decision or step sanctioned by law may be ignored based purely on a contrary view people hold. This then translates to the fact that no one is above the law even the president as was the case *in casu*.

[37] Section 98 of the Constitution governs presidential immunity.

[38] De Vos *et al*., *supra* note 27, p. 78.

were divorced from the principle of the rule of law. This reflects the fact that respecting the principle of the rule of law on its own is not sufficient to protect the most basic human rights of people in the society. The apartheid government maintained that it respected the laws because it governed in terms of the laws duly enacted by Parliament, yet the apartheid era witnessed countless instances of human rights violations in the history of South Africa, including extrajudicial killings and torture.

In Zimbabwe, the rule of law has been used in a rather formalistic manner.[39] The formalistic approach to the principle of rule of law includes the understanding of law as an instrument of governance rather than a substantive understanding that also concerns itself with the contents of the law. This also implies that as long as there are legislative provisions authorising governmental conduct, regardless of them being unjust and oppressive, the enforcement of such laws would be considered to be lawfully warranted. This would be tantamount to rule by law because such laws neither reflects the rule of law in a substantive sense nor would they be sufficient enough in protecting basic human rights that the rule of law is meant to protect. This scenario would be identical to the South African apartheid government in that the inherent injustice and inequality of the system at the time did not prevent some from still speaking of the system as being premised on the principle of the rule of law.[40]

On a negative note, some constitutional provisions undermine the principle of the rule of law and the enjoyment of property rights. Section 72(3)(b) of the Constitution[41] provides that where agricultural land or any right or interest in such land has been compulsorily acquired, no person may apply to the court for determination of any question relating to compensation, except for compensation for improvements effected on the land before its acquisition, and (c) provides that such acquisition may not be challenged on the ground that it was discriminatory in contravention of Section 56.[42] This general ouster of the court's jurisdiction in land issues emasculates the concept of rule of law and allows the state to violate property rights by grabbing land without paying compensation or allowing the owners of such land to turn to courts for redress. This in no way reflects the principle of the rule of law which implies that all citizens should have the right to approach courts to seek redress in the event that any right has been infringed. Such provisions imply that the state power is not subject to the checks and balances that exist through the judiciary. Even in the event that the state uses its powers arbitrarily, the courts' hands are tied and the state thus would get away with such abuse of its citizens which the rule of law and all the concepts that fall under it seek to protect.

From the above, it follows that the fact that the laws are in place and that the rule of enacted laws is being respected is not enough. A society cannot claim to function in accordance with the rule of law merely because the executive acts strictly in

[39] In the past, certainly before 1980 and until the 2013 version of the Constitution.
[40] Dugard referred to in De Vos *et al., supra* note 27, p. 79.
[41] *See also* Section 295 (3) of the Constitution.
[42] Which is generally to the effect that all persons are equal before the law and that they have the right not to be treated in an unfairly discriminatory manner on such grounds as, *inter alia*, gender, race and economic or social status.

accordance with enacted laws. Those laws should reflect the values and principles which underlie an open and democratic society that allows its citizens to enjoy fundamental rights and freedoms. The same laws should also apply uniformly to every person regardless of their race, gender or social standing. This means that everyone, including the president, should be accountable under the law. Failure to make those who hold public power accountable to the law would imply the trivialisation of the substantive content of the law, thereby leaving the citizenry vulnerable to exploitation, oppression and human rights violations.

4 Democracy, Transparency and Accountability

From the outset, it is important to emphasise that democracy, transparency and accountability form part of the principles of good governance protected in section 3(2) of the Constitution. This suggests the centrality of these values and principles in the new constitutional dispensation. The core idea behind the term 'democracy' is that decisions affecting the members of a political community should be taken by the members themselves, or at least by their elected representatives whose power to make those decisions ultimately derives from the members.[43] This definition speaks to various conceptions of democracy both from the perspective of the persons affected by political decisions and "from a perspective that recognises that modern democracy is exercised mainly through institutionalised politics that entails citizens electing individuals or organisations to represent their interests".[44] Almost all definitions of democracy revolve around the idea that the will of the people is sovereign and that the people should be involved in processes by which they are governed. To be 'democratic' a political system should enable members of a community to engage each other in matters that affect them and to make collective decisions to address such matters. Central to the notion of democracy is that no one has the divine right to govern and that governments are only legitimate if they rest squarely on the consent of the governed.

There are varied conceptions of democracy, and the Constitution does not prescribe any particular form thereof. These include, among others, direct democracy, representative democracy, participatory democracy and constitutional democracy. The different forms of democracy enshrined in the Constitution mirror both the varied conceptions of democracy and the centrality of democracy in shaping the type of post-colonial society 'We the People' wish to become. Direct democracy is "a system of government in which major decisions are taken by the members of the political community themselves, without mediation by elected representatives".[45] Direct democracy comes closest to attaining the rule of the people. This is because it practically demands a vote on every piece of legislation by every eligible member of society.

Unfortunately, the complex structure and internal workings of the modern nation state have left little room for direct democracy to prevail. Contemporary societies

[43] T. Roux, 'Democracy', in Woolman and Bishop, *supra* note 13, p. 10-1, at p. 10-1.
[44] De Vos *et al.*, *supra* note 27, p. 86.
[45] Roux, *supra* note 43, at p. 10-4.

pose a challenge to direct democracy in several senses: first, the numbers of people involved are often so high that it would not be possible to give every other person the opportunity to participate before decisions are made; second, some decisions are so complicated that it is difficult for other members of the political community to effectively contribute towards their making; third, even if it were possible for everyone to participate effectively, the decision-making process would become very long (other decisions would be overtaken by events) and unaffordably expensive (even where the decision to be made is relatively small); and, fourth, persons have the freedom to waive their right to participate and may decide to be 'non-aligned' when it comes to the making of certain decisions.

In modern nation states there are also multiple hurdles relating to lack of information sufficient enough to make an informed decision; geographical spread and the costs this generates for the state to reach out to everyone; unequal access to resources and its influence on the power of agenda setting; citizen apathy as a result of other members of the community perceiving the political, social and economic systems as stubbornly exclusionary; and lack of 'equal access' to decision-making forums and variations in individual or collective capacity to influence decisions. To respond to the challenges outlined above, many countries have turned to representative democracy while retaining key aspects of direct democracy such as public participation in law and policy-making, elections and referenda.

Representative democracy denotes an understanding of democratic governance in which the members of a political community participate in rule and decision-making processes indirectly through freely chosen representatives. At the core of representative democracy is the idea that the people should elect their representatives who should govern for a limited period of time until the next election (to create a framework for public accountability of parliament and government). Political parties are essential in a representative democracy because electoral processes largely require the electorate to vote for political parties and not individuals. Since the emergence of the nation-state as a political entity that occupies a particular geographical space and houses a sizeable population, representative democracy has become widely accepted as the only workable system of democracy.[46] The centrality of political parties in promoting representative democracy is mirrored in the founding values, the principles of good governance[47] and the provisions guaranteeing the freedom to belong to a political party and to participate in its activities.[48] Both political tolerance and multi-partyism are integral components of representative in modern democracies.

Representative democracy becomes effective if it is exercised alongside other types of democracy. For this reason, the Constitution and many other laws create platforms for public participation in governance-related matters. Participatory democracy seeks to ensure that citizens are afforded real opportunities to participate meaningfully in the making of decisions that affect them – a move beyond tokenism.

[46] *Ibid.*, at p. 10-13.
[47] Section 3(2) of the Constitution.
[48] Section 67(2) of the Constitution.

It is intended to ensure that while citizens confer a mandate on elected representatives, they are not totally excluded from political decision making processes during the period between elections. The Constitution anticipates the existence of a perpetually involved citizenry alerted to and involved in all legislative, policy and other programmes at every level of government.

The principle of public participation, which is a constitutive element of participatory democracy, is not only limited to citizens taking part in legislative processes, it also extends to the involvement of the public in defining and implementing government policies. The central idea is that citizens are entitled to more than the right to vote in periodic elections.[49] Participatory democracy "reflects a shared notion that a nation's sovereign authority is one that belongs to its citizens, who themselves should participate in government".[50] The same notion is expressed in the preamble of the Constitution, which starts by saying "We the people of Zimbabwe" to emphasise that the authority to govern is derived from the general public. The idea of ongoing public participation is also found in section 3(2)(f) which states that the principles of good governance include "respect for the people of Zimbabwe from whom the authority to govern is derived". It is also expressed in constitutional provisions that require national and provincial legislatures to facilitate public involvement in their processes.[51] Through these provisions the people reserved for themselves part of the sovereign legislative authority that they otherwise mainly delegated to the representative bodies they created.

The periodic rights to vote, which is inherently linked to representative democracy, and the right to participate actively on an on-going basis, a characteristic of participatory democracy, have a complimentary relationship. Active and on-going public involvement in legislative and government processes is in line with principles of accountability, responsiveness and openness, principles which, by their very own nature, are ingrained in representative democracy. To this end the South African Constitutional Court, in *Doctors for Life International*, held as follows:

> In the overall scheme of our Constitution, the representative and participatory elements of our democracy should not be seen as being in tension with each other. They must be seen as mutually supportive. General elections, the foundation of representative democracy, would be meaningless without massive participation by the voters. The participation by the public on a continuous basis provides vitality to the functioning of representative democracy. It encourages citizens of the country to be actively involved in public affairs, identify themselves with the institutions of government and become familiar with the laws as they are made. It enhances the civic dignity of those who participate by enabling their voices to be heard and taken account of. It promotes a spirit of democratic and pluralistic accommodation calculated to produce laws that are likely to be widely accepted and effective in practice. It strengthens the legitimacy of legislation in the eyes of the people. Finally, because of its open and public character it acts as a counterweight to secret lobbying and influence peddling. Participatory democracy is of special importance to those who are relatively disempowered in a country like ours where great disparities of wealth and influence exist.[52]

[49] P. Sachs in *Doctors for Life International*, paras. 231–232.
[50] P. Ngcobo in Doctors for Life International, para. 110.
[51] *See*, for instance, section 141 of the Constitution.
[52] *Doctors for Life International*, para. 115

Apart from the above forms of democracy, modern nation states also protect constitutional democracy. The term 'constitutional democracy' does not have any technical meaning and is said not to have an underlying theory attached to it. As a descriptive term, it describes a political system in which a particular political community's decisions are made in terms of a constitution. In a constitutional democracy, all the decisions that affect the citizens must be made in terms of the constitution which usually stipulates all the rights that are necessary for other forms of democracy to exist.

Constitutional democracy must be understood as something of a composite understanding of democracy entrenching the other multiple forms thereof. Constitutional democracy seeks to emphasise (a) the role that democracy plays in a constitutional system, and (b) the role that a constitution plays in a democratic system. The preamble to our Constitution provides that: "We the people of Zimbabwe … resolve by the tenets of this Constitution." The doctrine of the supremacy of the Constitution both as a founding value and a principle (trumping sense constitutional supremacy) emphasises the centrality of the Constitution in promoting democracy, good governance and human rights. The Constitution does not aspire to have any particular type of democracy as representing a societal ideal but narrates the type of democratic society that it seeks to build.

The different types of democracy referred to above create space for citizens, the courts and other mechanisms to require the state to account about the way public functionaries deliver on their constitutional mandate. Given that the primary duty of the state is to ensure effective service delivery to the ordinary people from whom the power to govern is derived, the transparency and openness that characterises democratic states empower citizens to demand accountability not only about service delivery but also about the extent to which laws and policies made by the political organs of the state respond to the broad needs of the general public. There is a strong overlap between democracy and the idea of responsive and open governments or societies. Governors must respond to the will and needs of the people. Constitutional provisions that facilitate ongoing dialogue between the citizen and the state ensure that government policies are informed by and respond to the legitimate demands of their people.

Democracy may also be explained as government by explanation or persuasion rather than government by coercion. In Mureinik's view, "a culture in which every exercise of power is expected to be justified, in which the leadership given by government rests on the cogency of the case offered in defence of its decisions, not the fear inspired by the force at its command".[53] Under the new constitutional dispensation, this democratic approach to governance firmly rests on the right to lawful, fair, just, reasonable, proportionate, impartial and prompt administrative justice as protected in section 68(1)–(3) of the Constitution. In particular, the government's duty to account for everything it does is firmly required by every person's right to be promptly and in writing given reasons for administrative action

[53] E. Mureinik, 'A Bridge to Where? Introducing the Interim Billof Rights', 10:1 *South African Journal on Human Rights* (1994) p. 31, at p. 32.

that adversely affects their rights, interests or legitimate expectations. This fosters the idea of government by explanation and a culture of justification.

Finally, the relevance of democracy to the enjoyment of fundamental rights and freedoms lies in the fact that the language of rights is unpopular in autocratic states. The civil and political rights to freedom of assembly, demonstration and petition; freedom of speech, expression and the media; and the right to campaign against the government can only be meaningfully exercised in democratic societies. The same applies to the rights to vote for a candidate or political party of one's choice; to make political choices freely; and to stand for, and if elected to hold, any political office. Given the elements of transparency and openness that characterise democratic societies, it is possible for citizens to request or demand access to information relating to specific issues such as budgeting for specific programmes or projects. In fact, the Constitution entrenches every person's right of access to information held by the state "in so far as the information is required in the interests of public accountability".[54] This right plays an important role in two senses: first, it implies that government must explain its laws and actions if required to do so;[55] second, it ensures that citizens have access to the information required for purposes of making informed choices in many contexts (including voting); and, third, it concretises the government's duty to be open and transparent in many contexts.

5 The Separation of Powers Doctrine and the Idea of Checks and Balances

The separation of powers is the idea that the state must be divided into three arms, namely the executive, the judiciary and the legislature.[56] Under the separation of powers doctrine, the legislature is responsible for making the law, the judiciary is responsible for interpreting and applying the law, and the executive is responsible for interpreting the law. It is not necessary, in this chapter, to engage in great detail with the constitutional provisions entrenching the separation of powers doctrine. The reason is that this is not a constitutional law textbook but a book on human rights under the Zimbabwean Constitution. For purposes of this chapter, it is imperative to underscore that the separation of powers creates a system of checks and balances amongst the three branches of government, which protects democracy by making sure that public power is not concentrated in one institution or one person but is distributed across the government.[57]

The checks and balances lead to greater accountability between the three arms of government, and such accountability helps check against abuse of power.[58] There are provisions which give power to a body to check on the decisions made by another body and these are judicial review, legislative oversight over the executive and the

[54] Section 62(1) of the Constitution.
[55] *See generally University of the Western Cape v. Member of Executive Committee for Health and Social Services*, 1998 (3) SA 124 (C) at 137B-C.
[56] R. Malherbe, *Constitutional Law* (2009) p. 78.
[57] A. Mavedzenge and D. Coltart, *A Constitutional Law Guide Towards Understanding Zimbabwe Fundamental Socio-Economic & Cultural Human Rights* (2014) p. 14.
[58] I. Currie and J. De Waal, *The New Constitutional and Administrative Law* (2001) p. 91.

creation of institutions such as auditor general and constitutional commissions to execute control over legislative and executive power.[59] Checks and balances are limits that are imposed upon all the branches of the government by vesting in each branch the right to amend or void those acts of another that falls within its purview.[60] The principle of checks and balances anticipates the necessary or unavoidable intrusion of one branch on the terrain of another, thereby ensuring accountability, responsiveness and openness between three branches of government.[61] While the purpose of separating functions and personnel is to limit the power of a single individual or institution, the purpose of checks and balances is to make the branches accountable to each other.[62]

The Constitution gives the judiciary the mandate to review the constitutionality of laws and government decisions.[63] The judiciary therefore performs the function of checks and balances on the two arms of government by ensuring that their activities conform to the law. Government have a tendency to manipulate democratic principles, and judicial review has become a necessary mechanism of ensuring governance is in accordance with the constitutionally entrenched normative values and principles of democracy.[64] Since the courts play an important role in the enforcement of constitutional rights, the discussion of the separation of powers doctrine in this section is strongly linked to the independence of the judiciary and the vindication of constitutional rights.

5.1 *Origins, Evolution and Purpose*

The articulation of an explicit doctrine of separation of powers as a distinct explicatory theory of governance is generally thought to have its origin in the political philosophy of the Enlightenment in 17th century Europe, when political thinkers started to challenge the unlimited mighty and arbitrariness of an absolute monarchy.[65] However, its basic aim is much older, that is to find a structure of government that prevents the accumulation of too much power in one institution.[66] The power which vests in a state may be divided into three, namely legislative, judicial and administrative.[67] All three powers originally vested in the king, but development towards separation took place, and the king finally remained as a figure-head with certain reserve powers which are only relevant under very extreme

[59] Sections 232–236 of the Constitution.
[60] I. M. Rautenbach and E F. J. Malherbe, *Constitutional Law,* 6th edition (2013) p. 165.
[61] *Frankfurter in Certification of the Constitution of the Republic of South Africa*, 1996, 108–109.
[62] *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Republic of South Africa*, 1996 (4) SA (CC) para. 112.
[63] Section 167(2)(d) and 167(3) of the Constitution of Zimbabwe. *See also* A. R. Gubbay, 'The Protection and Enforcement of Fundamental Human Rights: The Zimbabwean Experience', 2 *Human Rights Quarterly* (1997) at p. 232.
[64] B. Nwabueze, *Judicialism and Good Governance in Africa* (2009) p. 91.
[65] Woolman and Bishop, *supra* note 13, at p. 12-3.
[66] *Ibid.*
[67] W. J. Hosten *et al*., *Introduction to South African Law and Legal Theory* (1975) p. 604.

circumstances.[68] The separation of powers doctrine was first enunciated by French philosopher Montesquieu.[69]

However, the separation of powers doctrine grew out of centuries of political and philosophical development. Accordingly its origins can be traced to fourth century B.C., when Aristotle, in his treatise entitled *Politics*, described the three agencies of the government, *viz* the general assembly, the public officials and the judiciary.[70] In republican Rome there was a somewhat similar system consisting of public assemblies, the Senate and the public officials, all operating on a principle of checks and balances.[71] Following the fall of the Roman Empire, Europe became fragmented into nation states, and from the end of the Middle Ages until the 18th century the dominant governmental structure consisted of a concentrated power residing in hereditary rulers, the sole exception being the development of the English Parliament in the 17th century.[72] With the birth of the parliament, the theory of the three branches of government reappeared, this time in John Locke's *Two Treatise of Government* (1689), where these powers were defined as legislative, executive and federative.[73] Locke's concern was that absolute monarchical should not just be replaced by absolute parliamentary power. In his view, the concentration of influence in any one institution entailed an inherent danger:

> It may be too great a temptation to human frailty apt to grasp at Power, for the same Persons who have power of making Laws, to have also in their hands the power to execute them, whereby they may exempt themselves from Obedience to the Laws they make, and suit the Law, both in its making and execution, to their own private advantage.[74]

Locke, however, did not consider the three branches to be co-equal; nor did he consider them as designed to operate independently.[75] Locke considered the legislative branch to be supreme, while the executive and federative functions – internal and external affairs respectively – were left within the control of the monarch, a scheme which obviously corresponded with the dual form of government prevailing in England at the time, the Parliament and the King.[76] The separation of powers doctrine was refined and expanded by Baron de Montesquieu, whose *Spirit of the Laws* appeared in 1748 and was well known to many members of the Constitutional Convention. That is why he is known as the modern exponent of this theory.[77] Montesquieu's singular contribution was to conceive the judicial power as an independent state function, thereby treating it as a form of power equivalent to the legislative and executive powers, and laying the theoretical basis for the

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[68] *Ibid.*
[69] *The Spirit of Laws* (1748), Book XI Chapter VI, cited in *ibid.*, p. 604.
[70] Aristotle, *Politics*, Book IV, Chapter 14, in S. J. Ervin Jr., 'Separation of Powers: Judicial Independence', 35 *Law and Contemporary Problems* (1970) pp. 108-127. *See also* E. V. D. Robinson 'The Division of Governmental Power in Ancient Greece', 18 *Political Science Quarterly* (1903) p. 614.
[71] J. Bryce, *Modern Democracies* (1903) p. 391.
[72] Ervin Jr., *supra* note 70, p. 108.
[73] *See* G. B. Gwyn, *The Meaning of Separation of Powers* (1965) p. 47.
[74] J. Locke, *Two Treaties of Government II* (1688) Chapter XIII, para. 107.
[75] *See* Gwyn, *supra* note 73, p. 58.
[76] J. A. Fairlie, 'The Separation of Powers', 21 *Michigan Law Review* (1922) p. 396.
[77] T. B. Singh, *Principles of Separation of Powers and Concentration of Authority* (1996) p. 1.

independence of the judiciary.[78] For Montesquieu, the separation of powers doctrine was foundational to any constitution that sought to prevent the abuse of power and advance personal freedom:

> [There is no] liberty if the power of judging is not separate from legislative power and from executive powers ... All would be lost if the same man or the same body of principal men, either of nobles, or of the people, exercised these three powers: that of making laws, that of executing public resolutions, and that of judging the crimes or the disputes of individuals.[79]

Montesquieu also observed that in the British system the judiciary ranked 'next to nothing' when compared with the other branches of government.[80] Some 17 years later, Blackstone noted the importance of a more powerful and independent judiciary in his *Commentaries,* which were a primary reference for the American colonists:

> Were it [the judicial power] joined with the legislative, the life, liberty and property, of the subject would be in the hands of arbitrary judges, whose decisions would be then regulated only by their own opinions, and not by any fundamental principles of law; which, though legislators may depart from, yet judges are bound to observe. Were it joined with the executive, this union might soon be an overbalance for the legislative.[81]

Two years before the Constitutional Convention, William Paley, an English philosopher and theologian, observed as follows in his *Moral and Political Philosophy*:

> [T]he judges of the land become not infrequently the arbitrators between the king and the people, on which account they ought to be independent of either; or, what is the same thing, equally dependent upon both; that is, if they be appointed by one, they should be removable only by the other.[82]

Montesquieu looked to the English Constitution which in his belief was the only one having liberty as its chief object. Though English constitutional law classified political power primarily in terms of 'legislative' and 'executive' functions and further subdivided the latter to take into account Locke's distinction between executive and federative functions, he decided to call the conduct of foreign affairs as executive power and the execution of domestic law as judicial power.[83] Based on this broad classification, he divided the governmental power into legislative, executive and judicial functions. This is however evident from the fact that in the United Kingdom the principle of separation of powers has neither been accorded a constitutional status nor has it been theoretically enshrined.

5.2 *The Separation of Powers and the Independence of the Judiciary*

Judicial independence is an incidence of the separation of powers doctrine.[84] This doctrine seeks to avoid the concentration of power in a single organ of the state as

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[78] M. J. C. Vile, *Constitutionalism and the Separation of Powers* (1967) p. 96.
[79] Montesquieu, *The Spirit of Laws* (1823) p. 157.
[80] *Ibid*., p. 156.
[81] W. Blackstone, *Commentaries on the Law of England* (1765) pp. 259–260.
[82] Ervin Jr., *supra* note 70, p. 109.
[83] Montesquieu, *supra* note 79, p. 156.
[84] Woolman and Bishop, *supra* note 13, at p. 12-6.

this is viewed as detrimental to the freedom of citizens.[85] An independent judiciary and legal profession are critical elements of the rule of law and the protection of human rights.[86] The bedrock of a constitutional democracy is an independent judiciary. A judiciary that is not independent from the executive and legislature renders the checks and balances inherent in the concept of separation of powers ineffective. Montesquieu asserts that the judiciary should be separated from the legislature and the executive to guarantee freedom. Thus, the doctrine demands that the law making task be vested in the legislature, the application and interpretation of the law in the judiciary and the overall administration of government in the executive.[87]

Judicial independence is the yardstick of a functional judiciary and has been explained not only to mean independence from the legislature or the executive but also from political organs, the public or from themselves.[88] It also further means security of tenure and reliance, for payment of remuneration, on independent or non-political sources of funding. In most cases this requires the state to ensure that judges' salaries are paid from a fund other than the consolidated revenue fund.

Judicial independence is a principle which requires that the judicial branch of government be independent, and officers of the courts should be protected from political influence or other pressures and that the courts must practice fidelity to the law in their adjudication.[89] Courts do not operate in a political vacuum.[90] The tendency is to isolate the judiciary and its work though part of the government from political decision-making and to prevent courts from morphing into theatres for the deployment of political judgment and rhetoric.[91] Judicial impartiality is the principle that the judiciary must apply the law without fear, favour or prejudice.[92] This, it seems, is the major goal of positing adjudication as an objective and rationality-bound process, in stark contrast to the non-rational and often arbitrary/self-interested character of political decision-making.[93] For this reason, in most countries, judges are not elected unlike those who occupy executive and legislative positions.[94] In a new constitutional democracy such as the one envisaged by the new Constitution of Zimbabwe, an independent and impartial judiciary is essential for the task of applying

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[85] R. Brazier, *Constitutional Reform* (2008) pp. 179–180.
[86] A. R. Gubbay, 'The Progressive Erosion of the Rule of Law in independent Zimbabwe**',** *Third International Rule of Law Lecture* (2009) p. 2.
[87] E. Dumbutshena, 'The Rule of Law in a Constitutional Democracy with Particular Reference to the Zimbabwe Experience', 5 *South African Journal of Human Rights* (1989) p. 311, at p. 321.
[88] *Ibid.*, p. 313.
[89] J. B. Diescho, 'The Paradigm of an Independence Judiciary: Its History, Implications and Limitations in Africa', in N. Horn and A. Bosl (eds.), *The Independence of the Judiciary in Namibia* (2008) p. 18.
[90] M. Adams and G. Van Der Schyff, 'Political Theory Put to the Test: Comparative Law and the Origins of Judicial Constitutional Review', 10 *Global Jurist* (2010) p. 206.
[91] H. Botha 'Freedom and Constraint in Constitutional Adjudication', 20 *South African Journal for Human Rights* (2004) p. 249, at p. 250.
[92] Diescho, *supra* note 89, p. 18.
[93] A. C. Hutchinson and P. J. Monahan, 'Law, Politics, and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought', 36 *Stanford Law Review* (1984) p. 199, at p. 202.
[94] *See generally* J. Toobin, The Nine: Inside the Secret World of the Supreme Court (2007-2008) and S. D. Law, *How to Rig the Courts* (2011) p. 99.

and upholding the constitution.[95] It is certainly a welcome development that the new Constitution contains various provisions which separate state power among the different state institutions, ensuring that power is not pooled in one institution.[96]

In a country founded on constitutional democracy, the independence of the courts is pivotal to the protection of human rights.[97] Constant interferences with judicial independence[98] in Zimbabwe have consequently contributed to the infringement of human rights as the citizenry cannot rely on the courts for their protection.[99] Indeed, there has been periods in which it seemed that state institutions worked together in a manner that allowed arbitrary exercises of power to go unchecked with the result that citizens were deprived of exercising their rights and deriving the full benefits that such rights bestowed on them.[100] Cognisant of the significant role of the judiciary in the protection of human rights, the drafters of the Constitution ensured that the final document provides an adequate legal framework for bolstering the independence and review powers of the judiciary through a number of important provisions.[101]

Judicial independence is expressly provided for under the current Constitution. Section 164(1) thereof provides that "[t]he courts are independent and are subject only to this Constitution and the law, which they must apply impartially, expeditiously and without fear, favour or prejudice". This emphasises the idea that the courts are the sanctuary of democracy, the rule of law and the enjoyment of fundamental rights and freedoms. An independent judiciary that is at liberty to interpret and apply the law impartially is an essential ingredient for the efficient enforcement of human rights. By stipulating that the courts must apply the law "impartially, expeditiously and without fear, favour or prejudice", the Constitution underlines the functional importance of deciding cases free from the influence of politicians, powerful business interests and civil society or pressure groups.

The doctrine of separation of powers and checks and balances can operate optimally only if an independent and impartial judiciary is given adequate space to interpret and apply the provisions of the Constitution without fear, favour or prejudice. Under a democratic system of governance, the courts operate as a watchman and their fundamental role is to patrol the constitutional borders to check whether or not the political organs of the state – the legislature and the executive – are acting within the bounds of the authority conferred on them by the constitution or any other law.

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[95] M. Wesson and M. Du Plessis, 'Fifteen Years On: Central Issues Relating to the Transformation of the South African Judiciary', 24 *South African Journal for Human Rights* (2008) p. 188.

[96] M. Ryan, *Unlocking Constitutional and Administrative Law*, 2nd edition (2007) p.60.

[97] *See* section 3(2) of the Constitution.

[98] L. Chiduza, *Towards the Protection of Human Rights: Do the New Constitutional Provisions on Judicial Independence Suffice?* (2014) p. 368.

[99] One of the examples of the Zimbabwean government's interference with the judiciary was when Gubbay CJ (as he then was) was forced to retire prematurely after he delivered a judgment in the case of *Commercial Farmers Union v. Minister of Lands, Agriculture and Resettlement*, 2000 (2) ZLR 469 (SC). The former Chief Justice had granted an interdict barring further land acquisitions by the government, as such acquisition were unconstitutional and had been carried out in a violent manner.

[100] *See Mike Campbell (Pvt) Limited and Another v. The Minister of National Security Responsible for Land, Land Reform and Resettlement and Another*, SC 49/07.

[101] Chiduza, *supra* note 98, p. 368.

The Constitution is explicit enough to state the sort of 'things' that impede judicial independence and what exactly needs to be done for courts to have the freedom to decide legal disputes impartially. Section 164(2)(a) of the Constitution provides that "neither the State nor any institution or agency of the government at any level, and no other person, may interfere with the functioning of the courts". First, the duty not to interfere in the function of the courts applies vertically thereby imposing an obligation on the political organs and other functionaries of the state to respect and promote the independence of the judiciary and the separation of powers doctrine.

In addition, the state's duty to take positive steps to promote the institutional and functional independence of the courts is reiterated in section 164(2)(b) of the Constitution. This provision states that "the State, through legislative and other measures, must assist and protect the courts to ensure their independence, impartiality, accessibility and effectiveness and to ensure that they comply with the principles set out in section 165". The range of measures to be taken by the state is not constitutionally prescribed, thereby leaving room for the political organs of the state to be inventive enough to play their role in promoting judicial independence, the rule of law and democratic governance. Second, the duty not to interfere with the functioning of the courts also applies horizontally. Accordingly, every person has the duty to refrain from actions that impede or are likely to be perceived as impeding the impartial and independent interpretation and application of the Constitution or any other law. This is an important invention, especially given the rise of rich and powerful individuals as well as large business corporations that have the means and capacity to influence the outcome of legal disputes.

The judiciary is an important arm of the state. Judges are required to be independent in the discharge of their duties. This independence of the judiciary from other two arms of the state is the cornerstone of the theory of separation of powers. If the legislature or the executive are not happy with a certain interpretation of the law by the courts, the only way out is to seek a change to the law rather than disregard the interpretation and argue that it is wrong. The prerogative to interpret the law lies only with the judiciary. An act of Parliament or any other law which contravenes the Constitution can be declared unlawful by the courts. The constitutional imperative of judicial independence operates to safeguard rights to a fair trial but may very well go beyond the tenets of the Declaration of Rights. It could be conceptualised as a cornerstone for judicial review of legislation and executive conduct. Thus, the scope of judicial independence has a wider reach than just the limitations that it places on executive control of individuals and institutions.

From the foregoing discussion, two facets of judicial independence could be discerned. The first is the institutional facet. This relates to the structural safeguards, which ensure that judicial organs are not unduly interfered with. These would include controls, proper and transparent methods of appointing judicial officers (judges), reasonable financial autonomy and even exclusive jurisdictional competence over all issues of a judicial nature. The second facet to judicial independence is referred to as the neutralising distance between individual judges and the legal dispute. This facet canvasses issues such as adequate remuneration, security of tenure (so that a judge cannot be arbitrarily removed from office), political insularity, freedom from

fear of reprisals following decisions they make while performing their functions and of course impartiality. The importance of these aspects and the way in which they empower courts to make independent decisions about violations of rights as well as the remedies they attract will be explored below.

5.3 *Constitutional Litigation, Remedies for Proven Violations of Rights and the Role of the Courts in Safeguarding Human Rights*

There is an indisputable correlation between the existence of an independent and impartial judiciary and the enjoyment of fundamental rights and civil liberties. On the one hand, oppressive political regimes often rely on partial courts to push their agenda and to enforce draconian laws that entrench despotic power. On the other, democratic political systems heavily rely on independent and impartial courts to foster democracy, the rule of law, good governance and fundamental rights and freedoms. To this end, our Constitution underscores the fact that "the independence, impartiality and effectiveness of the courts are central to the rule of law and democratic governance". While, at this stage, the Constitution does not expressly recognise the importance of judicial independence for the enjoyment of human rights, it is patent that such rights may only be vindicated in democratic systems of governance that are premised on the idea of the rule of law. Besides, the relationship between judicial independence and the enjoyment of fundamental rights or freedoms is reiterated under the 'principles guiding the judiciary'. These include, among others, the principle that "the role of the courts is paramount in safeguarding human rights and freedoms and the rule of law".[102] Therefore, courts are constitutionally required to be mindful of their role in bridging the gap between the promise of the Declaration of Rights and the reality of poverty and degradation that confronts millions of people in this country.

Apart from the principles guiding the judiciary, there are other provisions that are designed to ensure that the courts play a leading role in the enforcement of fundamental human rights and freedoms. First, the Constitution protects the principle of the supremacy of the Constitution as a founding value and a principle, thereby ensuring that we depart from the concept of parliamentary sovereignty and entrench the powers of the courts to review legislation and administrative conduct that infringes upon fundamental rights and freedoms. To this end, the Constitution provides that "[t]his Constitution is the supreme law of Zimbabwe and any law, practice, custom or conduct inconsistent with it is invalid to the extent of the inconsistency".[103] The power to declare law or conduct, including the conduct of Parliament or the president, to be inconsistent with the Constitution is reinforced by other provisions of the Constitution.[104] For instance, section 175(6) of the Constitution provides that "[w]hen deciding a constitutional matter within its jurisdiction a court may declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of the inconsistency". The power to make

[102] Section 165(1)(c) of the Constitution.
[103] Section 2(1) of the Constitution.
[104] *See* section 175(1) and (6) of the Constitution.

declaratory and other orders to prevent infringements of rights is an important element of judicial independence and ensures that courts fashion appropriate remedies for peculiar infringements of rights.

The second point, which is related to the first, is that domestic courts now have, under the current Constitution, wide discretionary powers to decide the range of remedies that are appropriate for numerous human rights violations. These include the power to issue remedies other than those historically permitted by the common law or customary law. Apart from the power to issue declaratory orders, courts have, when deciding a constitutional matter within its jurisdiction, wide powers to "make any order that is just and equitable, including an order limiting the retrospective effect of the declaration of invalidity or suspending the declaration of invalidity for any period to allow the competent authority to correct the defect".[105] The power to make '*any* order that is just and equitable' is left deliberately open ended to ensure that courts have enough space to function optimally without any influence from internal or external persons and other state functionaries. In *Fose v. Minister of Safety and Security*,[106] the Constitutional Court had the occasion to observe as follows:

> Appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case the relief may be a Declaration of Rights, an interdict, a mandamus or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. *If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all important rights*.[107]

In the field of human rights litigation, it is necessary for courts to fashion new remedies and direct state functionaries to take concrete steps to ensure the enjoyment of human rights. However, such orders may not be too prescriptive to deny the political organs of the state their functional autonomy, particularly with regards to priority setting and resource allocation. Yet, the political organs of the state and every person – whether natural or juristic – must respect the decisions of the courts even where they do not agree with them. This is because the Constitution stipulates that "[a]n order of a court binds the State and all persons and governmental institutions and agencies to which it applies, and must be obeyed by them".[108] These provisions equally apply to court orders pertaining to the protection and enforcement of human rights.

Third, the Constitutional Court, the High Court and the Supreme Court have the "inherent power to protect and regulate their own processes and to develop the common law or customary law". The power to regulate their own processes is meant to underline the significance of judicial independence in the adjudication of cases. Further, the power to develop the common law or customary law is very necessary in a patriarchal society such as Zimbabwe, where women and other marginalised groups face discrimination and exclusion as a result of oppressive principles of

[105] Section 175(6)(b) of the Constitution.
[106] 1997 (3) SA 786 (CC).
[107] Para. 19, emphasis added.
[108] *See* section 164(3) of the Constitution.

customary law or the common law. Accordingly, when interpreting legislation or developing the common law or customary law, courts should determine whether there is any other way through which these sources of law may be brought into line with the Declaration of Rights without necessarily declaring them to be inconsistent with the Constitution. This requires courts to have regard to the objectives, underlying principles and founding values of the constitutional state.[109]

Fourth, there has been a significant paradigm shift, especially in light of the broad provisions of section 85(1) of the Constitution, towards the liberalisation of *locus standi* in Zimbabwe. The liberalisation of standing allows a wide range of persons who can demonstrate an infringement of their rights or those of others to approach the courts for relief. It is intended to enhance access to justice by individuals and groups without the knowledge and resources to vindicate their rights in the courts. To this end, the drafters of the Declaration of Rights acknowledged that restrictive standing provisions defeat the very reason behind conferring entitlements upon the poor and the marginalised. The majority of the people intended to benefit from the state's social provisioning programmes often do not have the resources, the knowledge and the legal space to drag powerful states, transnational corporations or rich individuals to court in the event that a violation of their rights occurs. To address this problem, section 85(1) of the Constitution allows not only persons acting in their own interests but also any person acting on behalf of another person who cannot act for themselves, any person acting as a member, or in the interests, of a group or class of persons, any person acting in the public interest and any association acting in the interests of its members to launch court proceedings against alleged violators of the rights in the Declaration of Rights.[110]

With regards to the liberalisation of standing, the provisions allowing public interest litigation stand out as an important innovation under the new constitutional order. This is particularly important because the bulk of human rights violations negatively affect not only individuals but also families and the communities in which people live. While it may be difficult, in some cases, to identify particular individuals affected by the infringement of rights, it is patent in the majority of contested cases that the disputed legislation or conduct violates certain rights. Public interest litigation enables lawyers and non-governmental organisations to expose and challenge human rights violations in instances where there is no identifiable person or determinate groups of persons directly negatively affected by the disputed legislation

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[109] *See* section 46(2) of the Constitution.

[110] Section 85(1) states that:

Any of the following persons, namely—

(a) any person acting in their own interests;
(b) any person acting on behalf of another person who cannot act for themselves;
(c) any person acting as a member, or in the interests, of a group or class of persons;
(d) any person acting in the public interest;
(e) any association acting in the interests of its members;

is entitled to approach a court, alleging that a fundamental right or freedom enshrined in this Chapter has been, is being or is likely to be infringed, and the court may grant appropriate relief, including a Declaration of Rights and an award of compensation.

or conduct. This line of reasoning is applied in *Mudzuru and Another v. Minister of Justice*, where Malaba DCJ makes the following remarks:

> section 85(1)(d) of the Constitution is based on the presumption that the effect of the infringement of a fundamental right impacts upon the community at large or a segment of the community such that there would be no identifiable persons or determinate class of persons who would have suffered legal injury. The primary purpose of proceedings commenced in terms of s 85(1)(d) of the Constitution is to protect the public interest adversely affected by the infringement of a fundamental right. The effective protection of the public interest must be shown to be the legitimate aim or objective sought to be accomplished by the litigation and the relief sought.[111]

Public interest litigation allows courts to entertain matters they would not entertain if they were to follow the technical rules and procedural formalities historically governing *locus standi*. According to Olowu, "it is important for the effective protection of human rights … to achieve liberal and wider access to court for social action and public interest litigation".[112] Elsewhere, the ECOWAS Court has relied on the *action popularis* to hold that "in public interest litigation, the plaintiff needs not show that he has suffered any personal injury or has a special interest that needs to be protected to have standing. Plaintiff must establish that there is a public right which is worthy of protection which has been allegedly breached and that the matter in question is justiciable."[113] The Constitution emphasises the idea that in matters affecting the public interest, requiring the plaintiff to demonstrate a personal interest 'over and above' those of the general public unnecessarily limits the jurisdiction of domestic courts, undermines the purpose behind liberalising standing and relegates poor persons' rights to the margins of the legal process.

6 Conclusion

This chapter explained in some detail the basic tenets of the new constitutional order. These include the doctrine of the supremacy of the Constitution, the rule of law, democracy, transparency and accountability, the separation of powers doctrine and checks and balances. On the supremacy of the Constitution, it has been observed that it means that whenever a legal norm or rule of decision which is established by the Constitution comes into practical conflict with a legal norm or rule of decision stipulated by every form of non-constitutional law, the norm that is contained in the Constitution is to be given precedence over norms entrenched in ordinary law. Accordingly, legal norms or rules of decision which are embodied in parliamentary legislation, subordinate legislation, judicial decisions, the common law and customary law are subordinate to the Constitution as the supreme law of the land. With regards to the rule of law, it was reiterated that it is a principle of governance in terms of which "all persons, institutions and entities, whether private or public, are accountable to laws that are publicly promulgated, equally enforced and

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[111] At p. 12.
[112] D. Olowu, *An Integrative Rights-Based Approach to Human Development in Africa* (2009) p. 172.
[113] *Registered Trustees of the Socio-economic Rights and Accountability Project (SERAP) v. Federal Republic of Nigeria & Universal Basic Education Commission*, Suit ECJ/CCJ/APP/08/08, 16.

independently adjudicated, and which are consistent with international human rights norms and standards".[114]

In Zimbabwe, the rule of law has been used in a rather formalistic manner. The formalistic approach to the principle of rule of law includes the understanding of law as an instrument of governance rather than a substantive understanding that also concerns itself with the contents of the law. This also implies that as long as there are legislative provisions authorising governmental conduct, regardless of them being unjust and oppressive, the enforcement of such laws would be considered to be lawfully warranted. This would be tantamount to rule by law because such laws neither reflects the rule of law in a substantive sense nor would they be sufficient enough in protecting basic human rights that the rule of law is meant to protect.

Democracy, transparency and accountability are some of the important tenets of the new constitutional order. There are varied conceptions of democracy, and the Constitution does not prescribe any particular form thereof. These include, among others, direct democracy, representative democracy, participatory democracy and constitutional democracy. The different forms of democracy enshrined in the Constitution mirror both the varied conceptions of democracy and the centrality of democracy in shaping the type of post-colonial society Zimbabwe wishes to become. The different types of democracy referred to above create space for citizens, the courts and other mechanisms to require the state to account about the way public functionaries deliver on their constitutional mandate. Given that the primary duty of the state is to ensure effective service delivery to the ordinary people from whom the power to govern is derived, the transparency and openness that characterises democratic states empower citizens to demand accountability not only about service delivery but also about the extent to which laws and policies made by the political organs of the state respond to the broad needs of the general public.

The separation of powers doctrine creates a system of checks and balances amongst the three branches of government. This protects democracy and human rights by making sure that public power is not concentrated in one institution or person but is distributed across the government. The checks and balances lead to greater accountability between the three arms of government, and such accountability helps check against abuse of power. For purposes of this chapter, it was emphasised that the importance of the separation of powers doctrine lies in its close link with the independence of the judiciary. There is an indisputable correlation between the existence of an independent and impartial judiciary and the enjoyment of fundamental rights and civil liberties. Democratic political systems heavily rely on independent and impartial courts to foster democracy, the rule of law, good governance and fundamental rights and freedoms. In our context, the relationship between judicial independence and the enjoyment of fundamental rights or freedoms is reiterated under the 'principles guiding the judiciary'. These include, among others, the principle that "the role of the courts is paramount in safeguarding human rights and freedoms and the rule of law".[115] Therefore, courts are constitutionally required

[114] *See* section 3.3 of this chapter.
[115] Section 165(1)(c) of the Constitution.

to be mindful of their role in bridging the gap between the promise of the Declaration of Rights and the reality of poverty and degradation that confronts millions of people in this country.

3 Zimbabwe's Constitutional Values, National Objectives and the Declaration of Rights

Admark Moyo*

1 Introduction

This chapter serves as the background to the analysis, interconnectedness and operationalisation of the founding values and principles, national objectives and the Declaration of Rights. It begins with an exploration of the meaning and scope of constitutional values and principles. Enumerated in section 3(1) and (2) of the Constitution,[1] founding values and principles are an integral part of the new constitutional dispensation. The fact that these values and principles are referred to as 'founding' suggests that they should perform a pivotal function in the development of our law and in according meaning to constitutional provisions. However, the exact meaning of these values or principles and their role in constitutional and statutory analysis remain largely unexplored. Besides, the distinction between values and principles is unsettled as these terms are not defined in the Constitution. These concerns leave the courts and lawyers confronted with a gap that, depending on the whims of the presiding judge, either allows judicial creativity or negatively implicates the interpretation, enforcement and enjoyment of the fundamental rights and freedoms enshrined in the Declaration of Rights. This chapter demonstrates that constitutional values and principles perform a pivotal function in the interpretation, application and limitation of the fundamental rights and freedoms entrenched in the Constitution. In addition, it demonstrates that constitutional values and principles guide courts, albeit indirectly, in the interpretation of legislation and the development of the common law or customary law. At this level, these values and principles perform a secondary role, but they still inform the interpretive or analytical processes of the courts.

Apart from serving as an introduction to constitutional values and principles law and the manner in which they are relevant to the enforcement of fundamental rights, this chapter also explores the nexus between fundamental human rights and the so-called national objectives. It is shown that a proper engagement with the applicable provisions tends to suggest the existence of a symbiotic relationship between fundamental human rights proper and national objectives that are not strictly enforceable. The relevant constitutional provisions – particularly sections 8(2) and 46(1)(d) of the Constitution – appear to imply that regard must be had to the national objectives when interpreting the fundamental rights or freedoms in the Declaration of Rights. Furthermore, the chapter also investigates the relationship between fundamental rights and the values that underlie a democratic society based on human dignity, justice, equality and freedom. While the Constitution does not expressly govern this relationship, the interpretation and limitation clauses make

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[1] Constitution of the Republic of Zimbabwe Amendment (No 20) Act 2013 (Constitution).

constant reference to values and imply that they are an important consideration in constitutional adjudication.

More importantly, this chapter introduces the Declaration of Rights as an important part of the Constitution, an epitome of the constitutional revolution that took place during the final years of the inclusive government. The provisions of the Declaration of Rights are meant to facilitate social and economic transformation and to ensure that the state rescues poor citizens from poverty, degradation and marginalisation. Apart from largely grounding the Constitution's transformative vision, the Declaration of Rights codifies monumental milestones that range from the indivisibility and interconnectedness of human rights; the protection of social and economic rights; the liberalisation of *locus standi*; the horizontal application of the Declaration of Rights and the demise of the public-private divide; substantive equality and the positive duty to address the injustices of the past; and the protection of the rights of vulnerable groups. Together, these monumental milestones make the Declaration of Rights an epitome of Zimbabwe's constitutional revolution.

2 Constitutional Values and Principles

Founding values are normative ideals upon which the nation state is founded. In most post-colonial states, they play an important role in promoting the achievement of an egalitarian or just society. They are broadly designed to respond to the socio-economic challenges confronting citizens, especially those living on the margins of society and to ensure that the government is anchored on such timeless principles as democracy and the rule of law. Founding values are largely shared by the generality of the entire population and transcend social divisions based on race, gender, political affiliation or other prohibited ground of discrimination. Many of the founding values stated in the Constitution underscore the fact that the state may not 'turn a blind eye' to the massive inequalities between persons belonging to different economic classes in society. There is an inherent link between the idea of transformative constitutionalism and the majority of the founding values, for example good governance, equality and gender equality. Thus, constitutional values and principles prescribe how state functionaries and key government institutions or agencies are to perform the functions and to exercise public power.[2]

The Zimbabwean Constitution does not in itself give a clear cut definition of what a value or principle is. Section 3(1) stipulates that Zimbabwe is founded on respect for the stipulated values and principles. It is apparent, however, that section 3(2) gives an outline of the principles of good governance – thus section 3(2) does not enumerate values. Venter posits that a value is a term which does not carry any connotation of material worth which indicates a standard or a measure of good, but rather an abstract concept.[3] Values are general and abstract universal aspirations which are used to set requirements for the appropriate and desired interpretation and application of the Constitution. Constitutional values should guide and influence

[2] *See*, for example, section 3(2) of the Constitution.
[3] F. Venter, 'Utilising Values in Constitutional Comparison', 4 *Potchefstroom Electronic Law Journal* (2001) p. 1, at p. 6.

the behaviour of both the state and individuals, including natural and juristic persons. They broadly define the aims and purposes of the government, and constitute detailed guidelines to be followed by the state when governing its citizens.[4] Principles are more specific and elaborate rules on how the people should be governed.[5] To Esteban, "legal principles possess a more defined structure which, combined with their clear nature as 'ought to be' propositions, make them more suitable for the creation of legal rules through judicial adjudication".[6]

Constitutional principles expand on and give flesh to constitutional values. For instance, the principles of good governance explain in some detail what good governance as a value 'ought to' mean and give multiple possible implications of good governance as a value. To this end, section 3(2) of the Constitution provides that the principles of good governance include, among others, a multi-party democratic political system; an electoral system based on universal adult suffrage and equality of votes; free, fair and regular elections; adequate representation of the electorate; the orderly transfer of power following elections; respect for the rights of all political parties; the observance of the principle of separation of powers; respect for the people of Zimbabwe from whom the authority to govern is derived; and transparency, justice, accountability and responsiveness. These principles are more specific than the provisions entrenching values. Constitutional principles outline the guidelines which state institutions and everyone are expected to follow in order to ensure that Zimbabwe is a constitutional state empirically founded on the value of good governance. In other words, principles are rules and guidelines which expand and amplify on values as an abstract and more general term. Therefore, constitutional values may be said to be distinguishable from but related to principles in the sense that the principles of the Constitution give expression to enumerated or unenumerated values.

It is important to note that because of the abstract nature of values, one cannot litigate based on a value; it has to have a further provision which clearly sets it out either as a rule to be followed or as a principle. Values are not enforceable on their own, they can only be enforceable if they have been further developed either into the Declaration of Rights or other provisions of the Constitution. Section 3(1)(e) of the Constitution stipulates the recognition of the inherent dignity and worth of each human being as a value. This value is further developed into an enforceable right in section 51 of the Constitution. In addition, the recognition of the equality of all human beings is found as a value in section 3(1)(f), but it can only be litigated when it becomes a right as stipulated in section 56 of the Constitution. With regards to the principles of good governance protected in section 3(2) of the Constitution, they can only become enforceable once converted into the political rights protected in section 67(1)–(3) of the Constitution.

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[4] *See* G. J. Austin, 'Constitutional Values and Principles', in M. Rosenfeld and A. Sajo (eds.), *The Oxford Handbook on Comparative Constitutional Law* (2012) p. 777, at p. 777.

[5] *See*, for instance, the principles referred to in section 3(2) of the Constitution.

[6] M. L. F. Esteban, *The Rule of Law in the European Constitution* (1999) pp. 40–41.

Just like values, principles are also not directly enforceable unless they have been developed into rights. Nonetheless, fundamental rights and freedoms amplify principles and values. These fundamental rights are justiciable and can be directly enforced by the courts in legal disputes between parties. They have more content – 'flesh and blood' – and specify the nature of obligations they impose on state and non-state actors. Unlike values and principles that form part of the founding provisions, rights are located in the Declaration of Rights which generates specific obligations to be performed by several constitutional duty bearers.

In *Zibani v. JSC and Others*,[7] the Court captured the unenforceability of values in the following terms:

> Our Constitution has values. These values are not laid out or promulgated in procedural laws or practice manuals of government and its agencies. They however find expression in the will of the people through the tenets expressed in the words used in the preamble to the Constitution, as well as the specific ideals set out in the founding values and principles. Where a State actor, such as the first respondent, fails to adhere to the same [i.e. founding values] no act of wrong-doing can ever be ascribed to such failure because such failure is not visited by the sanction of the law. The Constitution instils these values and ideals in the hope that an honest adherence to them will assure the attainment of the democratic ideals in which egalitarian equality is enjoyed by all. Viewed this way, it will be clear that the values and principles provide a moral exhortation to higher ideals for which this nation yearns for the enjoyment and realisation of our developmental endeavour. The Constitution is therefore a live document which remains work in progress. In the development path that is set and chosen at the national level, the Constitution provides beacons that shine the path for the citizenry to follow in pursuit of the highest stage of human development.[8]

Whilst these remarks are generally correct, they raise a serious question relating to whether values and principles provide a *moral* exhortation to higher ideals. It would appear that constitutional values are more than just moral viewpoints. They have legal content that provides overall guidance (to courts) in the interpretation and application of the Constitution. This is evident from the fact that when interpreting the rights in the Declaration of Rights, courts are bound to promote the values and principles that underlie a democratic society.[9] In similar parlance, the state is permitted to limit fundamental rights and freedoms provided that the limitation is justifiable, fair, reasonable and necessary in a democratic society based on founding and other values not necessarily enumerated in the constitutional text.[10] These provisions underline the importance of constitutional values in determining whether or not the interpretation and limitation of fundamental rights or freedoms is consistent with values and principles that underlie a democratic society based on openness, justice, human dignity, equality and freedom.

[7] 797/16.
[8] At p. 11.
[9] *See* section 46(1)(b) of the Constitution.
[10] *See* section 86(2) of the Constitution.

2.1 *Teleological Theory, Values and Textual Analysis*

This part examines the meaning and scope of the teleological theory of interpretation as a philosophical basis for a value-laden approach to constitutional and statutory analysis. Under the value-coherent theory, the resort to values and principles of equity enables courts to reach conclusions which they sense to be just and appropriate even if such conclusions are not specifically sanctioned by the constitutional or statutory text. Apart from distinguishing between the values or spirit of an enactment and its letter, teleological interpretation allows courts to extend or restrict the operation of the letter of the law.

In philosophical terms, the teleological theory places values at the centre of constitutional and statutory analysis. Apart from distinguishing between the "sense or spirit of a statute and its words", teleological interpretation allows courts to extend or restrict the operation of the letter of the law.[11] The value-coherent theory is not merely purposive, but also has an equitable element.[12] The idea of equity (in the sense of the 'spirit' or 'values' underlying statutory or constitutional provisions) "justifies departures from the literal interpretation of statutes".[13] Under teleological theory, the court "invokes whichever of the rules that satisfies its sense of justice in the case before it".[14] This approach to the interpretation of legal texts implies that while courts are bound by the rules of precedent and *stare decisis,* it would be irresponsible for them to act as machines, rigidly applying previous cases without regard to the unjust consequences that arise as a result.[15]

The resort to values and principles of equity enables courts to reach conclusions which they sense to be just and appropriate even if such conclusions are not specifically sanctioned by the constitutional or statutory text.[16] Teleological interpretation enables courts to search for the spirit or values underlying the

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[11] J. A. Corry, 'Administrative law and the interpretation of statutes' 1:2 *UTLJ (1935-36)* p. 286, at p. 296.

[12] *Ibid.,* 294.

[13] R. A. Posner, *Law and literature* (1998) p. 253. For a detailed explanation of the idea of equity as giving effect to the values underlying statutory provisions, *See Eyston v. Studd* (1574) 2 Plow 2 459; W. Friedmann, *Legal theory* (1967) p. 453 and Sir W. Blackstone. *Commentary on the Laws of England* (1765-1969) p. 1 at p. 62.

[14] J. Willis, 'Statutory interpretation in a nutshell', 55 *SALJ* (1938) p. 322, at p. 328.

[15] However, this does not mean that subordinate courts should be lightly allowed to freely ignore higher court decisions that are mandatorily precedent. Nonetheless, lower courts may depart from the previous decision if the dissenting judgment in such a decision is generally taken to be stipulating the correct legal position by the courts or if the key facts of the present dispute are substantially different from the facts of the previous case or if there have been significant legal changes or law reform since the delivery of the previous ruling or if the governing case (precedent) stipulates exceptions to its ruling and the current case falls within one of those exceptions or if the governing case has been reversed or overturned by a higher court or if the previous decision is no longer consistent with shared societal norms or values. *See generally* Lord Denning in *Packer v. Packer* [1954] 80 KB, 226. *See also* Justice C.O. Idahosa, 'Stare decisis and judicial precedent: The need for lower courts to be bound by decisions of the superior court of record', Paper presented at a Conference of All Nigerian Judges of Lower Courts, 21-25 November 2016, at p. 9.

[16] *See* Robert Goff LJ's dictum in *Elliott v. C* [1983] 2 All ER p. 1005, at p. 1010b-d.

constitutional or statutory text. Crawford once explained the import of teleological (philosophical) interpretation as follows:

> Under the equitable or philosophical theory of interpretation, the bounds of "genuine interpretation" are considerably extended. The legislative enactment, according to this theory, merely lays down a general guide and leaves the court wide leeway within which to deal with individual cases as the justice of the case demands in the light of the reason and moral sense of men generally. Accordingly, the court will use the statute applicable to the case in hand as a general guide, but the ethical situation among the litigants will be the determining factor. Justice in the pending controversy is the court's prime object, and such is also the basic legislative intent in all legislation. It may be assumed that the legislators in enacting all legislative acts, intend to delegate to the courts the power to determine each case on its own equitable merits. At least in the absence of a specific intent, may it not be assumed that the law-makers intended that the statute in question should promote justice? In fact, it seems logical that the court is simply exercising judicial power when it determines the pending controversy according to the ethical situation *inter partes*.[17]

A value-coherent theory is fundamentally premised on the realisation of justice for the individual and, where applicable, the community. The value-oriented approach involves "the rejection of positivism as a legal creed and the adoption of a realist-cum-value-oriented approach to the judicial process and civil liberty".[18] Teleological interpretation is wider than both literal and purposive interpretation. It does not just revolve around the "isolated purpose of the individual statute, but *par pro toto* refers to all considerations that can be applied".[19] Value-based interpretation of legal texts aspires to the coherence of the legal system as a whole and, in this respect, is broader than the purposive theory.[20] It is, in Mureinik's words, "the judge's chief weapon against legislative injustice"[21] by making recourse to such broader goals of the legal system as justice, human dignity, equality and freedom. Teleological theory recognises the importance of the abstract, vague and more general purposes of the law that often form the background of legal texts. The need to avoid hard, harsh and unjust consequences, even when they are clearly mandated by the legislative or constitutional text, imposes on judges the duty to make creative efforts to justify rulings that are consistent with the core values of justice, equality, human dignity and freedom.

Teleological interpretation seeks to promote the achievement of justice by invoking other tools of analysis (i.e. values) that may not necessarily be stipulated in the legislative text itself. It revolves around fleshing out the values that underpin enumerated human rights and freedoms – especially the founding values of the constitutional state – and then giving an interpretation that best promotes those values. A constitution is drafted in broad and general terms which lay down principles of generality applicable to different contexts. As such, it should not be narrowly and

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[17] E.T. Crawford, *The Construction of Statutes* (1940) at p. 243.
[18] J. Dugard, *Human Rights and the South African Legal Order* (1978) at p. 400.
[19] A. Ross, *On law and order* (1958) at pp.147-48.
[20] *See generally* H. M. Hart Jr. and A. M. Sacks, *The Legal Process: Basic Problems in the Making and Application of the Law*, 1st edition (1958) p. 1414, arguing that "[t]he purpose of a statute must always be treated as including not only an immediate purpose or group of purposes, but a larger and subtler purpose as to how the particular statute is to be fitted into the legal system as a whole".
[21] E. Mureinik, 'Administrative Law in South Africa', 103 *SALJ* (1986) p. 615, at pp. 622 and 623.

simply construed in the way that an ordinary statute drafted to govern a specific issue is construed. A constitution requires its interpreters to approach it with less rigidity, greater generosity and an awareness of the need to ensure that fundamental rights and freedoms are not unduly circumscribed.[22]

At the heart of teleological interpretation is the idea that a Constitution is a living document *sui generis* (of its own kind) designed to address deep social and political problems through an unequivocal commitment to a new set of values and political goals. In *Government of the Republic of Namibia and Another v. Cultura 2000 and Another*,[23] the Court held that "[a] Constitution is an organic instrument. Although it is enacted in the form of a statute it is *sui generis*. It must broadly, liberally and purposively be interpreted so as to avoid 'the austerity of tabulated legalism' and so as to enable it to continue *to play a creative and dynamic role in the expression and the achievement of the ideals and aspirations of the nation, in the articulation of the values bonding its people* and in disciplining its Government".[24] Accordingly, the meaning of rights and freedoms should be construed in light of both the purpose for which the right or freedom became part of the Declaration of Rights and the (un)enumerated values upon which our constitutional state is founded. The next section demonstrates that our Constitution entrenches, among others, the value-coherent interpretation theory and requires courts to have resort to values in locating the meaning of the provisions in the Declaration of Rights.

2.2 *The Role of Values in Constitutional Analysis*

Under the current Constitution, courts have the peremptory obligation to promote the values and principles that underlie a democratic society. Section 46(1)(b) of the Constitution provides that when interpreting the provisions of the Declaration of Rights, a court, tribunal, forum or body must "promote the values and principles that underlie a democratic society". This is a peremptory obligation which requires courts and other decision-making bodies to locate the values and principles which underlie a democratic society and to ensure that the interpretation these bodies give to fundamental rights is consistent with those values and principles. It would seem that the first question under this inquiry is: What are the values that underlie a democratic society? This part of the inquiry is partly answered by the fact that section 46(1)(b) refers to a "democratic society based on openness, justice, human dignity, equality and freedom". These and other values play an important role in assessing whether a court or other decision-making body has reached a decision which promotes the values which underlie a democratic society. Part of the reason for this claim is that openness, justice, human dignity, equality and freedom are, in themselves, values which underlie a democratic society.

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[22] In *Ong Ah Chuan v. Public Prosecutor*; *Koh Chai Cheng v. Public Prosecutor* [1981] AC p. 648, the Privy Council observed that "the way to interpret a constitution … is to treat it not as if it were an Act of Parliament, but 'as *sui generis,* calling for principles of interpretation of its own, suitable to its character … without necessary acceptance of all the presumptions that are relevant to legislation or private law".

[23] [1994] 1 SA 407.

[24] *Government of the Republic of Namibia*, p. 418.

Furthermore, the general claim that courts must promote the values and principles which underlie a democratic society suggests that the values and principles which are mentioned in the interpretation clause merely provide guidelines on the kind of values which underlie a democratic society. Whilst section 46(1)(b) of the Constitution avoids providing an exhaustive list of values and principles, it then underlines the significance of the values and principles upon which the Zimbabwean state is founded. It stipulates that apart from considering openness, justice, human dignity, equality and freedom as some of the core values, courts must, in particular, promote the values and principles referred to in section 3(1) and (2) of the Constitution. The founding values and principles referred to in section 3(1) and (2) of the Constitution include, among other things, the supremacy of the Constitution; the rule of law; the nation's diverse cultural, religious and traditional values; human dignity; equality of all human beings; and good governance. In interpreting rights provisions, courts and other decision-making bodies should promote these values and principles, as a minimum. If decision-making bodies make decisions that are inconsistent with these values and principles, such decisions ought to be disregarded for want of consistency with the Constitution.

Founding values and principles play a secondary but nonetheless important role in determining the content of rights. This is because the Constitution requires a value-laden approach to the interpretation of rights. Since they entrench normative values and standards, the founding provisions do not create self-standing and enforceable constitutional rights, but merely lay down the principles and values with which all the rights and their interpretation must be consistent. To this end, section 46(1)(b) reproduces the notion that the fundamental human rights and freedoms protected in the Declaration of Rights are 'informed' by and give effect to founding values and principles. As such, courts may not ignore this fact when interpreting and giving effect to all the provisions in the Declaration of Rights.

At a more critical level, reference to the values which underlie a democratic society imposes on courts the duty to consider the spirit of the Constitution when interpreting the rights in the Declaration of Rights. In *New Patriotic Party v. Attorney-General*,[25] Francois JSC made the following seminal remarks about the need to respect the spirit of the Constitution:

> [A] broad and liberal interpretation [is necessary] to allow the written word and the spirit that animates it, to exist in perfect harmony … My own contribution to the evaluation of a Constitution is that a Constitution is the outpouring of the soul of the nation and its precious life-blood is its spirit. Accordingly, interpreting the Constitution, we fail in our duty if we ignore its spirit. Both the letter and spirit of the Constitution are essential fulcra which provide leverage in the task of interpretation. [Judges] are enjoined to go beyond the written provisions enshrining human rights, and to extend the concept to areas not specifically or directly mentioned but which are inherent in a democracy and intended to secure the freedom and dignity of man.[26]

The spirit of the Constitution is often derived from shared societal values, i.e. norms that pervade all subsidiary value systems in a political community. Values, whether

[25] [1993-94] 2 GLR 3531.
[26] At pp. 79–80.

enumerated or not, animate the underlying spirit and philosophy of the Constitution. The idea of unenumerated values and rights implies that in constitutional interpretation there is a place for the unwritten in the written Constitution. These values represent the spirit of the Constitution and, in giving meaning to fundamental rights or freedoms, courts must give effect to such values.[27] As Francois JSC would have it, "it is the proper attainment of these silences that provide the measure of understanding the basic constitutional concepts of the fundamental law".[28] In *Agyei Twum v. Attorney-General and Akwetey*,[29] Date-Baj JSC held as follows:

> It has to be remembered that there is room for the *unwritten in the written constitution*. The fact that a country has a written constitution does not mean that only its letter may be interpreted. *The courts have the responsibility for distilling the spirit of the Constitution, from its underlying philosophy, core values*, basic structure, the history and nature of the country's legal and political system etc, in order to determine what implicit provisions in the written constitution flow exorably from this spirit.[30]

Thus, if the letter of the Constitution does not explicitly authorise a particular form of interpretation, then the spirit of the Constitution permits the courts to derive meaning from the underlying values of the Constitution. When interpreting statutory provisions, the courts are allowed to engage models of reasoning that might be considered, from the theoretical point of literalism and intentionalism, to be outside the text of the statute or to be remedying problems in the text or filling gaps in the text. Perhaps the most inspirational remarks about the centrality of the underlying values or spirit of the Constitution were made by Francois JSC in *Kuenyehia v. Archer*,[31] where he held as follows:

> Any attempt to construe the various provisions of the Constitution … must perforce start with awareness that a constitutional instrument is a document *sui generis* to be interpreted according to principles suitable to its peculiar character and necessarily according to the ordinary rules and presumptions of statutory interpretation. It appears that the overwhelming imperatives are the spirit and objectives of the Constitution itself, keeping an eye always on the aspirations of the future and not overlooking the receding footsteps of the past. It allows for a liberal and generous interpretation rather than a narrow legalistic one. It gives room for a broader attempt to achieve enlightened objectives and tears apart the stifling straight jacket of legalistic constraints that grammar, punctuation and the like may impose.[32]

All the values upon which the nation state is founded play an important role in promoting the achievement of an egalitarian or just society. They are broadly designed to respond to the socio-economic challenges confronting citizens, especially those living on the margins of society and to ensure that the government is anchored on such timeless principles as democracy and the rule of law. Founding

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[27] *See Asare v. Attorney General*, [2003-2004] 2 SCGLR 823, at pp. 835–836, where Date-Bah held that "the spirit to which Sowah JSC refers is another way of describing the unspoken core underlying values and principles of the Constitution. Justice Sowah enjoins us to have recourse to this spirit or underlying values in sustaining the Constitution as a living organism".
[28] *See New Patriotic Party v. Attorney-General*, p. 84.
[29] [2005-2006] SCGLR 732.
[30] *Ibid*., p. 766, emphasis added.
[31] [1993-94] 2 GLR 525.
[32] At pp. 561–562.

values are largely shared by the generality of the entire population and transcend social divisions based on race, gender, political affiliation and other prohibited grounds of discrimination. The fact that values prescribe how state functionaries and key government institutions or agencies are to perform public functions and to exercise public power underlines their importance in shaping public policy and interpreting the Declaration of Rights. Constitutional values guide and influence the behaviour of both the state and individuals, including natural and juristic persons. They generally define the aims and purposes of the government and constitute detailed guidelines to be followed when governing citizens.

2.3 *Indirect Application of the Declaration of Rights – The Role of Values in Statutory Interpretation and the Development of the Common Law and Customary Law*

Sometimes the Declaration of Rights does not apply directly to the impugned law. In such instances, the court is neither required to measure the validity of the law against the applicable constitutional right nor to declare invalid the statutory provision in question. Instead, the Declaration of Rights will indirectly influence the manner in which the court interprets and applies the law, but it will not declare the law to be unconstitutional. Indirect application of the Declaration of Rights is provided for in the interpretation clause. Section 46(2) of the Constitution provides that "[w]hen interpreting an enactment, and when developing the common law and customary law, every court, tribunal, forum or body must promote and be guided by the spirit and objectives of this Chapter". As is shown below, the reference to the 'spirit and objectives' of the Declaration of Rights represents the role of values in statutory interpretation and the development of the common law.

In instances of indirect application of the Declaration of Rights, the relationship between the provisions in the Declaration of Rights and the ordinary law is not governed by the principles set out in the Declaration of Rights. Instead, this relationship is regulated by the principles set out in the ordinary law (i.e. statutory laws, the common law and customary law). Nonetheless, the court must interpret legislation or develop the common law or customary law in a way that promotes the values in the Declaration of Rights. The indirect application of the Declaration of Rights is not based on an investigation into whether or not the law is in direct conflict with a fundamental right stipulated in the Constitution. Accordingly, "the court has to invoke the values that underlie the [Declaration of Rights] and ask whether it should interpret or develop the law to bring it in line with these values".[33] The development of the common law or customary law is a unique remedy which is intended to balance the demands of the Constitution and the 'timeless' principles of the ordinary law.

2.3.1 The Indirect Application of the Declaration of Rights to Legislation

Section 46(2) of the Constitution governs the indirect application of the Declaration of Rights to legislation. It provides that "[w]hen interpreting an enactment, every

[33] P. De Vos *et al*. (eds.), South African Constitutional Law in Context (2014) p. 338.

court, tribunal, forum or body, must promote and be guided by the spirit and objectives of this Chapter". To achieve this objective, courts have to examine the object and purpose of the Act of Parliament in question and apply the provisions of legislation in a manner that conforms to the Declaration of Rights. The principle of reading legislation in conformity with the Declaration of Rights implies that judicial officers must prefer an interpretation that falls within the ambit of the Declaration of Rights over those that are not, provided that such an interpretation can be reasonably extended to the statutory provision in question.[34] Therefore, the extent to which courts can interpret legislation in conformity with the Declaration of Rights is largely dependent on what the letters of the statutory provisions are reasonably capable of meaning.[35] The interpretation "must not be fanciful or far-fetched but one that reasonably arises from the challenged text without unwarranted strain, distortion or violence to the language".[36] Accordingly, the duty to interpret legislation in a manner that gives effect to the spirit (i.e. values) of the Constitution should be observed where the legislation is reasonably capable of being so interpreted. This is tantamount to what is normally called 'reading down', which is generally an interpretive process that is limited to what the statutory provision is reasonably capable of meaning.

The indirect application of the Declaration of Rights to legislation is closely linked to the principle of avoidance or subsidiarity. This principle implies that where it is possible to decide a case without applying the Declaration of Rights directly, then the courts should adopt that approach instead always measuring the validity of legislation against specific constitutional standards.[37] Both the principle of interpretation in conformity and the principle of avoidance imply that when a judicial officer is confronted with a legislative provision, they must first attempt to interpret the provision in accordance with the values under a democratic society before proceeding to examine the validity of the provision against a specific provision of the Declaration of Rights. On the whole, constitutional values play an important role in harmonising statutory provisions and the prescriptions of the Declaration of Rights.

2.3.2 The Inherent Power to Develop the Common Law or Customary Law

Section 46(2) of the Zimbabwean Constitution provides that when interpreting an enactment, and when developing the common law and customary law, every court, tribunal or body must promote and be guided by the spirit and objectives of this Chapter. Developing the common law or customary law involves interpreting the law

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[34] *See Investigating Directorate: Serious Economic Offences and Others v. Hyundai Motor Distributors (Pty) Ltd and Others In re: Hyundai Motor Distributors (Pty) Ltd and Others v. Smit NO and Others*, 2001 (1) SA 545 (CC), para. 23.

[35] *South African Police Service v. Police and Prisons Civil Rights Union and Another* 2011 (6) SA 1 (CC).

[36] *Daniels v. Campbell and Others*, 2004 (5) SA 331 (CC), para. 83.

[37] *See S v. Mhlungu and Others*, 1995 (3) SA 867 (CC), para. 59; *Zantsi v. Council of State, Ciskei and Others*, 1995 (4) SA 615 (CC), paras. 2–5; *S v. Bequinot*, 1997 (2) SA 887 (CC), paras. 12–13; and *National Coalition for Gay and Lesbian Equality and Another v. Minister of Justice and Others*, 1999 (1) SA 6 (CC), para. 21.

in a manner that makes it conform to the Constitution.[38] Section 179 of the Constitution states that the Constitutional Court, the Supreme Court and the High Court have inherent power to protect and regulate their own process and to develop the common law or the customary law, taking into account the interests of justice and the provisions of this Constitution. The law should be certain and predictable; it should also be just and move with the demands of the times.[39]

Even before the constitutionalisation of the courts' duty to develop the common law in line with the Constitution, domestic courts were already taking it upon themselves to develop the common law.[40] In *Zimnat Insurance Co Ltd v. Chawanda*,[41] the Court had to answer the question whether a woman married under an unregistered customary union had a right of support and thus a right to compensation for loss of support following the death of her husband. The Court had to do away with discrimination between a customary law marriage and a civil marriage. In essence, the Court had to protect the interests of widows who were married under customary law by developing customary law to allow them to have a claim against third parties for the wrongful death of their spouse. In the Court's view, the law must be dynamic and capable of adapting to social change. Gubbay CJ (as he then was) held that "in a developing country, [the] law cannot afford to remain static [as] it must adapt … itself to fluid economic and social norms as and values and to altering views of justice". The Court reiterated that the judiciary has a vital role to play in moulding and developing the law in light of social and economic change so as to be in line with the social needs of the country.

In the case of *Nyamande & Donga v. Zuva Petroleum*,[42] the Supreme Court delivered a judgment that authorised, on the basis of the common law, employers to terminate permanent employees' contracts of employment by merely giving three months' notice. The facts of the case were that the appellants were employed by BP Shell as supply and logistics manager and finance manager. BP Shell sold its services as a going concern to Zuva Petroleum, the respondent. A transfer of undertaking was done in terms of section 16 of the Labour Act[43] and an agreement of sale concluded. The appellants were transferred to the new undertaking without any change of the terms and conditions of employment that they enjoyed when they were employed by BP Shell. When their contracts were terminated on notice, the appellants prayed the Supreme Court to reverse the decision of the Labour Court, arguing that it violated section 12B and 12(4) of the Labour Act.

The Court concluded that employers had an unfettered common law right to terminate permanent employment contracts by giving employees three months' notice as employees did if they wanted to leave the job. Unfortunately, the Court

[38] I. Currie and J. De Waal, *The Bill of Rights Handbook*, 6th edition (2013) p. 24.
[39] J. Reid, 'The Judge as Law Maker', 12 *Journal of Society of Public Teachers of Law* (1974) p. 22, at p. 26.
[40] G. Feltoe, 'Using the Constitution to Develop the Common Law of Delict', 1 *Zimbabwe Electronic Law Journal* (2017) p. 1, at p. 2.
[41] 1990 (2) ZLR 143 (S).
[42] SC 43/2015.
[43] Chapter 28:01 of the Laws of Zimbabwe.

failed to realise that the Constitution makes a complete break with Zimbabwe's colonial history and ushers in a new constitutional dispensation. Section 2(1) provides that "this Constitution is the supreme law of Zimbabwe and any law, practice or conduct inconsistent with it is invalid to the extent of the inconsistency". This provision indirectly sets out a hierarchy of laws, with the Constitution affirming its supremacy at the top of the hierarchy. The doctrine of the supremacy of the Constitution suggests that the values and rights entrenched in the Constitution affect all corners of the legal system and influence the content of all branches of the law, including labour law. The common law has largely been reconstituted and its validity depends on its consistency with constitutional values, principles and rights. Thus, the common law is accepted as a valid source of law subject to the Constitution.

Accordingly, the laws that were in force on the date the Constitution became operative remain valid and binding to the extent of their consistency with the Constitution. The Constitution governs the validity of legislation and other legal rules embodied in other sources of law. Constitutional values and rights – including the labour rights protected under section 65 of the Constitution – have redrawn the relationship between the common law and the Constitution. This implies that many rules of the common law, including the employer's right to terminate an employment relationship based on notice, are superseded by constitutional provisions. It was therefore inappropriate for the Court to elevate common law principles above statutory and constitutional provisions regulating labour practices. In fact, it was unfortunate that the parties never referred to the Constitution in their arguments against dismissal based on notice.

The duty to develop the common law or customary law implies that as society changes the law must also change.[44] Both continuity and creativity are legitimate values in the development of the common law or customary law.[45] Determining the effect of an apparent precedent frequently requires complex analysis of the case law, including the contexts in which principles were developed and the interrelationship between different decisions.[46] By distinguishing or reinterpreting a decision, later judges might determine that it supports a value or principle quite different from what was previously thought.[47] Common law courts are challenged to find the appropriate balance "between certainty and flexibility".[48] Precedent must not be "our master"[49] as the founding values of our state may call for adaptations of the common law or customary law. It can be noted that changing the common law in a modest, incremental fashion ensures that change remains within the confines of what citizens might reasonably expect.[50] How far judges have and exercise the power to modify the common law seems to be a question of degree; it is not entirely clear where the line should be drawn.[51]

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[44] *McInerney v. Liddy*, [1945] IR 100, 104 (IEHC).
[45] R. A. Posner, *The Problematics of Moral and Legal Theory* (1999) p. 244.
[46] *The People (DPP) v. Mallon*, [2011] IECCA 29, para. 49 (IECCA).
[47] S. Henchy, 'Precedent in the Irish Supreme Court', 25 *Modern Law Review* (1962) p. 544, at p. 558.
[48] Ibid.
[49] Reid, *supra* note 39, p. 25.
[50] T. Bingham, 'The Rule of Law', *Judicial Studies Institute Journal* (2008) p. 121, at p. 126.
[51] *See* J. M. Kelly *et al.*, *The Irish Constitution*, 4th edition (2003) p. 259.

3 National Objectives and Human Rights

The Zimbabwean Constitution provides for both national objectives and justiciable fundamental rights and freedoms. The meaning and scope of these objectives has not been the subject of scholarly analysis or debate, thereby leaving a huge gap that needs clarification for the benefit of the courts, the political organs of the state and the general public. This section provides detailed analysis on the relationship between national objectives and human rights. No doubt, by including the national objectives in the Constitution, the framers had the intention of creating standards by which the success or failure of the state and all its functionaries could be judged.[52] Accordingly, it therefore follows that the national objectives are a crucial yardstick upon which the state can be held accountable in terms of compliance with its human rights obligations towards the citizens.

The case of *S v. Banda,*[53] aptly demonstrates how national objectives can be used to buttress the protection of human rights. In that case, Charehwa J held that even though the conviction and sentencing of two sexual offenders had been in accordance with the Criminal (Codification and Reform) Act, the application of that sentencing regime trivialised "the protective measures for young persons prescribed in our law and in the current international framework for safeguarding young persons". To that end, the learned judge invoked section 19(2)(c) of the Constitution (which is a national objective) to demonstrate that the trial magistrate should have adopted a stricter sentence so as to fully guarantee the protection of the rights of young persons. The reasoning of the Court was commendable in this respect as the presiding judge determined the adequacy and desirability of the current domestic laws on sexual offences against young persons against the national objective which requires the state to adopt reasonable policies and other measures to ensure that children are *inter alia* "protected from maltreatment, neglect or any form of abuse".[54] This shows the importance of national objectives particularly in terms of how they can influence the protection of fundamental rights and freedoms within a particular country.[55]

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[52] *See* H. M. Seervai, *Constitutional Law of India* (1967) p. 759, who makes similar arguments with respect to the inclusion of DPSP in the Indian Constitution.

[53] *S v. Banda*, HH-47-16. This was a criminal review of a case concerning a man (above 30) who had impregnated a girl of 15 years. The trial magistrate properly convicted and sentenced the man, but on review Charehwa J faulted the magistrate for not giving due regard to the national objectives in section 19. The learned judge also emphasised the need to look to section 327(6) of the Constitution which requires the courts to adopt all reasonable interpretations which are consistent with international conventions, treaties and agreements that are binding on Zimbabwe.

[54] Section 19(2)(c) of the Constitution.

[55] *See* B. De Villiers, 'Directive Principles of State Policy and Fundamental Rights: The Indian Experience', 8 *African Journal on Human Rights* (1992) p. 29, at pp. 37–45, 38–39 and 43–45 for a more detailed discussion on the relationship between DPSP and fundamental human rights.

3.1 *National Objectives as Directive Principles of National Policy – The Indian Experience*

Like founding values and principles, the justiciability and significance of national objectives is a subject of great contestation.[56] These terms are marred in controversy particularly with regard to their potential abuse by judges in the interpretive process. Depending on how widely they are interpreted, such abuse could in turn deal heavy blows to the separation of powers doctrine. Generally speaking, there is an understanding that the national objectives provided for in Chapter 2 of the Constitution are not *stricto sensu* justiciable and that constitutional claims must be based on more substantive provisions that protect the right which is alleged to have been breached. However, it is argued that national objectives (indeed as well as the founding values and principles) are crucial supportive mechanisms in the landscape of human rights adjudication.[57] Under this approach, the full realisation and promotion of human rights can be furthered by giving more weight to the national objectives provided for in Chapter 2 of the Constitution.

In other jurisdictions, directive principles of state policy (DPSP), that are similar to 'national objectives' under our Constitution, have become the axis upon which the judicial enforcement of socio-economic rights revolves. For instance, the Indian Supreme Court has noted that fundamental "rights are not an end in themselves but are the means to an end".[58] The Indian Supreme Court has explained this relationship under similar provisions of the Indian Constitution in the following terms:

> The importance of Directive Principles in the scheme of our Constitution cannot ever be over-emphasized. Those principles project the high ideal which the Constitution aims to achieve. In fact Directive Principles of State Policy are fundamental in the governance of the country and there is no sphere of public life where delay can defeat justice with more telling effect than the one in which the common man seeks the realisation of his aspirations. But to destroy the guarantees given by Part III [fundamental rights] in order purportedly to achieve the goals of Part IV [directive principles] is plainly to subvert the Constitution by destroying its basic structure. Fundamental rights occupy a unique place in the lives of civilized societies and have been variously described as 'transcendental', 'inalienable' and 'primordial' and … they constitute the ark of the Constitution. The significance of the perception that Parts III and IV together constitute the core of [our] commitment to [a] social revolution and they, together, are the conscience of the Constitution is to be traced to a deep understanding of the scheme of the Indian Constitution. Parts III and IV are like two wheels of a chariot, *one no less important than the other*. *Snap one and the other will lose its efficacy*. *They are like a twin formula for achieving the social revolution which is the ideal which the visionary founders of the Constitution set before themselves.* In other words, the Indian Constitution is founded on the bed-rock of the balance between Parts III and IV. To give absolute primacy to one over the other is to disturb the harmony of the

[56] *See generally* G. J. Jacobsohn Austin, 'Constitutional Values and Principles', in M. Rosenfeld and A. Sajo (eds.), *The Oxford Handbook of Comparative Constitutional Law* (2012).

[57] Singh once opined that the functions of the court are not strictly restricted to interpretation of the law but court can also make law "by sharing the passion of the Constitution for social justice". *See* P. Singh, 'Judicial Socialism and Promises of Liberation: Myth and Truth', 28 *Journal of the Indian Institute* (1986) p. 338.

[58] In this context, the DPSP are the 'end' which the fundamental rights should lead to. *See Minerva Mills Ltd v. Union of India*, A.I.R. 1980 S.C 1789, at pp. 1806–1807.

> Constitution. This harmony and balance between fundamental rights and directive principles is an essential feature of the basic structure of the Constitution.[59]

Similarly, in the Zimbabwean context, the rights provided for in Chapter 4 of the Constitution are by no means an end in themselves and are there to facilitate the realisation of the national objectives protected under Chapter 2 of the same. Thus, there exists a symbiotic relationship between the national objectives and the fundamental rights provided for in Chapter 4 of the Constitution.

3.2 *National Objectives as Directly Enforceable Guarantees?*

Whilst it is essential to recall that national objectives are *prima facie* not enforceable in that claims cannot be based solely on an alleged breach of 'national objectives', it should be noted, however, that our Constitution seems to elevate the importance and significance of national objectives, giving them a special status compared to other documents such as the Indian Constitution. Section 8(1) provides that the national objectives shall guide the state and all its institutions when dispensing with their functions. Section 8(2) goes further and entrenches national objectives into the interpretive scheme of the Constitution or any other law of the land. All laws in Zimbabwe are thus to be interpreted with due regard being had to the national objectives stipulated in Chapter 2 of the Constitution. To this end, section 46 of the Constitution is very instructive in that it requires courts, tribunals and all other forums to "pay due regard to all the provisions of th[e] Constitution, in particular, the principles and objectives set out in Chapter 2".[60] This provision is possibly reflective of an intention, by the drafters of the Constitution, to establish enforceable standards (through the national objectives) against which the validity of the conduct of individuals and society as a whole, including the state and it functionaries, should be measured and judged. Indeed, the national objectives are "a set of social ideals which are semi-justiciable and designed as targets towards which the country must aim. They define a goal for the Nation without which this country would drift as it appeared to have done in the past."[61]

Admittedly, even after having established the undeniably symbiotic relationship which exists between national objectives and the fundamental rights in the Declaration of Rights, it remains a fact that national objectives are not *stricto sensu* directly enforceable guarantees. However, the Constitution increases the visibility of national objectives (in terms of their justiciability) by requiring the courts and all other tribunals to 'particularly' give them 'due regard' when interpreting the rights enshrined in the Declaration of Rights. The word 'particularly' and the phrase 'due regard' (in section 46(1)(d)) are very crucial in bringing out the legal weight which the Constitution attaches to the national objectives in Chapter 2 of the Constitution. The word 'particularly' denotes strong emphasis on the need to include the national objectives as part of the interpretive guidelines when dealing with alleged infringements of fundamental rights, whilst the need to give 'due regard' ultimately

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[59] *Ibid.,* at 250B-C, 254H and 255A-D, emphasis added.
[60] Section 46(d) of the Constitution.
[61] S. Kumo and A. Aliyu (eds.), *Issues in the Nigerian Draft Constitution* (1977) p. 29.

animates the status of the national objectives as a 'standard' against which all relevant conduct should be judged. In other words, these objectives are a key determinant of whether conduct will pass constitutional muster in that, for example, if the state implements a gender policy which is not fully (or at least not substantially) reflective of the national objective of achieving gender balance as provided for under section 17 of the Constitution, such a policy will not pass the constitutionality test.

Under the new Constitution, the fate of a litigant's case is no longer dependent on whether the court is benevolent enough to consider the national objectives as strengthening the litigant's claim because the Constitution already requires the court to do so. By requiring courts to 'pay due regard' to the national objectives, section 46(1)(d) of the Constitution has indirectly incorporated the whole of Chapter 2 into the analytical framework of the interpretation clause. Where there is an enforceable constitutional right that is intended to protect the same interests as those protected by the applicable national objective, it is important for the court to consider the scope of both the right and the objective when interpreting the former. For instance, gender balance in section 17 of the Constitution should guide the court in interpreting the equality clause (section 56 of the Constitution), and culture in section 16 of the Constitution must be reflected when courts interpret the right to culture under section 63 of Constitution. This approach is starkly different from other jurisdictions such as India, where the utilisation of DPSP has been owed greatly to judicial activism rather than the actual text of the Constitution. One hopes, however, that the courts of Zimbabwe will be alive to the meaning, relevance and effect of the national objectives in light of section 46(1)(d) of the Constitution.

However, despite the arguments made above, there are some residual limitations with regards to the application of national objectives in the interpretive mandate of the court. Firstly, legislation cannot be struck down solely on the basis of non-compliance with national objectives as the later are not directly applicable to statutory laws and do not set concrete benchmarks for states to comply with. This general proposition is subject to the exception that in instances where certain national objectives are coupled with justiciable rights protected by the Declaration of Rights, they – i.e. national objectives – can be relied upon to declare the impugned law or conduct unconstitutional. Secondly, the court may not rely on national objectives as a justification for overstepping its designated role under the separation of powers doctrine. It remains difficult for courts to make policy choices or decisions with budgetary implications based on fundamental rights and freedoms, let alone national objectives. These remarks demonstrate the practical challenges that arise in any attempt to broaden the usefulness of national objectives in interpreting and enforcing fundamental human rights and freedoms.

3.3 *National Objectives and Systemic Interpretation under the Zimbabwean Constitution*

Section 46(1)(d) of the Constitution creates two related obligatory duties: first, the duty to pay due regard to all the provisions of the Constitution, and, second, the duty to pay specific attention to the principles and objectives set out in Chapter 2 of the

Constitution. These duties are related in that Chapter 2 is part of all the provisions of the Constitution which are referred to in the first leg of the analysis, and therefore reference to 'the principles and objectives' does not create an entirely separate duty to consider anything entirely new within the framework of the relevant provisions. Among other things, section 46(1)(d) makes clear the need to approach the entire Constitution as creating a single unified system for the protection of human rights and fundamental freedoms.[62] National objectives under the Zimbabwean Constitution appear to be more compelling, legally speaking, than the directive principles of state policy under constitutions of other countries. As stipulated above, our Constitution avoids the traditional bifurcated approach in terms of which only the provisions of the Declaration of Rights are binding and DPSP are entirely not. As stipulated above, the national objectives entrenched in Chapter 2 of the Constitution are 'incorporated' into the interpretive framework of the Declaration of Rights, thereby ensuring that national objectives influence the scope and content of fundamental human rights and freedoms.

The 'incorporation' of national objectives into the scheme of fundamental human rights and freedoms is consistent with the principle of systematic interpretation. The idea of systemic interpretation suggests that the whole Constitution should be interpreted as creating a single unitary system targeted at achieving certain social, political and economic goals. In this manner, section 46(1)(d) the Constitution mandates systemic interpretation by requiring courts to have regard to all provisions of the Constitution, including national objectives, when interpreting fundamental rights and freedoms.[63] Though context encompasses aspects such as legal history and drafting history, the Constitution restricts context to textual context. Thus, provisions of the Constitution must be and are often understood in relation to and in light of one another (especially when they are associated) and as part of other components of more encompassing instruments of which they form part, drawing on the system or logic or scheme of the written text as a whole. The duty to 'pay due regard' to all the provisions of the Constitution, suggests that a court is bound to interpret and apply human rights in a manner that fulfils the broad vision, purpose and object of the Constitution as a whole. Construed widely, this duty could also amount to a reproduction of generous and purposive interpretation of constitutional provisions.

If rights and freedoms are to bear their full potential, they should not be treated as discrete silos, but as different parts of a continuum. To achieve this end, the Constitution requires courts, when interpreting fundamental rights or freedoms, to pay due regard to all the provisions of the Constitution. Reading the Constitution as a single whole enables courts to consider the broad context within which the interpretation of rights must take place. This affirms the claim that rights cannot be enjoyed in a vacuum but in a particular textual context which either broadens or limits the enjoyment of rights.

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[62] *See also* the case of *Kesavananda Bharatis v. State of Kerala And Anor*, W.P.(C) 135 of 1970.
[63] Section 46(1)(d) of the Constitution.

In *Mudzuru and Anor v. Minister of Justice*,[64] section 78 of the Constitution, which protects marriage rights for heterosexuals, was interpreted within the context of sections 81 and 44 of the Constitution. Section 81 protects, in a broad way, the rights of the child and the principle of the best interests of the child. Section 44 imposes on state and non-state actors the duty to respect, protect, promote and fulfil the rights and freedoms set out in the Declaration of Rights. The Court then concluded that section 22 of the Marriage Act was inconsistent with the Constitution as it promoted child marriages which the Constitution seeks to suppress.[65] Whilst the Court did not rely on national objectives, there is clear reference to other provisions of the Constitution to reinforce the importance of the entire constitutional framework in ensuring the adequate realisation of human rights guarantees. National objectives form part of the guiding principles of constitutional interpretation and must be accorded due respect when interpreting the provisions of the Declaration of Rights.

More recently, the Supreme Court of Zimbabwe dealt with the role of national objectives in the enjoyment of the rights in the Declaration of Rights. In *Zimbabwe Homeless People's Federation and Others v. Minister of Local Government & National Housing,*[66] the Supreme Court of Zimbabwe failed to distinguish between national objectives and the fundamental rights entrenched in the Declaration of Rights. It held that national objectives and human rights that are to be realised progressively "within the limits of the resources available" to the State "are essentially [ex]hortatory in nature" and "cannot be said to be strictly justiciable and enforceable in themselves".[67] To its credit, the Court observed that such provisions are neither entirely superfluous nor devoid of any legal significance, especially because they remain interpretively relevant for the purpose of informing and shaping the specific contours of the substantive rights enshrined elsewhere in the Constitution.[68] While these findings are compelling with respect to the role of national objectives in fleshing out the content of substantive rights, they are wrong in equating national objectives and fundamental rights that are both qualified by the terms 'progressive realisation' and 'within available resources'. The Court erred in suggesting that the socio-economic rights that are to be realised progressively and 'within available resources' are largely aspirational and do not impose concrete legal obligations on the state. To its credit, however, the Court would later observe that the fact that socio-economic rights are to be realised subject to the availability of resources does not absolve the state of its administrative obligation to take reasonable legislative and other measures to enable the general public to have access to adequate shelter.[69]

[64] CCZ 12/2015.
[65] At p. 50.
[66] Judgment No. SC 2020.
[67] *Ibid*., p. 8.
[68] *Ibid*., p. 8.
[69] *Ibid.*, p. 11.

4 The Declaration of Rights in Context

4.1 *Structure of the Declaration of Rights*

This section briefly discusses the structure of the Declaration of Rights and highlights some of the most important provisions for purposes of constitutional adjudication. These provisions include the application clause, the interpretation clause, the limitation clause, the public emergency clause and the provisions regulating standing in constitutional matters. Apart from the idea of 'standing' which is discussed later as one of the monumental milestones of the Declaration of Rights, these provisions and their implications for constitutional adjudication are briefly discussed as some the key provisions of the Declaration of Rights.

4.1.1 The Application Clause

The application clause mainly deals with two issues: first, holders of rights under the Declaration of Rights and, second, bearers of obligations the same. At the application stage, a court or tribunal ought to decide whether the applicant is entitled to claim the right in question and whether the respondent is constitutionally bound by the right which has allegedly been violated.[70] The twin questions of who holds rights and who bears obligations under the Declaration of Rights are clearly answered in the Declaration of Rights. In terms of section 45(1) and (2) of the Constitution, the Declaration of Rights binds not only organs of the state, but also individuals and juristic persons. Section 45(1) of the Constitution provides that the Declaration of Rights "binds the State and all executive, legislative and judicial institutions and agencies of government at every level". Apart from making it clear that the state bears duties under the Declaration of Rights, this provision entrenches the vertical application of the Declaration of Rights since it governs the relationship between state institutions and the individual. Thus, all organs of the state at every level have the duties to respect, protect, promote and fulfil the enforceable guarantees enshrined in the Declaration of Rights.

In addition, the Constitution also binds individuals and juristic persons, but the extent to which the Constitution applies horizontally depends on the nature of the right in question and any duty imposed by it. To this end, section 45(2) of the Constitution provides that "[t]his Chapter binds natural and juristic persons to the extent that it is applicable to them, taking into account the nature of the right or freedom concerned and any duty imposed by it".[71] Section 44 of the Constitution, which provides for the scope of human rights obligations of constitutional duty bearers, provides 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 Declaration of Rights. These provisions emphasise the idea that natural and juristic persons are not always bound to the same extent as

[70] *See generally* I. Currie and J. de Waal*, The Bill of Rights Handbook,* 6th edition (2013) pp. 24 and 29.
[71] Section 45(2) of the Constitution.

public authorities. Yet, the idea that the Declaration of Rights also governs horizontal relationships remains constant and is even evident in the provisions governing the supremacy of the Constitution as a principle.[72]

With regards to the issue of holders of fundamental rights, section 45(3) provides that "[j]uristic persons as well as natural persons are entitled to the rights and freedoms set out in this Chapter to the extent that those rights and freedoms can appropriately be extended to them". It is apparent from this clause that the state and all agencies of government do not bear fundamental rights but only duties. Natural persons are entitled to many of the rights protected in the Declaration of Rights. Most of the rights are extended to 'every person', whether or not they are a foreign national, young, old, disabled and so on. Nonetheless, the Declaration of Rights extends certain rights only to particular groups for different reasons, and this differentiation cannot be appropriately categorised as a violation of the equality clause. For instance, the Declaration of Rights extends voting rights only to nationals who have reached a particular age; special equality guarantees for women who have experienced unfair discrimination for a long period of time; parents and guardians who perform special responsibilities with regards to children under their care; employees who need special protection due to unequal bargaining power between them and employers; and special measures protection to children, women, people with disabilities, the elderly, war veterans and so on. This differential treatment and special protection for particular groups is normally founded on sound reasons that they rarely raise constitutional disputes. To address the differences between the categories of rights to which natural or juristic persons are entitled, the Declaration of Rights emphasises that the rights and freedoms entrenched in it can be claimed by natural and juristic persons to the extent that they can be appropriately extended to them.

At the application stage, a court or tribunal also has to decide whether the Declaration of Rights applies directly or indirectly to the dispute before it.[73] When the Declaration of Rights applies directly, the purpose is to establish whether the ordinary rules of law (as contained in legislation, the common law or customary law) are consistent with the Declaration of Rights. If they are not, then the Declaration of Rights overrides the ordinary rules of law. This principle is entrenched in sections 2(1) and 175(6)(a) of the Constitution which entrench the doctrine of the supremacy of the Constitution in a trumping sense. In instances of direct application, the Declaration of Rights generates its own set of special remedies such as declaratory orders, structural interdicts, constitutional damages and meaningful engagement.[74]

In instances of indirect application of the Declaration of Rights, the relationship between the provisions in the Declaration of Rights and the ordinary law is not governed by the principles set out in the Declaration of Rights. Instead, this relationship is regulated by the principles set out in the ordinary law (i.e. statutory

[72] Section 2(2) of the Constitution states that "[t]he obligations imposed by this Constitution are binding on every person, natural or juristic, including the State and all executive, legislative and judicial institutions and agencies of government at every level, and must be fulfilled by them".
[73] *See* I. Currie and De Waal, *The New Constitutional and Administrative Law*, vol. 1 (2001) p. 321.
[74] De Vos *et al.*, *supra* note 33, p. 323.

laws, the common law and customary law). Nonetheless, the court must interpret legislation or develop the common law or customary law in a way that promotes the values in the Declaration of Rights. The indirect application of the Declaration of Rights is not based on an investigation into whether or not the law is in direct conflict with a fundamental right stipulated in the Constitution. Accordingly, "the court has to invoke the values that underlie the [Declaration of Rights] and ask whether it should interpret or develop the law to bring it in line with these values".[75] The development of the common law or customary law is a unique remedy which is intended to balance the demands of the Constitution and the 'timeless' principles of the ordinary law.

4.1.2 The Interpretation Clause

The interpretation of fundamental human rights and freedoms is an important aspect of constitutional law. If rights are wrongly or narrowly interpreted, citizens will not adequately enjoy what is constitutionally due to them. The interpretation clause is part of the Declaration of Rights under the Zimbabwean Constitution. It provides courts, legal practitioners and law- and policy-makers with guidance on how to interpret the provisions of both the Declaration of Rights and Acts of Parliament. To give appropriate meaning and content to the rights and freedoms set out in the Declaration of Rights, it is important to ensure that human rights are interpreted in a way that pays homage to the letter and spirit of the interpretation clause.

Constitutional analysis under the now defunct Lancaster House Constitution (LHC) was carried out in a haphazard manner as there was no interpretation clause that stipulated, in a comprehensive manner, how courts had to interpret the provisions of the Declaration of Rights. The interpretation clause anticipates huge transformation in the way courts and other decision-making bodies interpret and limit the fundamental rights and freedoms protected in the Constitution. This is because it introduces new interpretive guidelines which were not part of Declaration of Rights analysis under the LHC. To begin with, the interpretation clause requires that courts consider a number of guidelines when interpreting the rights entrenched in the Declaration of Rights. These guidelines include the need to give full effect to the rights and freedoms enshrined in the Declaration of Rights; to promote the values and principles that underlie a democratic society based on clear values; to take into account international law and all treaties and conventions to which Zimbabwe is a party; to pay due regard to all the provisions of the Constitution, in particular the principles and objectives set out in Chapter 2 of the Constitution; and, when necessary, to consider foreign law. These new provisions entrench new ideas, norms and values which should inform constitutional interpretation. If these norms and values are to influence the way our courts interpret human rights, it is necessary for the relevant provisions to be unpacked so that courts and lawyers are aware of both the tools of constitutional analysis and their peremptory obligations when interpreting Declaration of Rights provisions.

[75] *Ibid.*, p. 338.

Section 46(2) of the Constitution provides that "[w]hen interpreting an enactment, and when developing the common law and customary law, every court, tribunal, forum or body must promote and be guided by the spirit and objectives of this Chapter". As is shown below, the reference to the 'spirit and objectives' of the Declaration of Rights articulates the role of the underlying values of the constitutional state in statutory interpretation and the development of the common law. Sometimes the Declaration of Rights does not apply directly to the impugned law. In such instances, the court is neither required to measure the validity of the law against the applicable constitutional right nor to declare invalid the statutory provision in question. Instead, the Declaration of Rights will indirectly influence the manner in which the court interprets and applies the law, but it will not declare the law to be unconstitutional. Indirect application of the Declaration of Rights is provided for in the interpretation clause.

4.1.3 The Limitation Clause

Human rights are not absolute. Whether based on the common law or constitutionally entrenched, an individual's rights are limited by the rights of others and other compelling societal interests. Where there are compelling and justifiable reasons for permitting infringements of human rights, these infringements may not be regarded as unconstitutional.[76] In *Ndyanabo v. Attorney-General*,[77] Samandatta J, for the Tanzania Court of Appeal, held that "[f]undamental rights are not illimitable. To treat them as being absolute is to invite anarchy in society. Those rights can be limited, but the limitations must not be arbitrary, unreasonable and disproportionate to any claim of state interest."[78] It follows that an individual's fundamental rights may have to yield to the common interests of society/the state or to the competing interests grounding other individuals' rights, provided that these interests are more compelling than the interests protected by the fundamental right concerned. In essence, the need to limit rights emerges from the notion that if human beings were allowed to enjoy rights without limitations, then only a savage few, those who are physically powerful enough to defend their claims, would enjoy fundamental rights and freedoms to the exclusion of the weak and the vulnerable.

A careful reading of the relevant provisions of the Constitution demonstrates that the state may limit human rights and freedoms, provided that the strict requirements governing limitations are complied with. In terms of section 86 of the Constitution,[79]

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[76] *See* D. Meyerson, *Rights Limited* (1997) pp. 36–43.
[77] (2002) AHRLR 243 (TzCA 2002).
[78] Para 35.
[79] Section 86 provides as follows:
(1) The fundamental rights and freedoms set out in this Chapter must be exercised reasonably and with due regard for the rights and freedoms of other persons.
(2) The fundamental rights and freedoms set out in this Chapter may be limited only in terms of a law of general application and to the extent that the limitation is fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom, taking into account all relevant factors, including –
(a) the nature of the right or freedom concerned;

all constitutional rights (except those rights stipulated in section 86(3) of the Constitution) are subject to limitations that are reasonable and justifiable in an open and democratic society. Under section 86(2) of the Constitution, fundamental rights and freedoms may only be limited by a law of general application and to the extent that the limitation is fair, reasonable, necessary and justifiable in an open and democratic society based on openness, justice, human dignity, equality and freedom. The first requirement means that government derives its power from the law and should exercise such power *only* in the manner and to the extent stipulated in the empowering legislation.[80] The second requirement implies that constitutional rights may only be limited by laws that apply equally to all people and that law must not be arbitrary in its application.

Besides stipulating the two requirements stipulated above, the Constitution gives an outline of the factors that must be considered in determining whether the limitation of a particular right is fair, necessary, reasonable and justifiable in a democratic society. These factors include the nature of the right or freedom concerned; the purpose of the limitation; the nature and extent of the limitation; the need to ensure that the enjoyment of fundamental rights and freedoms by any person does not prejudice the rights and freedoms of others; the relationship between the limitation and its purpose; and the significance of implementing less restrictive means to achieve the purpose of the limitation.[81] These factors impose far-reaching restrictions on the state and imply that rights should be limited only in exceptional circumstances. The restrictions imposed on the limitation of rights reinforce the idea that the purpose of the Declaration of Rights is not to limit but to protect fundamental rights and freedoms.

4.1.4 Public Emergency Clause

The Declaration of Rights' public emergency provisions codify rules regulating the circumstances under and extent to which a state may derogate from human rights during a state of emergency. Specific conditions are often attached to the state's

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(b) the purpose of the limitation, in particular whether it is necessary in the interests of defence, public safety, public order, public morality, public health, regional or town planning or the general public interest;
(c) the nature and extent of the limitation;
(d) the need to ensure that the enjoyment of rights and freedoms by any person does not prejudice the rights and freedoms of others;
(e) the relationship between the limitation and its purpose; in particular whether it imposes greater restrictions on the right or freedom concerned than are necessary to achieve its purpose; and
(f) whether there are any less restrictive means of achieving the purpose of the limitation.
(3) No law may limit the following rights enshrined in this Chapter, and no person may violate them –
(a) the right to life, except to the extent specified in section 48;
(b) the right to human dignity;
(c) the right not to be tortured or subjected to cruel, inhuman or degrading treatment or punishment;
(d) the right not to be placed in slavery or servitude;
(e) the right to a fair trial;
(f) the right to obtain an order of *habeas corpus* as provided in section 50(7)(a).

[80] *See August v. Electoral Commission*, 1999 (3) SA 1 (CC).

[81] Section 85(2)(a)–(f) of the Constitution.

decision to pursue the public emergency route. Ordinarily, emergency measures must be authorised and established by law, shown to be necessary and designed to promote national security interests. These requirements are designed to perform certain critical functions. They are meant to strike a delicate balance between the enjoyment of fundamental rights and national security, and to prevent the relaxation of obligations arising from fundamental but derogable rights. Our Constitution is very categorical on the kind of rights that are non-derogable, and these include the right to life;82 the right to human dignity; the right to a fair trial; the right not to be placed in slavery or servitude; the right to obtain an order of *habeas corpus*; and the right not to be tortured or subjected to cruel, inhuman or degrading treatment. The non-derogable rights protected in sections 86(3) and 87(4)(b) of the Constitution provide for the minimum levels of protection to be accorded to persons, even during a public emergency.

The declaration of a state of emergency is regulated by sections 87(1)–(4) and 113 of the Constitution. In addition, the provisions of the Second Schedule are relevant to declarations of public emergency. Be that as it may, the provisions of section 113(1)–(8) of the Constitution directly regulate the procedure (the how part) for declaring a public emergency. Only the president has the power to declare a public emergency, and s/he can do that without consulting anyone or any institution, whether Parliament or cabinet.[83] For purposes of this chapter, it is not necessary to discuss in detail all provisions regulating the declaration of a state of public emergency. It suffices to mention that for a declaration of public emergency to be lawful and withstand constitutional scrutiny, it must fulfil the following requirements: the declaration must be authorised by a written law; the written law must be published in the gazette; the written law may not impose greater restrictions than are strictly required by the demands of the public emergency; the written law may not indemnify the state or any other person in respect of any unlawful activity; and the written law may not authorise violations of illimitable and non-derogable rights. These requirements both limit the circumstances under which a public emergency may be declared and emphasise the fact that such emergencies should not be lightly declared.

4.1.5 Substantive Provisions

Substantive provisions of the Declaration of Rights protect the rights and freedoms to which every person or group of person is entitled. Our Constitution protects civil and political rights, social and economic rights and, to a limited degree, group rights. All these sets of rights guaranteed in the Constitution generate positive and negative obligations on state and non-state actors. As provided for in section 44 of the Constitution, every other constitutional right imposes on the state and, to a limited extent, on individuals the duties to respect, protect, promote and fulfil the rights entrenched in the Declaration of Rights. The provisions entrenching substantive

[82] However, the right to life is regrettably limited by the imposition of capital punishment for murder committed under aggravated circumstances.
[83] Section 113(1) of the Constitution.

rights should be applied, interpreted and limited in a manner consistent with the other key provisions of the Constitution. These other key provisions include the application clause, the interpretation clause, the limitation clause and the public emergency cause.

4.2 *The Declaration of Rights as an Epitome of Zimbabwe's Constitutional Revolution*

The Zimbabwean Constitution is a transformative document in that it seeks to transform the lives of ordinary citizens and create better conditions of living for all people. It has a Declaration of Rights which codifies fundamental human rights and spell outs, in broad terms, what the government should do in order to achieve social and economic transformation. At the heart of the social transformation agenda are socio-economic rights, the notion of remedial equality, affirmative action measures in different contexts and other mechanisms meant to address historical injustices. These mechanisms ensure that the Declaration of Rights stands as a 'bridge' linking pasts that were characterised by inequality, racial segregation and the marginalisation of 'blacks' in all sectors of society to futures that are characterised by respect for human dignity, social justice and equal opportunity for all persons regardless of their age, gender, skin colour, social origin, economic status or any other prohibited ground of discrimination.

To ensure that the 'bridge' is not made up of 'constitutional ropes of sand' or rights that constitute no more than paper law, it is important for state and non-state actors to take positive steps targeted at ensuring that historically disadvantaged categories of persons, particularly women, people with disabilities, the elderly, war veterans and children benefit from distributive and redistributive programmes. The most important point is that the Declaration of Rights singles out specific categories of persons for further constitutional protection regardless of the fact that such persons are also protected by provisions entrenching the rights of the generality of the population. This approach recognises that there are certain barriers that impede the realisation of the rights of disadvantaged persons in ways that are peculiar to them.

The Constitution is both a backward-looking and forward-looking document. It was designed both to address the injustices of the past and to create a legal framework within which the redistribution of power, privilege and wealth should take place now and in the future. At the heart of social groups meant to benefit from the Constitution's transformative vision are blacks, women, the elderly, war veterans, people with disabilities, children and youth. In his seminal work published in the late 1990s, Klare defines the project of transformative constitutionalism in the following terms:

> [A] long term project of constitutional enactment, interpretation and enforcement committed (not in isolation, of course, but in a historical context of conducive political developments) to transforming a country's political and social institutions and power relations in a democratic, participatory and egalitarian direction. Transformative constitutionalism connotes an enterprise

of inducing large-scale social change through non-violent political processes grounded in law.[84]

Since the late 1990s, scholars have grappled with the scope of the idea of social transformation and the role of state and non-state actors in promoting social and economic transformation.[85] The social and economic transformation which the Constitution seeks to achieve is a continuous process that survives multiple generations of the general public. Transformative constitutionalism, as a long term project, is intended to achieve three objectives. These objectives are to transform the country's social and political institutions in an egalitarian direction; to change narratives and realities of power relations between different social groups; and to induce large-scale social change through non-violent political processes grounded in law. As former Chief Justice of South Africa once said:

> Transformation is a permanent ideal, a way of looking at the world that creates a space in which dialogue and contestation are truly possible, in which new ways of being are constantly explored and created, accepted and rejected and in which *change is unpredictable but the idea of change is constant*.[86]

There is no doubt that the change envisaged in numerous constitutional provisions seeks to facilitate social and economic transformation for the benefit of the poor in our societies. Most of the changes that are expected to take place as a result of the dawn of the new constitutional dispensation can largely be attributed to the revolutionary provisions entrenched in the Declaration of Rights. To this end, the Declaration of Rights can be characterised as an epitome of Zimbabwe's constitutional revolution.

4.3 *Monumental Milestones of the Declaration of Rights*

4.3.1 Indivisibility and Interconnectedness of Human Rights

In order to give 'full effect' to the rights and freedoms entrenched in the Declaration of Rights, it is vital for the courts and all agencies of government to view different rights not in an oppositional manner but in a manner that accommodates the notion that all rights are mutually reinforcing and should be read together whenever this is possible. Against this background, it is patent that the Constitution codifies the idea that all human rights are, as a matter of principle, indivisible, interrelated and interconnected. It is the indivisibility and interconnectedness of human rights that calls for the holistic interpretation and application of all the rights that are protected in the Declaration of Rights. By adopting a unitary approach to the enjoyment of

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[84] K. Klare, 'Legal Culture and Transformative Constitutionalism', 14 *South African Journal on Human Rights* (1998) p. 146, at p. 150.

[85] *See*, for example, D. Moseneke, 'The Fourth Bram Fischer Memorial Lecture: Transformative Adjudication', 18 *South African Journal on Human Rights* (2002) p. 309; A. J. van der Walt, 'Legal History, Legal Culture and Transformative Constitutionalism in a Constitutional Democracy', 20 *Southern African Public Law* (2005) p. 155; and S. Liebenberg, 'Needs, Rights and Transformation: Adjudicating Social Rights', 17:1 *Stellenbosch Law Review* (2006) p. 5.

[86] P. Langa, 'Transformative Constitutionalism', 17:3 *Stellenbosch Law Review* (2006) p. 351, at p. 354, emphasis added.

human rights and freedoms, the Constitution follows up the promise made by the international community in the early to mid-1990s. In 1993, participants at the Vienna World Human Rights Conference declared:

> All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to *promote and protect all human rights and fundamental freedoms*.[87]

Just like the international community did in the early 1990s, Zimbabwe took a bold step to ensure the protection of all sets of rights on the same footing, thereby bridging the conceptual gap between civil and political rights on one side of the ledger and social, economic and cultural rights on the other. In theory, the existence of the constitutional provisions protecting social and economic rights in the same Declaration of Rights protecting civil and political rights embodies the twin concepts of the interrelatedness and indivisibility of human rights. To this end, the Declaration of Rights transcends the historical divide between the so-called generations of rights. In the past, there were three generations of rights in terms which civil and political rights were dubbed 'first generation' rights. These rights were initially thought to generate negative duties only, although there is adequate evidence, at least now, that civil and political rights also generate positive duties on the part of both state and non-state actors. Social, economic and cultural rights were generally referred to as 'second generation' rights and were thought to generate mainly positive obligations, especially on the part of the state, to provide the resources needed to enjoy these rights. Group rights such as the right to self-determination or the rights of linguistic and religious communities were referred to as 'third generation' of rights.[88] These latter categories of rights were not viewed as important and were generally relegated to the margins of the international legal system.

It is clear that the division of rights into generations created, if not intentionally, a hierarchy of rights in terms of which civil and political rights were viewed as more important and therefore deserving more protection than the other sets of rights. The Constitution departs from his rather artificial classification of rights and stipulates that rights should be read holistically if they are to be 'given full effect'. As Yacoob J, referring to the South African situation, would have it:

> Our Constitution entrenches both civil and political rights and social and economic rights. All the rights in our Bill of Rights are inter-related and mutually supporting. There can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied those who have no food, clothing or shelter. Affording socio-economic rights to all people therefore enables them to enjoy the other rights enshrined in Chapter 2. *The realisation of these rights is also key to the advancement of race and gender equality and the evolution of a society in which*

[87] *See* Vienna Declaration and Programme of Action, World Conference on Human Rights, Vienna 14–25 June 1993, UN DOC. A/CONF.157/23 (1993), Part 1, para. 5.

[88] For a fuller description of generations of rights, *see generally* M. R. Sarani, S. H. Sadeghi and H. Ravandeh, 'The Concept of "right" and its three generations', 5:4 *International Journal of Scientific Study* (2017) p. 37, at p. 38.

men and women are equally able to achieve their full potential … The proposition that rights are interrelated and are all equally important is not merely a theoretical postulate.[89]

The 2013 Constitution of Zimbabwe follows the South African model and provides for all sets of rights without necessarily stipulating which rights are more important than others. Accordingly, there is no hierarchy of rights in the Constitution, and all rights are important and should be equally respected and promoted. Nonetheless, section 86(3) provides for rights that may not be limited by any law or conduct and, to this extent, tends to suggests that these rights are more compelling than others. They include the right to life, except to the extent specified in section 48; the right to human dignity; the right not to be tortured or subjected to cruel, inhuman or degrading treatment or punishment; the right not to be placed in slavery or servitude; the right to a fair trial; and the right to obtain an order of *habeas corpus* as provided in section 50(7)(a) of the Constitution.

4.3.2 The Inclusion of Socio-Economic Rights in the Declaration of Rights

Historically, socio-economic rights were not viewed as justiciable rights, primarily because they engender positive obligations in contrast to the negative obligations commonly associated with civil and political rights. The latter set of rights was collectively named 'first generation rights' and the former rights were collectively referred to as 'second generation rights'. This generation classification of human rights has led to the marginalisation of socio-economic rights in constitutional and international human rights law and thought. Both the separate adoption of the International Covenant on Civil and Political Rights (ICCPR)[90] and the International Covenant on Economic, Social and Cultural Rights (ICESCR)[91] and the manner in which the legal obligations imposed by the two categories of rights are defined reflect the historical relegation of socio-economic rights to the margins of legal protection and the ideological tension between the Eastern bloc and the Western bloc during the negotiations for the adoption of the two covenants.[92] Regrettably, the rights that are protected in the ICESCR are to be realised progressively to the maximum of the state's available resources, and the obligations of states parties under the ICCPR are to respect and ensure the enjoyment of civil and political rights without any limiting reference to available resources.[93]

The constitutional protection of socio-economic rights underlines the importance of social provisioning in the enjoyment of civil and political freedoms. Berlin once noted that "to offer political rights … to men who are half-naked, illiterate, underfed, and

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[89] *Government of the Republic of South Africa and Others v. Grootboom and Others*, 2001 (1) SA 46, paras. 23 and 83, emphasis added.
[90] GA res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966), 999 UNTS 171, entered into force 23 March 1976.
[91] GA res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 49, UN Doc. A/6316 (1966), 993 UNTS 3, entered into force 3 January 1976.
[92] For an historical account of the forces which led to the relegation of socio-economic rights, *see* C. Mbazira, 'Bolstering the Protection of Economic, Social and Cultural Rights under the Malawian Constitution', 1:2 *Malawi Law Journal* (2007) pp. 220–231; and M. Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on Its Development* (1998).
[93] *See* Article 2(1) of the ICCPR and Article 2(1) of the ICESCR.

diseased, is to mock their condition, they need medical help or education before they can ... make use of an increase in their freedom".[94] These sentiments were later echoed by Nelson Mandela when he made the following remarks:

> A simple vote, without food, shelter and health care is to use first generation rights as a smokescreen to obscure the deep underlying forces which dehumanise people. It is to create an appearance of equality and justice, while by implication socio-economic inequality is entrenched. We do not want freedom without bread, nor do we want bread without freedom. We must provide for all the fundamental rights and freedoms associated with a democratic society.[95]

These remarks are mirrored in the constitutional text protecting social, economic, civil and political rights. Apart from departing from the generation categorisation of human rights and the resultant marginalisation of socio-economic rights, the Declaration of Rights acknowledges and reinforces the interrelatedness and indivisibility of all human rights and entrenches a holistic approach to human rights and socio-economic transformation. Given that many Zimbabweans live in absolute poverty,[96] the centrality of socio-economic rights to the improvement of the quality of life of citizens is quite telling. The drafters of the Constitution realised that the human rights movement would be threatened with a crisis of relevance if the Declaration of Rights did not protect socio-economic rights. The constitutional protection of socio-economic rights promotes the substantive enjoyment of all human rights, makes the transition to democracy more meaningful to the majority of the citizenry and transforms the quality of life of those who live in abject poverty.[97] The Constitution recognises that the quality of democracy should not be measured solely by the number of citizens who exercise their rights to vote and to stand for public office, but also by the country's success in uprooting poverty, reducing inequality and broadening equal access to opportunities and basic services.

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[94] I. Berlin, 'Two Concepts of Liberty', in H. Hardy (ed.), *Liberty* (2002) p. 166, at p. 171. *See also* C. Scott and P. Macklem, 'Constitutional Ropes of Sand or Justiciable Guarantees? Social and Economic Rights in a New South African Constitution', 141 *University of Pennsylvania Law Review* (1992) p. 1, at p. 27, arguing that "[a] constitutional vision that includes only traditional civil liberties within its interpretive horizon fails to recognise the realities of life for certain members of society who cannot see themselves through the constitutional mirror".

[95] N. R. Mandela, 'Address: On the Occasion of the ANC's Bill of Rights Conference', in A Bill of Rights for a Democratic South Africa: Papers and Report of a Conference Convened by the ANC Constitutional Committee, May 1991, p. 9, at p. 12.

[96] Poverty has been broadly defined as having "various manifestations, including lack of income and productive resources sufficient to ensure sustainable livelihoods; hunger and malnutrition; ill health; limited access or lack of access to education and other basic services; increased morbidity and mortality from illness; homelessness and inadequate housing; unsafe environments; and social discrimination and exclusion. It is also characterized by a lack of participation in decision-making and in civil, social and cultural life." Absolute poverty has in turn been defined as "a condition characterized by severe deprivation of basic human needs, including food, safe drinking water, sanitation facilities, health, shelter, education and information. It depends not only on income but also on access to social services." *See* World Summit for Social Development, Programme of Action, Chapter II 'Eradication of Poverty', para. 19, Copenhagen, March 1995.

[97] *See* A. Sachs, 'Towards a Bill of Rights in a Democratic South Africa', 6 *South African Journal on Human Rights* (1990) p. 1, at pp. 4–6, and D. Omar, 'Enforcement of Social and Economic Rights', in *A Bill of Rights for a Democratic South Africa* (1991) p. 106, at p. 112.

More importantly, however, the protection of socio-economic rights performs compelling functions in the protection of marginalised and vulnerable groups and individuals. To a large extent, the protection of social and economic rights embodies the transformative vision of the Constitution. To begin with, by converting material needs and interests into human rights, the Declaration of Rights announces a departure from the charity-based approach to the rights-based approach to human development. This means that social provisioning should no longer be characterised as a demonstration of the government's generous support to those in need of basic amenities of life, but as a fulfilment of a constitutional promise made to citizens on the adoption of the new Constitution. To this end, both the achievement of substantive equality and the promotion of socio-economic transformation through the adoption of legislative and policy measures deliberately intended to benefit the poor become binding obligations imposed on the government by the citizen's justiciable socio-economic rights. An important corollary of the rights-based approach to human development is that those who violate socio-economic rights or refuse or fail to achieve the transformative vision of the Constitution may be taken to court for doing so. The adjudication of socio-economic rights becomes an important tool for achieving social transformation and promoting equality between persons belonging to different races, ages, genders and other classes in society.

At a deeper level, the protection of socio-economic rights is rooted in the idea of equal worth, care and concern. It portrays the government as a caring 'friend' of the vulnerable citizen and embodies the idea that no matter how poor and downtrodden a citizen may be the state will take steps to ensure that they live a dignified life. In a way, the protection of socio-economic rights promises the citizen that the state cares and is concerned about their condition. As such, the state shall not watch its citizens having their dignity compromised or their lives degraded because of their inability to afford basic necessities of life. A state that ignores the needs of the most vulnerable in society, those whose ability to enjoy rights is in most peril, may not be construed as respecting and protecting the dignity of its citizens as required by section 51 of the Zimbabwean Constitution.

The inclusion of socio-economic rights in the Declaration of Rights is an integral component of the social and economic transformation which the drafters of the Constitution were intent on achieving. First, it fosters a comprehensive or inclusive vision of human rights which responds to multiple forms of disadvantage, subordination and economic inequalities. This vision portrays the post-colonial legal order as a system designed to correct the economic injustices of the past and to challenge the institutionalised legacy of social inequality. Second, the inclusion of socio-economic rights in the new Constitution foresees a constitutionally grounded process of social change in terms of which marginalised individuals and groups play an active part in challenging the state of inequality in the country. Accordingly, being constitutionally empowered to invoke all sets of rights, especially socio-economic rights, entitles citizens to play an integral part in the process of socio-economic reconstruction and human development. In other words, the protection of social and economic rights as justiciable guarantees in the Declaration of Rights sends a signal to all rights bearers, particularly in light of the provisions liberalising *locus standi*, that

they are important and the state equally cares for them regardless of their present economic or social position in society. This mirrors the centrality of the notion of equal care and equal concern which revolves around the twin ideas of human dignity and equality – both as founding values and as enforceable rights.

4.3.3 The Liberalisation of *Locus Standi* (Standing)

Section 85(1)(a)–(e) extends to various categories of people the right to approach a court alleging that a "right has been, is being or is likely to be infringed". These categories include persons acting in their own interests; persons acting on behalf of those who cannot act for themselves; persons acting as members of or in the interests of classes of people; persons acting in the public interest or associations acting in the interests of their members.[98] By liberalising standing, especially through allowing public interest litigation and class actions meant to protect class and public interests, the Constitution enables more knowledgeable individuals and organisations to institute court proceedings against those responsible for infringing the poor's socio-economic rights. This is an important step towards social and economic transformation, especially in light of the fact that those whose needs are most urgent and whose capability to fend for themselves is next to none, are likely to lack the technical knowledge on how to obtain effective remedies for violations of socio-economic rights. In fact, section 85 removes the need for there to be an actual violation of a right and legal proceedings can be initiated to prevent such violations before they occur. While it refers to acts that are about to happen, which indicates some form of immediacy or impending threats to the enjoyment of rights, this need not necessarily be the case.

More importantly, however, courts have powers to give prohibitory orders such as interdicts to prevent violations of rights which are about to happen. They do not have to have to wait until the actual violation occurs and litigants have the leeway to

[98] Section 85 of the Constitution provides as follows:
(1) Any of the following persons, namely –
(a) any person acting in their own interests;
(b) any person acting on behalf of another person who cannot act for themselves;
(c) any person acting as a member, or in the interests, of a group or class of persons;
(d) any person acting in the public interest;
(e) any association acting in the interests of its members;
is entitled to approach a court, alleging that a fundamental right or freedom enshrined in this Chapter has been, is being or is likely to be infringed, and the court may grant appropriate relief, including a Declaration of Rights and an award of compensation.
(2) The fact that a person has contravened a law does not debar them from approaching a court for relief under subsection (1).
(3) The rules of every court must provide for the procedure to be followed in cases where relief is sought under subsection (1), and those rules must ensure that–
(a) the right to approach the court under subsection (1) is fully facilitated;
(b) formalities relating to the proceedings, including their commencement, are kept to a minimum;
(c) the court, while observing the rules of natural justice, is not unreasonably restricted by procedural technicalities; and
(d) a person with particular expertise may, with the leave of the court, appear as a friend of the court.
(4) The absence of rules referred to in subsection (3) does not limit the right to commence proceedings under subsection (1) and to have the case heard and determined by a court.

institute proceedings if they perceive an imminent threat to the rights or freedoms in question. In *Mawarire v. Mugabe NO and Others,*[99] Chidyausiku CJ, for a unanimous Court, made the following remarks:

> Certainly this Court does not expect to appear before it only those who are dripping with the blood of the actual infringement of their rights or those who are shivering incoherently with the fear of the impending threat which has actually engulfed them. This Court will entertain even those who calmly perceive a looming infringement and issue a declaration or appropriate order to stave the threat, more so under the liberal post-2009 requirements.[100]

Chidyausiku CJ was mostly concerned with the fact that the traditional approach to standing only served litigants who had suffered an infringement of their rights or those who faced an imminent threat to their rights. This approach had to be broadened to include 'even those who calmly perceive a looming infringement' in order to fulfil the constitutional imperative that any person alleging that a right 'has been, is being or is likely to infringed' is entitled to approach the courts for relief.

The Constitution has also overturned the dirty hands doctrine, a principle in terms of which a person who had violated the law had no right to approach the courts for relief even if their rights had been violated in the process.[101] Further, the Constitution requires courts to avoid refusing to entertain cases based on procedural and other technicalities. This is important for access for justice by all, especially in countries where the majority of citizens are not familiar with the legal process for vindicating their rights and are therefore likely to make multiple procedural blunders when seeking to enforce their rights.

There has been a significant paradigm shift, especially in light of the broad provisions of section 85(1) of the Constitution, towards the liberalisation of *locus standi.* The new approach addresses the shortcomings of the traditional and narrow approach. It is intended to enhance access to justice by individuals and groups without the knowledge and resources to vindicate their rights in the courts. There is no doubt that the new approach to Declaration of Rights litigation acknowledges that the old approach defeated the idea behind conferring entitlements upon the poor. The majority of people who benefit from the state's social provisioning programmes do not have the resources, the knowledge and the legal space to drag powerful states or transnational corporations to court in the event of a violation of their rights. Insisting that the person who institutes proceedings be the one whose rights have been directly and immediately adversely affected would hinder public interest litigation by non-governmental, pressure groups and other interested persons.

4.3.4 The Horizontal Application of the Declaration of Rights and the Demise of the Public/Private Divide

In terms of section 45(1) and (2) of the Constitution, the Declaration of Rights binds not only organs of the state, but also individuals and juristic persons. Section 44

[99] CCZ 1/2013.
[100] At p. 8.
[101] Section 85(2) of the Constitution.

provides that "[t]he 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 this Chapter". Section 45(1) of the Constitution provides that the Declaration of Rights "binds the State and all executive, legislative and judicial institutions and agencies of government at every level". Thus, all the organs of the state at every level have the duties to respect, protect and promote the enforceable guarantees enshrined in the Declaration of Rights.

In addition, the Constitution also binds individuals and juristic persons, but the extent to which the Constitution applies horizontally depends on the nature of the right in question and any duty imposed by it. To this end, the Declaration of Rights provides that "[t]his Chapter binds natural and juristic persons to the extent that it is applicable to them, taking into account the nature of the right or freedom concerned and any duty imposed by it".[102] Section 44 of the Constitution, which provides for the scope of human rights obligations of constitutional duty bearers, provides 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 Declaration of Rights. These provisions emphasise the idea that natural and juristic persons are not always bound to the same extent as public authorities. Yet, the idea that the Declaration of Rights also governs horizontal relationships remains constant and is even evident in the provisions governing the supremacy of the Constitution as a principle.[103]

Conventional perceptions of the law are based on a rigid division between private and public spheres.[104] The private sphere is characterised by institutions such as the family, the market, and juristic or quasi-juristic persons like companies and partnerships. In terms of the private/public divide, state institutions have no business interfering with the activities of these institutions. As Liebenberg would have it, "[t]he state's role in these zones of freedom and privacy should be minimised and restricted to facilitating the unimpeded functioning of these institutions. Within this paradigm, the function of Declarations of Rights in national constitutions is to shield citizens against unwarranted state intrusions in their natural rights and liberties."[105] This approach to the promotion and protection of human rights both relegates the meeting of needs to family or market institutions and depoliticises the oppression confronted by weaker classes in society.

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[102] Section 45(2) of the Constitution.

[103] Section 2(2) of the Constitution states that "[t]he obligations imposed by this Constitution are binding on every person, natural or juristic, including the State and all executive, legislative and judicial institutions and agencies of government at every level, and must be fulfilled by them".

[104] On the historical origins of the public/private divide, *see* D. Gobetti, 'Humankind as a System: Private and Public Agency at the Origins of Modern Liberalism', in J. Weintraub and K. Kumar (eds.), *Public and Private in Thought and Practice: Perspectives on a Grand Dichotomy* (1997) pp. 103–132.

[105] S. Liebenberg, Socio-economic Rights: Adjudication under a Transformative Constitution (2009) p. 59. *See also* R. Barnett, *Restoring the Lost Constitution: The Presumption of Liberty* (2004) p. 263, arguing that "[t]here is no constitutional privilege to commit a tort or breach of contract, but for long as one is acting rightfully, one should presumptively be immune from government interference".

The orthodox view about vertical and horizontal relationships gave birth to and sought to entrench a divide between public law and private law. From this conventional perspective, the Declaration of Rights, being an aspect of public law, could not rightly be applied to govern relationships between private persons because these relationships belonged to the private sphere and had to be governed by private law. In Cockrell's words, it was initially thought that "to allow a bill of rights to intrude into the realm of horizontal relationships would have unduly intrusive consequences in matters that were adequately regulated by private law".[106] This approach was driven by the underlying assumption that vertical relationships were between fundamentally unequal parties and horizontal relationships were between squarely equal parties.

Given that the state was thought to have great monopoly over social and economic power, it was imperative for a Declaration of Rights to protect the weaker party, i.e. the citizen, against the abuse of public power. The implicit "assumption was that private power – situated in the realm of the 'market' [and the family] rather than the domain of politics – was not problematic in the way that public power was, and should be considered immune from the reach of a bill of rights".[107] Three criticisms against this approach to the application of the Declaration of Rights, an aspect of public law, to horizontal relationships governed by private law eventually emerged. One of the criticisms seeks to demonstrate that it is a myth that private persons have equal power. An individual employee who is signing an employment contract with a multi-national company with branches all over the region or the world may not be correctly said to be equal to their employer, who has economic power over them and gives them directions every day. In the context of the family, it can hardly be said that child is equal to a parent or guardian, who gives them instructions which must be obeyed, decides which school they ought to attend and determines their child's religious beliefs.

The second criticism challenges the assumption, implicit in the public-private, that the state does not or should not regulate horizontal relationships. This criticism seeks to point at the hidden role of the state in regulating private relationships. For instance, the consummation of marriage between two individuals is often regulated by every country's marriage laws; the relationship between medical practitioners and their clients – i.e. patients – is also subject to the criminal and delictual rules of law; and the employer-employee relationship is often regulated by the constitution and the country's labour laws. One could think about additional examples, but the point sought to be established is that the state has always intervened in private relationships primarily for two purposes: first, to achieve its own objectives and to protect the weaker party in horizontal relationships, and, second, to protect and advance shared values and practices which citizens are not allowed to trump at will.

The third criticism draws inspiration from the rise of private power in modern society, such that it is no longer the case that the state still enjoys monopoly over social,

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[106] *See* A. Cockrell, 'Private Law and the Bill of Rights: A Threshold Issue of Horizontality', in LexisNexis, *Bill of Rights Compendium*, Service Issue, (2013) 3A1, 3A4, para. 3A2.
[107] *Ibid*., 3A, para. 3A2.

political and economic power.[108] To a large extent, this argument hinges on the privatisation of public power, i.e. the performance of public functions by private companies or individuals. The classical liberal political postulate that the major threat to liberty is the power of the state does not only fail to explain the relative weaknesses of some states but also overlooks the growing power of large national and supranational private institutions such as conglomerates.[109] In an age characterised by the outsourcing of public services to private companies and the privatisation of public functions, the formalistic application of the private/public distinction would extend immunity, from human rights norms and values, to many private persons performing public functions. In fact, many private law norms, values and principles would be concealed from the public eye and would be insulated from critical examination for their consistency with the normative public value-system entrenched in the Constitution, particularly the Declaration of Rights.[110] Seidman casts the dichotomy as a false one and locates the link between public and private power in the following terms:

> Liberal rights both grew out of, and reinforced, the public-private distinction as the core of Liberal legal ideology. Liberal rights were almost always conceptualised as claims by private persons against the state, rather than as claims to state resources to combat private oppression. Claims to Liberal rights therefore both ignored and obfuscated the extent to which the private sphere was, itself, constructed by public decisions. The failure to detect state responsibility had the effect of taking off the table constitutional claims to radical redistribution of private resources and power.[111]

The modern world has registered an unprecedented rise in "new fragmented centres of power such as voluntary associations, trade unions, corporations, multinationals, universities, churches, etc. The emergence of large private institutions, wielding massive power over the lives of citizens, is an integral component of modern life. In principle, this power might be as oppressive – and potentially as illegitimate – as the power wielded by the state."[112] In fact, some private corporations have become so

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[108] *See South African National Defence Union v. Minister of Defence*, 2003 SA 239 T, 218, Van der Westhuizen J had the following to say: "The assumption that the state is always more powerful than so-called private concerns is not necessarily tenable or generally accepted in either modern constitutional jurisprudence or political and economic philosophy; hence the recognition that constitutional rights could be horizontally binding on private entities under certain circumstances as envisaged in section 8 of the Constitution."

[109] *See generally* N. Fraser, 'Reframing Justice in a Globalised World, 36 *New Left Review* (2005) p. 1, at pp. 9–10; K. De Feyter and F. Gomez Isa (eds.), *Privatisation and Human Rights in the Age of Globalisation* (2005); and C. Scott, 'Multinational Enterprises and Emergent Jurisprudence on Violations of Economic, Social and Cultural Rights', in A. Eide, C. Krause and A. Rosas (eds.), *Economic, Social and Cultural Rights: A Textbook*, 2nd revised edition (2001) p. 563, at pp. 566–567.

[110] For similar arguments, *see* A. J. van der Walt, 'Tradition on Trial: A Critical Analysis of the Civil Law Tradition in South African Property Law', 11 *South African Journal on Human Rights* (1995) p. 169, at p. 184, arguing that private law rights have been conventionally "valued and protected as trumps which insulate the individual from all, but the most limited unavailable state actions"; and A. Cockrell, 'Can You Paradigm?' – Another Perspective on the Public Law/Private Law Divide', *AJ* (1993) p. 227, at p. 228.

[111] *See* L. M. Seidman, 'Critical Constitutionalism Now', 75 *Fordham Law Review* (2006) p. 525, at p. 578.

[112] Cockrell, *supra* note 87, 3A4, para. 3A2.

powerful that they do not only control or influence the decisions made by national governments but are also responsible for gross violations of human rights. Today, many public services – including the provision of water, electricity, sanitation, food and health care – have been fully or partly privatised, and functions historically performed by public bodies now lie in the hands of juristic persons. Albeit in a different context and drawing inspiration from Roberts, Calland succinctly writes:

> [The] focus on the public sector leaves out large, and growing, amounts of relevant and important information held by private entities. For while the case for transparency in the public sphere has been successfully made and in many places implemented, public power has seeped into a new range of institutions and bodies. *Because of the massive trend toward privatization, goods and services once provided by the state, or at least considered to be state responsibilities, are now provided by private firms under various arrangements with governments*. As Roberts notes, in the last quarter of the twentieth century "authority has flowed out of the now-familiar bureaucracy and into a new array of quasi-governmental and private bodies. The relocation of authority has provoked another doctrinal crisis: the old system of administrative controls, built to suit a world in which public power was located within government departments and agencies, no longer seems to fit contemporary realities.[113]

There is no sound reason why juristic persons that perform quasi-public roles and provide public goods and services should not be held to the same standards of transparency and accountability as their public sector counterparts. The growing trend toward the privatisation of public power and the challenges that emerge as a result provide a background against which the horizontal application of the Declaration of Rights must be understood and justify an imaginative reading of the relevant provisions of the Constitution. In *AAA Investments (Pty) Ltd v. Micro Finance Regulatory Council and Another*,[114] O'Regan J held as follows:

> It is true that no bright line can be drawn between 'public' functions and private ordering. Courts in South Africa and England have long recognised that non-governmental agencies may be tasked with a regulatory function which is public in character. In determining whether rules are public in character, although made and implemented by a non-governmental agency, several criteria are relevant: whether the rules apply generally to the public or a section of the public, whether they are coercive in character and effect; and whether they are related to a clear legislative framework and purpose. This list is not exhaustive, nor are any of the criteria listed necessarily determinative.[115]

These remarks indicate not only the modern complexities surrounding the exercise of public power, but also the relocation of public power into the hands of powerful individuals and multinational companies. Add to these developments movement towards collaborative work between private entities and public bodies, i.e. the so-called public-private partnerships. This trend has resulted in the further economic empowerment of non-state actors and the proliferation of powerful, geographically indeterminate transnational non-state actors. These groups and individuals do and will represent the primary participants not only in industrial development and the

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[113] R. Calland, 'Prizing Open the Profit-making World', in A. Florini (ed.), *The Right to Know: Transparency for an Open World* (2007) p. 214, at pp. 214–215, emphasis added.
[114] 2007 (1) SA 343 (CC).
[115] Para. 119.

private market, but also in providing essential services to the poor throughout the world. Historically, non-state actors would challenge the state system as their operations were shrouded in privacy and secrecy. The horizontal application of the Declaration of Rights challenges this traditional approach and seeks to hold non-state actors accountable for human rights violations that occur in the private sphere.

4.3.5 Substantive Equality and the Positive Duty to Address the Injustices of the Past

Unlike formal equality, which requires uniform treatment of persons according to the same 'neutral' norm, substantive equality requires that persons in unequal circumstances be treated unequally in order to address socio-economic disparities. Substantive equality therefore requires that affirmative action measures be taken to level up differences in resource ownership, power and privilege, particularly where there is a direct chain of causation between preferential treatment of one group and the disadvantage faced by another group. When it comes to remedying existing patterns of disadvantage, section 56(6) of the Constitution provides the legal basis for adopting measures intended to groups that were unfairly discriminated against. It provides that "[t]he State must take reasonable legislative and other measures to promote the achievement of equality and to protect or advance people or classes of people who have been disadvantaged unfair discrimination".[116] It further provides that "such measures must be taken to redress circumstances of genuine need [and] no such measure is to be regarded as unfair for the purposes of subsection 3". Affirmative action measures may not be regarded as violating the prohibition of unfair discrimination under section 56(3) of the Constitution. The Constitution insulates all the measures that are adopted by the state to promote the rights of persons belonging to vulnerable groups, all of whom were historically disadvantaged by unfair discrimination. In attempting to equalise opportunities, the legislative and policy measures referred to in section 56(6) of the Constitution may not be strictly based on identical treatment of different categories of persons because, as a result of history, various social and racial groups find themselves in different economic situations.

Disadvantage is often a result of the unfair advantages enjoyed by privileged and connected persons or classes of persons in society. In the Zimbabwean context, there are two broad causes of advantage and disadvantage: first, the country's political and economic history and, second, the social and economic class system that oppresses vulnerable categories of people in this country. The Constitution recognises that patterns of institutionalised advantage and disadvantage overtly implemented by the colonial administration for over nine decades affected various social groups differently and require legislative, policy and other measures which affect these groups differently if substantive equality is to be achieved. As observed by the Human Rights Committee, the equal enjoyment of rights and freedoms does

[116] Section 56(6) of the Constitution.

not mean identical treatment in every instance.[117] Equality may require states to adopt specific affirmative steps to eliminate or dismantle structures and practices perpetuating patterns of disadvantage. States may grant preferential treatment to disadvantaged groups in society.[118] As a matter of principle, all government actions which coincidentally benefit the great majority of one social group at the expense of another are not automatically unfairly discriminatory if they are intended to address the injustices of the past.

To overcome patterns of prejudice, persons who became affluent through state-sponsored privileges and accumulated discrimination should be barred from decontextualizing and de-historicising inequalities. Differential treatment is unfairly discriminatory if the governmental action being objected to serves no legitimate purpose or nullifies the exercise of human rights.[119] In *Mike Campbell (Pvt) Ltd and Another v. Minister of National Security Responsible for Land, Land Reform and Resettlement*,[120] the Supreme Court of Zimbabwe refused to reverse the compulsory acquisition of land owned by white farmers despite the fact that no compensation had been paid to the appellants. In the Supreme Court's world, the legislature had lawfully ousted the jurisdiction of the courts of law in land related matters and the Court lacked the institutional competence to deal with such matters.[121] Considered in its historical context, land reform would inevitably adversely affect white farmers who benefited from colonial seizures of native land on grounds of race. Historically, race and land ownership were so inextricably linked that legislative and other measures designed to promote the rights of persons belonging to historically disadvantaged communities would invariably adversely affect those previously advantaged by systematic patterns of racial segregation.

Presumptively unfair discrimination based on the grounds of race, gender, skin colour, political affiliation or any of the prohibited grounds of discrimination mentioned in section 56(3) of the Constitution is immune from constitutional challenges provided it is meant to correct social and economic inequalities amongst different categories of people. As once noted by Sachs J in *City Council of Pretoria v. Walker*,[122] "differential treatment that happens to coincide with race in the way that poverty and civic marginalisation coincide with race, should [not] be regarded as presumptively unfair discrimination when it relates to measures taken to overcome such poverty and marginalisation".[123] With reference to the compulsory acquisition of land, the fact that the loss of land (designated for compulsory acquisition) coincided with race (white) in the same way landlessness coincided with race (black) did not in itself imply that farmers, who were predominantly white as a consequence of history, had been discriminated against on the basis of race. This observation

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[117] *See* United Nations Human Rights Committee, CCPR General Comment No. 18: Non-discrimination, para. 8, available at: <http://www.unhchr.ch/tbs/doc.nsf/0/3888b0541f8501c9c12563ed004b8d0e?Opendocument> (accessed 10 April 2008).
[118] *Ibid*., para. 10.
[119] *Ibid*., paras. 6 and 10.
[120] SC 49/07 28-29.
[121] *Ibid.*
[122] 1998 2 SA 363 (CC).
[123] Para. 118.

does not mean that the laws in terms of and the manner in which land reform was implemented in Zimbabwe were constitutional. All it means is that, as a matter of principle, the need to remedy the historical institutionalisation of advantage (land ownership) and disadvantage (landlessness) requires the state to take positive legislative and other measures that are intended to benefit groups of people who were historically marginalised.

Substantive equality requires that the actual social, economic and historical context in which different social groups find themselves be duly considered when determining whether the achievement of equality is being promoted or not. In the Zimbabwean context, substantive equality therefore envisages preferential treatment of historically disadvantaged groups, if need be, to heal the deep wounds of decades of systematic racial segregation against blacks. In this respect, the South African Constitutional Court once observed "although a society which affords each human being equal treatment on the basis of equal worth is our goal, we cannot achieve that goal by insisting upon the identical treatment in all circumstances before that goal is achieved … A classification which is unfair in one context may not necessarily be unfair in another."[124] Two years later, these remarks were echoed in *National Coalition for Gay and Lesbian Equality v. Minister of Justice*,[125] where the Constitutional Court observed as follows:

> Particularly in a country such as South Africa, persons belonging to certain categories have suffered considerable unfair discrimination in the past … Past unfair discrimination frequently has ongoing negative consequences, the continuation of which is not halted immediately when the initial causes thereof are eliminated, and unless remedied, may continue for a substantial time and indefinitely … One could refer to such equality as remedial [or substantive] equality.[126]

Given the link between advantage and disadvantage, it is apparent that redistributive reform will always adversely affect those previously advantaged on grounds of their membership to a particular group. As once noted by the South African Constitutional Court, "[t]he measures that bring about transformation will inevitably affect some members of the society adversely, particularly those coming from previously advantaged communities".[127] The existence of a legitimate government purpose for the state's redistributive policies does not necessarily make discriminatory governmental action non-discriminatory. However, such a purpose justifies the differential treatment (or discrimination) by showing the existence of more pressing social goals. A legitimate government purpose thus distinguishes unfair discrimination from mere differentiation or fair discrimination.

4.3.6 The Protection of the Rights of Vulnerable Groups

The Zimbabwean Constitution codifies the rights of such vulnerable groups as the elderly, women, children, persons with disabilities and war veterans. Historically,

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[124] *President of the Republic of South Africa v. Hugo*, 1997 4 SA 1 (CC) para. 41
[125] 1999 1 SA 6 (CC).
[126] Paras. 60–61.
[127] *Bato Star Fishing v. Minister of Environmental Affairs and Tourism*, 2004 4 (SA) 490 (CC), para. 74.

these groups have been subjected to unfair discrimination and their rights have been trumped upon by society and the state. The challenges faced by these groups are not similar, and the state should adopt reasonable legislative and other measures to respond to multiple challenges faced by these social groups. In adopting measures to address these challenges, the state should be mindful of the idea of intersectionality – i.e. the fact that disadvantage and marginalisation often occur at multiple levels. Accordingly, to make people who face multiple levels of disadvantage equal with others, it is imperative for the state to adopt multiple measures targeted at each of the causes of disadvantage.

The diagram below indicates the experiences of disadvantaged persons and demonstrates that the causes of disadvantage are by nature plural. More importantly, however, the list of markers of disadvantage is not exhaustive and other factors, such as location or place of residence, can limit or improve human potential. Besides, all the prohibited grounds of discrimination mentioned in section 56(3) of the Constitution may also be listed as factors that negatively or positively affect every person's social or economic status.

Experiences of Disadvantaged Persons

A proper reading of the provisions protecting the right to equality makes it clear that state and non-state agencies have the positive duty to accommodate those who were disadvantaged by unfair discrimination in all their empowerment projects, especially in the context of access to economic opportunities, education and land. This argument is rooted in a broad and inclusive understanding of the right to equality. Section 56(1) provides that "all persons are equal before the law and have the right to equal protection and benefit of the law". Section 56(3) prohibits unfair discrimination based on the grounds of nationality, race, colour, tribe, place of birth, ethnic or social origin, language, class, religious belief, political affiliation, opinion, custom, culture, sex, gender, marital status, age, pregnancy, disability or economic or social status, or whether they were born in or out of wedlock. Unfair discrimination is then defined in section 56(4) of the Constitution which provides as follows:

> A person is treated in a discriminatory manner for the purpose of subsection (3) if– (a) they are subjected directly or indirectly to a condition, restriction or disability to which other people are not subjected; or (b) other people are accorded directly or indirectly a privilege or advantage which they are not accorded.

For purposes of this chapter, it is imperative to categorically state that many vulnerable groups in this country are being treated in a discriminatory manner in the sense foreseen and prohibited by the Constitution. They are being subjected to a condition or restriction to which other people are not subjected, and other people are being accorded privileges and advantages which they are being denied. This is taking place despite the fact that the state has the right and duty to take remedial measures to correct the injustices of the past. Whilst much has been done to deracialise land and company ownership, top management employment, public procurement and the education system, very little has been done to benefit youths, women, the elderly, people with disabilities, persons belonging to ethno-religious minority groups and other disadvantaged classes in society. Even in the context of land redistribution, there is need to target these groups in order to make them 'more equal' with other groups. Private companies and government agencies at all levels should accommodate persons belonging to disadvantaged groups if they are to avoid discrimination based on the prohibited grounds of ethnic or social origin, colour, tribe, place of birth, gender, sex, disability or social or economic status, age, class and many other listed grounds.

The constitutional promise of equality for all contained in section 56(6) of the Constitution envisages preferential treatment for historically marginalised groups. It is important to underline that youths, women, children, persons with disabilities and the elderly have been and are still part of the classes of people who have been disadvantaged by unfair discrimination. Accordingly, the state has the duty to take reasonable legislative and other measures to promote the achievement of equality and to advance the rights of these groups of people. When the state takes measures to ensure that marginalised groups escape the poverty traps, such measures are not to be regarded as unfair because they would constitute reasonable and justifiable affirmative action measures within the framework of section 56 of the Constitution.

Disadvantaged persons are not a homogenous group but are uniquely positioned within inter-sectoral and cross-cutting problems. For the state to guarantee to disadvantaged persons the opportunity to enjoy happy, prosperous and fulfilling lives, it must respond to each of the individual challenges faced by each of them. It is significant for those tasked with drafting legislation and policies to take cognisance of the idea of the intersectionality or multi-pronged nature of disadvantage. For instance, a black girl child with physical disabilities born to poor parents who live in a rural area where patriarchy and the marginalisation of women are normalised must jump many 'hurdles' before she can have access to quality education and/or enhanced employability. To this end, Wolffe observes that "disadvantage is by nature plural and impossible to pin down to two or three 'key markers, and that disadvantages tend to cluster. The symptoms often intermingle; a poor person living in shabby accommodation might have little access to good education, limiting their chances in the job market, and might have an antagonistic relationship with the criminal justice system."[128] To transform the lives of people who are trapped in situations of disadvantage due to multiple overlapping attributes, it is important to

[128] *See* 'Dealing with Disadvantage', *University of Cape Town News*, 22 September 2014.

take measures that respond to each of the attributes which place the individual in situations of disadvantage.

5 Conclusion

This chapter explored the meaning and relationship between constitutional values, principles and rights. It emphasised that values and principles are not directly enforceable against anyone or the state, especially in cases where the national constitution also protects directly enforceable guarantees that magnify the founding values and principles in question. Nonetheless, founding values perform an important function in the interpretation, application and limitation of the rights and freedoms set out in the Declaration of Rights. This is evident from the constitutional injunction that when interpreting provisions of the Declaration of Rights, courts "must promote the values and principles that underlie a democratic society, in particular the values and principles set out in section 3" of the Constitution.[129] This peremptory obligation requires courts and other decision-making bodies to locate the values and principles which underlie a democratic society and to ensure that the interpretation these bodies give to fundamental rights and freedoms is consistent with those values and principles. Founding and other values play an important role in assessing whether a court or other decision-making body has reached a decision which promotes the values which underlie a democratic society.

Apart from analysing the scope and role of founding values and principles, this chapter also pointed out that regardless of numerous theoretical contestations concerning their legal nature, national objectives have become the axis upon which the judicial enforcement of fundamental rights revolves. Generally speaking, there is an understanding that the national objectives provided for in Chapter 2 of the Constitution are not *stricto sensu* justiciable and that constitutional claims must be based on more substantive provisions which protect the justiciable and enforceable right which is alleged to have been breached. However, it is argued that national objectives are crucial supportive mechanisms in the landscape of human rights adjudication. Under this approach, the full realisation and promotion of human rights can be furthered by giving more weight to the national objectives provided for in Chapter 2 of the Constitution. By including the national objectives in the Constitution, the framers had the intention of creating standards by which the success or failure of the state and all its functionaries could be judged. Accordingly, it therefore follows that the national objectives are a crucial yardstick upon which the state can be held accountable in terms of compliance with its human rights obligations towards the citizens.

In addition to the analysis on the status of national objectives in our constitutional analytical framework, this chapter also briefly discussed the structure of the Declaration of Rights and identified some of the most important provisions for purposes of constitutional adjudication. These provisions include the application clause, the interpretation clause, the limitation clause, the public emergency clause,

[129] Section 46(1)(d) of the Constitution.

substantive provisions and the provisions regulating standing in constitutional matters. More importantly, however, the chapter identified and discussed the milestones that together make the Declaration of Rights an epitome of Zimbabwe's constitutional revolution and the entire Constitution genuinely transformative. The protection of all sets of rights, especially the inclusion of socio-economic rights in the Declaration of Rights, epitomises Parliament's desire to transform the lives of poor and ordinary citizens who live on the margins of social, economic and political systems. It reduces the stigmatisation of the vulnerable and empowers them to make rights-based claims against potential violators of their rights and freedoms.

The Declaration of Rights extends to various categories of people the right to approach a court alleging that a 'right has been, is being or is likely to be infringed'. By liberalising standing, especially through allowing public interest litigation and class actions meant to protect class and public interests, the Constitution enables more knowledgeable individuals and organisations to institute court proceedings against those responsible for infringing the poor's socio-economic rights. This is an important step towards social and economic transformation, especially in light of the fact that those whose needs are most urgent and whose capability to fend for themselves is next to none usually lack the technical knowledge on how to obtain effective remedies for violations of socio-economic rights. The new approach to standing is intended to enhance access to justice by individuals and groups without the knowledge and resources to vindicate their rights in the courts. The majority of people who benefit from the state's social provisioning programmes do not have the resources, the knowledge and the legal space to drag powerful states or transnational corporations to court in the event of a violation of their rights. Insisting that the person who institutes proceedings be the one whose rights have been directly and immediately adversely affected would hinder public interest litigation by non-governmental organisations, pressure groups and other interested persons.

The Constitution envisions a substantive form of equality in terms of which the decision-maker should consider the historical, social, economic and political factors affecting the human condition. Unlike formal equality, which requires uniform treatment of persons according to the same 'neutral' norm, substantive equality requires that persons in unequal circumstances be treated unequally in order to address socio-economic disparities. Substantive equality therefore requires that affirmative action measures be taken to level up differences in resource ownership, power and privilege, particularly where there is a direct chain of causation between preferential treatment of one group and the disadvantage faced by another group. When it comes to remedying existing patterns of disadvantage, section 56(6) of the Constitution provides the legal basis for adopting measures intended to groups that were unfairly discriminated against. The Constitution recognises that patterns of institutionalised advantage and disadvantage overtly implemented by the colonial administration for over nine decades affected various social groups differently and require legislative, policy and other measures which affect these groups differently if substantive equality is to be achieved. Yet, there is need to be mindful of the extent to which differential treatment can be constitutionally justified and avoid reverse discrimination against historically privileged classes of persons.

The remarks relating to substantive equality are linked to the provisions governing the protection the rights of vulnerable or disadvantaged groups. The Zimbabwean Constitution codifies the rights of such vulnerable groups as the elderly, women, children, persons with disabilities and war veterans. Historically, these groups have been subjected to unfair discrimination and their rights have been trumped upon by society and the state. The challenges faced by these groups are not similar and the state should adopt reasonable legislative and other measures to respond to multiple challenges faced by these social groups. In adopting measures to address these challenges, the state should be mindful of the idea of intersectionality – i.e. the fact that disadvantage and marginalisation often occur at multiple levels. Accordingly, to make people who face multiple levels of disadvantage equal with others, it is imperative for the state to adopt various measures targeted at each of the causes of disadvantage. Read together, the monumental milestones of the Declaration of Rights discussed above create an adequate legal framework for social and economic transformation to take place and for the marginalised to better enjoy their fundamental rights or freedoms.

Part II - The Interpretation and Limitation of Fundamental rights

4 The Interface between International and National Human Rights Law under the Zimbabwean Constitution

Admark Moyo*

1 Introduction

We live in a more globalised world than our predecessors and forefathers. As such, it is becoming extremely difficult for all political communities, including the most conservative ones, to ignore the reality that no country is an island unto itself. Globalisation, free trade, travel and migration, education and the internet are connecting people and countries in ways that have never been seen before. This new phenomenon has left no stone unturned, and legal systems have had to cope with new challenges posed by the interaction between international law, foreign law and domestic law. This chapter explores the complexities in the relationship between national and international human rights law, with a particular focus on the theories and constitutional provisions governing this relationship. However, the chapter does not offer to examine broad themes such as the universality or cultural relativity of human rights but engages with theoretical models 'monism and dualism' that have for long been exploited to explain the true nature of the relationship between international law and national law. Further, the chapter discusses the manner in which international law becomes part of or influences the content of national law. In this section, the focus is on the concepts of transformation or incorporation of international human rights law into the domestic human rights system.

Apart from giving a theoretical exposition of the interface between international and national human rights law, the chapter also explains, in some detail, the various ways in which international law influences the outcome of cases at the domestic level. It is demonstrated that international law often achieves this result through three different ways: First, through the provision in the Declaration of Rights that requires courts to take into account international law and all treaties and conventions to which Zimbabwe is a party; through the principle of consistent interpretation; and through the rise of 'worldly' judges who 'embrace' the obligation to apply international law. Further, this chapter explores the ways in which the Constitution anticipates conflicts between domestic law and international law to be resolved and fully explains the ambit of the applicable constitutional provisions. This inquiry is generated by the fact that the Zimbabwean Constitution treats different types of international law differently with regards to their legal position in the realm of domestic law. Accordingly, the chapter explains the implications of the provisions regulating the legal position of customary international law and international treaties, with a particular focus on their (in)adequacy in governing the interface between national and international law. Finally, the chapter discusses the constitutional provisions regulating the legal status of self-executing international treaties as well as international agreements that are not international treaties.

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2 Monism and Dualism

2.1 *Monism*

The monist theory views international law and municipal law merely as ingredients of one body of knowledge called 'law'. In this sense, 'law' is viewed as a "single entity of which the 'national' and 'international' versions are only specific expressions or manifestations".[1] As posited by Viljoen, "[i]n monist states, following French constitutional law, 'once a treaty has been ratified and published 'externally', it becomes part of internal law'. At least in theory, no legislative action is needed to lower the second storey level of international law norms to the ground floor level of national law."[2] The monist theory supposes that both sets of legal rules – whether national or international – govern the same sphere of activity and are primarily "concerned with the same subject matter. Moreover, because they operate concurrently over the same subject matter, there may be a conflict between the two systems: international law may require one result and the provisions of national law another."[3] If this occurs in a particular case, international law supersedes national law. For instance, if international law absolutely outlaws, as it does, torture or cruel, inhuman or degrading treatment or punishment in all circumstances, the theory of monism requires a national court to give effect to this prohibition despite the existence of rule of national law permitting, for instance, the use by the police of torture for purposes of obtaining evidence relating to a criminal trial.

Generally, all monists presume international law's superiority over national law in the event of a conflict between rules of the two systems, but there are different reasons for why this should be so.[4] The presumed superiority of international law is a direct consequence of the existence of a 'basic norm' from which all law gains its validity. In terms of this 'monist-positivist' conception of the relationship between national and international law, international law derives from the practice of states and national law derives from the state as established in international law.[5] This makes the international legal system a superior legal order and is consistent with the conception of the state as an amalgam of individuals than as a separate entity in its own right.[6] Under this conception, international law is considered superior because national law, often used to limit individual freedom and to persecute 'opposing voices' within the nation-state, cannot be trusted to effectively guarantee human rights. The superiority of international law is based on its tendency to amplify rather than to limit individual liberty."

Another similar approach casts the relationship between international and national law as purely monist, with international law still positioned higher in the hierarchy of

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[1] T. Finegan, 'Holism and the Relationship between Municipal and International Human Rights Law', 2:4 *Transnational Legal Theory* (2011) p. 478.
[2] F. Viljoen, *International Human Rights Law in Africa* (2007) p. 531.
[3] M. Dixon, *Textbook on International Law*, 7th edition (2013) p. 90.
[4] For the historical debate of the theories, *see* J. Nijman and A. Nollkaemper (eds.), 'Introduction', in *New Perspectives on the Divide between National and International Law* (2007).
[5] Dixon, *supra* note 3, p. 91.
[6] *Ibid*., p. 91.

laws, but with both systems below an even higher legal order – the law of nature. This is often referred to as the monist-naturalist theory and grounds the validity of all laws on their compliance with natural law. Consequently, there is a hierarchy of legal orders in terms of which natural law is located at the top, followed by international law which is in turn followed by national law.[7]

The various theoretical postulates explained above, from different angles, all attempt to resolve the issue concerning the relative superiority of international law. They constitute an inherent part of the broader debate on the validity of international law as a legal system. Nonetheless, there is a very common monist thread which emphasises the idea that international law and national law are part of the same hierarchical order. As such, "norms of international and national law must be ranked in order of priority should a conflict occur in a concrete case. In this sense, international law is superior".[8] The state's legal institutions, particularly the courts and the legislature, are under an obligatory duty to ensure that the rights and obligations arising from national law comply with international human rights law. They should also guarantee to citizens the right to rely on international law in domestic courts. More importantly, however, municipal courts should recognise and give effect to international law, especially where there is a conflict between international and national law.

2.2 *Dualism*

The theory of dualism is premised on the idea that international and national law do not operate in the same sphere, and deal with different subject matters. From this perspective, international law regulates the relationship between states where as national law deals with domestic issues within a state. Dualists contend that international law regulates the relationship between sovereign states and national law governs the rights and duties of citizens within the territorial boundaries of a state. Similarly, state conduct that may be unlawful in terms of international law may be considered to be valid and require national courts to protect it if there is a clear and unambiguous rule of national law to that effect. In terms of the dualist model, international law retains primacy over municipal law in international decisions, while municipal law has primacy over international law in municipal decisions.[9]

Dualism assumes the existence of two separate legal systems governing the same subject matter and permits the state to act with impunity, at the domestic level, even though its actions constitute clear violations of international law. In *Jones v. Minister of Interior for the Kingdom of Saudi Arabia,*[10] the court permitted state impunity for alleged acts of torture even if torture is unlawful under international law. This implies that when a dualist state tortures suspected terrorists, it would be breaching its legal obligations at the international level (i.e. the duty not to authorise, instigate or

[7] *Ibid.*
[8] *Ibid*., p. 92.
[9] N. Ndeunyema, 'International Law in the Namibian Legal Order: A Constitutional Critique', 9 *Global Journal of Comparative Law* 9 (2020) p. 271, at p. 274.
[10] [2006] UKHL 26, [2007] 1 AC 270, [2007] 1 All ER 113, [2006] 2 WLR 1424.

condone acts of torture), but national courts may not be seized with that matter since that is a matter for international courts to decide upon.[11] This underlines the central idea that there are dual legal systems operating concurrently with regards to the same rights and obligations. As such, domestic courts should stop concerning themselves "with the meaning of an international instrument operating purely on the plane of international law".[12]

The practical effect of the doctrine of dualism, which is also a paradox, is that a state may be conducting itself perfectly lawfully within its territorial borders, even if it is conducting itself equally unlawfully at the international plane and may incur international responsibility as a result. Accordingly, international law cannot invalidate national law, or vice-versa, and the rights and obligations created by one of the two systems cannot be inevitably transferred to the other. Dualism recognises that international law and domestic law have the potential to and sometimes do conflict with each other because they deal with the same subject, but asserts that each system applies its own rules unless the rules of that system says something to the contrary. International courts or tribunals interpret and apply international law and domestic courts apply, in our case, Zimbabwean law.

The doctrine of dualism posits that "before any rule of international law can have any effect within the domestic jurisdiction, it must be expressly and specifically transformed into municipal law".[13] The transformation takes place through either the amendment of domestic laws or the enactment of new legislation in light of the ratified international treaty or convention. It implies the inclusion of an international instrument and or the principles embodied in an international instrument in domestic law. Dualism supposes that international and domestic laws are fundamentally different from each other and enabling legislation is needed to incorporate international law into the domestic legal system. As observed by Ambani, "[u]nder dualism, treaties are not counted as part of municipal law until transformation or incorporation has occurred".[14]

The central objective behind a dualist approach to the relationship between national and international law is the need to create and enforce checks on the exercise of public power and the performance of public functions at the international level. In *Re McKerr*,[15] a decision of the House of Lords, Lord Steyn observed that the rationale for dualism was to prevent the executive from usurping the law-making functions of the legislature, especially by preventing it from making law without the domestic constitutional requirements for the law-making process. Ratification of international

[11] This view is questionable especially given that most states, even so-called dualists, adopt a monist approach when it comes to the reception of customary international law. It follows that domestic litigants can invoke the customary law prohibition against torture at the national level.

[12] Per Simon Brown LJ in *Campaign for Nuclear Disarmament v. Prime Minister of the United Kingdom* [2002] EHC 777 (QB).

[13] M. N. Shaw, *International Law* (1997) p. 104.

[14] J. O. Ambani, 'Navigating Past the 'Dualist Doctrine': The Case for Progressive Jurisprudence on the Application of International Human Rights Norms in Kenya', in M. Killander (ed.), *International Law and Domestic Human Rights Litigation in Africa* (2010) pp. 25 and 27.

[15] [2004] UKHL 12. *See also* Lord Bingham in *R v. Jones* [2006] 2 WLR 772 rejecting the notion that crimes under international customary law are automatically crimes under national (i.e. UK) law.

treaties signed by or under the authority of the president ensures that only those international instruments that are ordained by national legislative structures acquire the force of law. Initially designed a mechanism to elevate parliamentary sovereignty over the other branches of the state, ratification has become a safeguard against the arbitrary exercise of executive powers and functions.

Following English law, the doctrine of dualism portrays the domestic legal system as composed of two separate, but co-existing systems of law, each performing different functions and intended to govern the conduct of different parties, with sovereign states being the subjects of international law and individuals the subjects of national law.[16]

Thus, the dualist approach to international law is not only anchored on the existence of two separate legal regimes, but also public fear about the danger associated with granting the executive extensive power to enter into binding agreements with foreign states. Further, the fact that the separation of powers doctrine prescribes that law-making be within the exclusive province of the legislature implies that allowing the executive to enter into binding agreements with foreign states without requiring the involvement of parliament would constitute an assault on one of the central principles of modern democracy.

However, the practical relevance of these theories (monism/dualism) is increasingly being questioned. State practice on the reception of international law varies widely and does not follow either of the theories in its original form. The debate between the two schools, whilst by no means moot, negates the reality that portraying the interaction between national and international law in either/or oppositional terms does "not only hide a wide variety of complexity in the implementation of the doctrines, but also serves to overstate the differences between them".[17] In any case, a state cannot use deficiencies in its national law as a justification for non-compliance with its international law obligations. This is particularly important when, as often happens, a treaty or other rule of international law imposes on states an obligation to enact a particular rule as part of their municipal law.

Further, the main purpose of Article 27 of the Vienna Convention on the Law of Treaties (VCLT) is to reassert the fundamental principle that international treaties must be performed in good faith. To this end it rules out the most mundane justification for non-compliance, the deviant legal situation within a state. This follows the fact that the objective of many treaty making processes is to change the states parties' domestic legal situation, treaties would be necessarily doomed to immediate failure if non –performance could be justified by deviant domestic laws.[18] To this end, Article 27 of the VCLT confirms a fundamental rule of the law of state responsibility

[16] W. A. Bradley and K. Ewing, *Constitutional and Administrative Law* (1993) p. 326.
[17] A. Chandra, 'India and International Law: Formal Dualism, Functional Monism', 57 *Indian Journal of International Law* (2017) p. 25, at p. 29. *See also* E. Denza, 'The Relationship between International and Domestic Law', in M. Evans (ed.), *International Law*, 3rd edition (2010) pp. 417 and 418.
[18] O. Dorr and K. Schmalenbach, 'Article 27, Internal Law and Observance of Treaties', Vienna Convention on the Law of Treaties (2011) p. 453.

which signifies that a state cannot escape its responsibility on the international plane by referring to its domestic legal situation.

3 Theories Governing the Reception of International Law in the National Legal System

Theoretically speaking, the doctrines of transformation and incorporation / harmonisation perform an important function in explaining the reception of international law at the domestic level. Incorporation or harmonisation is closely related to the monist approach and transformation is closely related to the dualist approach to international law. The doctrine of harmonisation posits that international law rules become part of domestic law without any further need for explicit adoption by parliament or national courts. In other words, rules of international law are directly implicitly incorporated into national law by virtue of them being rules of international law. The automatic incorporation of an international law rule remains operative unless there is a clear and unambiguous provision of national law, whether an act of parliament or court decision, which explicitly prohibits the use of the rule in question. Accordingly, once it is determined that an international law rule exists and that it is relevant to the case under consideration, that rule becomes, without more, part of national law and may be applied by national courts.[19] The Zimbabwean Constitution follows the incorporation or harmonisation approach with regards to the legal position of customary international law in the domestic sphere, but this is the legal position only if there is no statutory provision declaring otherwise.[20]

Under normal circumstances, where a state adopts the incorporation or harmonisation approach to international law, it is usually a result of some constitutional provision of its own. More importantly, the incorporation or harmonisation model drastically shifts from the claim of conflict between international law and municipal legal orders.[21] It challenges the overall correctness of monist and dualist positions by arguing that the attempt to resolve conflict by asserting the automatic superiority of one legal order over the other does not reflect prevailing reality.[22] Namibia comes across as one of the notable exceptions to the dualist approach followed by many African jurisdictions as its national Constitution states that international treaties and general rules of public international law become part of the laws of the land once they are ratified. Section 144 thereof provides that "[u]nless otherwise provided by this Constitution or Act of Parliament, the general rules of public international law and international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia". Thus, for instance, an application of section 144 to the ICESCR implies that the Covenant became part of Namibian constitutional law on 28 February 1995 when Parliament ratified the

[19] *See* section 326(1) of the Zimbabwean Constitution.
[20] Section 326(1) of the Constitution provides that "[c]ustomary international law is part of the law of Zimbabwe unless it is inconsistent with this Constitution or an Act of Parliament". Section 326(2) provides that courts should interpret legislation in a manner consistent international law.
[21] *See generally Vishaka v. State of Rajasthan* (1997) 6 SCC 241 and *Attorney General for Canada v. Attorney General for Ontario* 9 [1937] AC 326 (Privy Council).
[22] Ndeunyema, *supra* note 9, p. 275.

Treaty. As such, the provisions of the ICESCR – particularly all the rights provided for therein – have direct and immediate application within the Namibian legal system, thereby opening the floodgates for all citizens to pray for the enforcement of their internationally recognised rights in the national courts. To this end, Namibian courts have confirmed that the effect of Article 144 of the Constitution is to render international instruments directly enforceable at the national level, unless there is a legislative provision to the contrary.[23] Thus, socio-economic rights, though not fully protected in the Bill of Rights and explicitly stated as principles of state policy, are directly enforceable in the Namibian courts.

In terms of the theory of transformation, rules of international law do not automatically become part and parcel of the domestic legal system, unless such rules have been explicitly adopted by the state, usually through legislation[24] For example, if a state follows the transformation theory, it can continue implementing practices which violate the international prohibition on torture if it has not expressly domesticated the Convention Against Torture. Unless and until the applicable international law principles have been transformed by an act of parliament or similar conduct, the state will remain subject to the jurisdiction of the national courts regardless of the prescriptions contained in international law.[25] This is a direct consequence of the application of the doctrine of dualism. As observed by Ndeunyema:

> The transformation doctrine reflects an 'extreme' dualist position in asserting that individual rules of international law will only become part of municipal law where they are consciously transformed or incorporated into the municipal law by way of a legislative act, the promulgation of a treaty or other appropriate constitutional gesture. The transformation doctrine presupposes that international law is independently inapplicable in a municipal court, and hence must be 'transformed' into municipal law through the agencies of the sovereign will, the Legislature and Executive.[26]

As is demonstrated in other sections of this chapter, this appears to be the legal position in Zimbabwe, especially in relation to international law derived from treaties and conventions.

The central distinction between incorporation or harmonisation and transformation is that the former recognises international law as part of the domestic legal system just because it is international law while the latter requires a deliberate act, on the part of the state, domesticating international obligations. Incorporation implies that rules of international law form part of the domestic legal system unless they are expressly excluded by national law, but transformation suggests that such rules form part of national law only if they are clearly included in national law. The central features of incorporation and transformation respectively mirror the theories of monism and dualism. As stipulated above, the theory of monism stipulates that international and domestic law constitute central elements of a single unified system and this position

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[23] *Thudinyane v. Edward* (SA 17/2005) [2012] nasc 22 [18], para. 18.
[24] *See generally* L. Henkin, 'The Constitution and United States Sovereignty: A Century of Chinese Exclusion and its Progeny', 100 *Harvard Law Review* (1987) p. 853, at p. 864.
[25] *Ibid.*
[26] Ndeunyema, *supra* note 9, p. 274.

is demonstrated by the fact that once signed and ratified, international treaties and conventions automatically become part of national law. Contrariwise, dualists posit that international law and national law operate in different spheres of competence, and that rules of international law become operative at the domestic level only if they have been deliberately transformed into national law through the requisite national processes.

More importantly, it needs to be emphasised that the immaculate theoretical equilibrium explored above is hardly entirely precise as many countries either choose between the two theories or deliberately adopt an 'ambiguous' approach to international law; thereby prompting the courts to address issues on a case by case bases.[27] Holistically, Zimbabwe can be classified as falling within the latter group of countries because the relevant provisions entrench variations in how courts should refer to various forms of international law. In virtually all cases, states exercise – through the national constitution and/or legislation – their sovereign right to decide whether or not to adopt the doctrine of incorporation or transformation.[28] Whether the state adopts either the incorporation or transformation approach only reveals what method the state has preferred as a way of giving effect to its international obligations in the domestic legal system. It does not necessarily explain whether the state is monist or dualist.

4 International Law in the Zimbabwean Legal System

This section explains, in some detail, the various ways in which international law influences the outcome of cases at the domestic level. It is demonstrated that international law often achieves this result through three different ways: First, through the provision in the Declaration of Rights that requires courts to take into account international law and all treaties and conventions to which Zimbabwe is a party; through the principle of consistent interpretation; and through the rise of 'worldly' judges who warmly 'embrace' an obligation to apply international law. Anecdotal evidence suggests, it is argued, that some of these judges are not even aware of their obligatory duty to consider international law and refer to it on their own volition.

4.1 *The Role of Constitutional Interpretation*

4.1.1 Preliminary Remarks

The interpretation of fundamental human rights and freedoms is an important aspect of constitutional law. If rights are wrongly or narrowly interpreted, citizens would not adequately enjoy what is constitutionally due to them. The interpretation clause is part of the Declaration of Rights in the Zimbabwean Constitution. It provides courts, legal practitioners, law and policy-makers with guidance on how to interpret the

[27] *See* A. Cassese, *International Law*, 2nd edition (2005) p. 236.
[28] *See generally* F. Francioni, 'International Law as a Common Language for National Courts', 36 *Texas International Law Journal* (2001) p. 587.

provisions in both the Declaration of Rights and Acts of Parliament. To give appropriate meaning and content to the rights and freedoms set out in the Declaration of Rights, it is important to ensure that human rights are interpreted in a way that pays homage to the letter and spirit of the interpretation clause. Our Constitution stipulates that when they are interpreting the Declaration of Rights, domestic courts "must take into account international law and all treaties and conventions to which Zimbabwe is a part"'. Thus, international law should play an important role in the interpretation of the rights in the Declaration of Rights. To this end, this chapter explains the true meaning of the provisions governing the relationship between international human rights law and national law, thereby enabling the courts to take full advantage of the interpretation clause (section 46(1)-(2)) and sections 326(2) and 327(6) of the Constitution. It is to these provisions that the analysis turns.

4.1.2 The Peremptory Obligation to Take into Account International Law and All Treaties and Conventions to Which Zimbabwe Is a Party

Regardless of the above mentioned constitutional imperatives, it remains questionable whether all legal practitioners and judges are aware of their obligation to take international law into account when performing their interpretive functions. For those who have read the provisions governing the relationship between international law and domestic law, it may be difficult to determine what it means to take international law into account. Does it mean that international law has persuasive value? (if it does, why have the provision in the first place, especially given that all sources of law that are not strictly legally binding on the courts have persuasive value?) Or does it mean that international law is now part of Zimbabwean law? (if it does, why not just provide, as the Constitution of Namibia does, that international law forms part of the law of Zimbabwe?) Or does it mean that the force of international law in domestic courts is somewhere between being persuasive authority and mandatory authority? (if it does, what exactly does this mean?). Section 39(1)(b)-(c) of the South African Constitution (1996) provides that "when interpreting the Bill of Rights, a court, tribunal or forum must consider international law and may consider foreign law". In *S v. Makwanyane and Another*,[29] the Court addressed the question of the applicability of international law in the interpretation of the Bill of Rights. Chaskalson stated that the international and foreign authorities are of value because they analyse arguments for and against the death sentence and show how courts of other jurisdictions have dealt with this vexed issue. It has been stated that the South African Constitution strengthened the role of international law in the interpretation process as it obliges courts to apply international law where it is applicable, and since virtually every provision in the South African Bill of Rights has been governed by general principles of international law, it is difficult to imagine situations where public international law would not be applicable.[30]

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[29] *S v. Makwanyane and Another* 1995 (3) SA 39 (CC).

[30] J. Dugard, 'The Role of International Law in Interpreting the Bill of Rights', 10 *South African Journal on Human Rights* (1994) p. 212. *See also Azapo and others v. the President of the Republic of South Africa*1996 (4) 671(CC) paras. 26 –32.

Under the Zimbabwean legal system, international law constitutes both a direct and indirect source of law. International law is a direct source of law in two respects. First, section 326(1) stipulates that customary international law forms part of the law of Zimbabwe unless it is inconsistent with this Constitution or an Act of Parliament. Thus, general principles of public international law need not be incorporated into domestic law by statute for them to be binding on all agencies of government. Customary international law is binding on Zimbabwe as long as there is no domestic statute or constitutional provision providing for the contrary.[31] In applying principles of customary international law, courts and other decision-making forums should attempt to reach an interpretation that is consistent with the Constitution or municipal legislation, but if this is not feasible, domestic law will always prevail. Second, section 327(2)(a)-(b) provides that "an international treaty which has been concluded by the President … 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 into the law through an Act of Parliament".

International law is an indirect source of law in that it aids the courts in their interpretation of the provisions of the Declaration of Rights. Many provisions of the Constitution prescribe an important interpretive role for norms of public international law – whether customary in nature or contained in international treaties.[32] Section 46(1)(c) imposes on those interpreting the Declaration of Rights the peremptory duty to "take into account international law and all treaties and conventions to which Zimbabwe is a party". This provision leaves the courts with no discretion over whether or not they should consider international law when interpreting constitutional provisions entrenching fundamental rights and freedoms. Section 46(1)(c) also indirectly imposes on practicing lawyers an ethical duty to refer to all applicable laws to ensure that the court is acquainted with the relevant international norms when locating the meaning and scope of the constitutional provision or right in question. There are limited, if any, sections of the Declaration of Rights which do not have corresponding provisions at the international level. As such, it is highly likely that the interpretation of constitutional rights almost invariably requires the consideration of equivalent provisions at international law.

The duty imposed on the courts is to 'take into account' international law when interpreting fundamental human rights and freedoms. At a general level, the phrase 'take into account' means 'to take consideration of something' or to pay attention to something. Accordingly, section 46(1)(c) prescribes that the court should 'consider' the scope of the right in question under international law. As Chisala-Tempelhoff and Bakare would have it, courts are under an obligation "to interpret laws in such a way as to avoid creating breaches [of] international law or international agreements. [In other words], the judiciary must make every effort to take judicial notice of all treaties

[31] For comparative literature, *see* M. J. Nkhata, *Malawi Country Report*, <http://www.icla.up.ac.za/images/country_reports/malawi_country_report.pdf>.

[32] *See,* for example, sections 46(1)(c), 326(2) and 327(6) of the Constitution, which are discussed below.

that are binding on the country."[33] The duty to 'take into account' does not, however, mean that the court is required to interpret the right in exactly the same way it has been interpreted by international courts, treaty-monitoring bodies and other forums. As O'Shea would observe, the duty to 'consider' international law "means that an inquiry must be made into the relevant provisions of international law; however they need not necessarily be applied to the particular situation if there are other overriding considerations arising out of other rules of interpretation".[34] The position would, however, be different if the Constitution of a particular country – Namibia is a good example – has a provision stipulating that customary international law and all international treaties to which the country is a state party form part of domestic laws and need no domestication for them to be binding on the country in question.

Nonetheless, the phrase 'must take into account' suggests that international law should play more than a persuasive role in the interpretation of fundamental human rights and freedoms. It means that it is inadequate for the court to just have a glance at international law, but for it to genuinely consider its role in the interpretation of Declaration of Rights provisions. Accordingly, it will be inconsistent with the Constitution for judicial officers to just cast a ceremonial glance at international law and then proceed to hastily dismiss its relevance to constitutional issues before the courts. One renowned scholar in the region made compelling remarks which resonate with the way the Constitution anticipates our courts to approach international law when interpreting rights or legislation. He posited that:

> [t]he position … is that where … a party to a treaty containing provisions that are relevant to the facts of a case at hand, it is peremptory that if a court is interpreting the Constitution, it must demonstrate that it paid due regard to that treaty. The courts, as an organ of the state, will be bound not to act in a manner that defeats the object and purpose of such a treaty in interpreting the Constitution. In cases where the treaty has been domesticated, it will obviously easily be directly enforceable by the courts as part of domestic law.[35]

Under the VCLT, it is imperative that where a state party has signed a treaty without ratifying it, the same state may not act in a manner which is not consistent with the spirit and object of the treaty it has signed. Perhaps one of the shortcomings of the interpretation clause is that it does not provide guidelines on how the process of 'taking into account' should be conducted and how international legal norms should be read into the Declaration of Rights' interpretive matrix. At common law, there is a presumption that parliament would not make laws that are contrary to the state's international obligations.[36] This common law position appears to have been codified in and expanded upon by the Constitution.

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[33] *See* S. Chisala-Tempelhoff and S. S. Bakare, 'Malawi', in V. O. Ayeni (ed.), *The Impact of the African Charter and the Maputo Protocol in Selected African States* (PULP, Pretoria) p. 149, at p. 153.

[34] *See* A. O'shea, 'International Law and the Bill of Rights', in LexisNexis *Bill of Rights Compendium* (1996) p. 7A1, at para. 7A2.

[35] R. E. Kapindu, 'The Relevance of International Law in Judicial Decision-Making in Malawi', in Southern African Litigation Centre *et al.*, *Using the Courts to Protect Vulnerable People: Perspectives from the Judiciary and Legal Profession in Botswana, Malawi and Zambia* (2015) p. 74, at p. 84.

[36] *See generally Maynard v. The Field Cornet of Pretoria* (1894) SAR 214; and *S v. Penrose* 1966 1 SA 5 (N) p. 11E-F.

4.2 *The Principle of Consistent Interpretation*

National courts in many jurisdictions apply a canon of construction that requires the interpretation of national law in a manner that is consistent with international obligations arising from both international customary law and provisions of ratified treaties.[37] This also appears to be the practice in neighbouring South Africa.[38] Sloss posits that:

> [c]ourts in both monist and dualist states frequently apply an interpretive presumption that statutes should be construed in conformity with the state's international legal obligations derived from both treaties and customary international law. This interpretive presumption is sometimes called a 'presumption of conformity' or a 'presumption of compatibility'… Labels aside, the presumption of conformity is probably the most widely used transnationalist tool. Courts in [many jurisdictions] have applied the presumption in cases involving vertical treaty provisions to help ensure that government conduct conforms to the nation's international treaty obligations.[39]

Often, the presumption is portrayed as manifesting hypothetical parliamentary intent that unless there is concrete evidence to the contrary, legislators do not intend to compromise their country's international obligations through statutes.[40] One recurring theme relates to the threshold conditions or circumstances that are necessary to trigger the application of the 'presumption of compatibility'. There is general consensus that domestic courts may apply the presumption in the event that the applicable legislative provisions are facially vague or ambiguous. However, some courts refuse to endorse a broader role for international conventions in statutory interpretation other than where law-making bodies have clearly prescribed such a role.

Thus, apart from directing courts to 'take international law into account' when interpreting the Declaration of Rights, most states usually require judicial officers to construe legislation in a manner that is consistent with their international obligations. This can be an essential method for ensuring that international law becomes part of 'the law of the land' even if it is not incorporated into domestic law through implementing legislation. Thus, international law may still have a huge impact on the domestic legal system if local judicial officers interpret domestic legislation by

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[37] For comparative jurisprudence, *see Murray v. Schooner Charming Best*, 6.U.S. 64, 118 (1804), where the Supreme Court of the United States held that "an act of congress ought never to be construed to violate the law of nations if any other possible construction remains".

[38] Considering the relevance of international law to matters regulated by domestic law, Mohamed DP, in *Azanian People's Organisation (AZAPO) v. President of the Republic of South Africa* 1996 1 BHRC 52 (CC) paras. 65H-66A, held as follows: "International law and the contents of international treaties to which South Africa might or might not be a party at any particular time are, in my view, relevant only in the interpretation of the Constitution itself, on the grounds that *the law-makers of the Constitution should not lightly be presumed to authorise any law which might constitute a breach of the obligations of the state in terms on international law.*"

[39] D. Sloss, 'Domestic Application of Treaties', in D. Hollis (ed.), *The Oxford Guide to Treaties* (2012).

[40] *See* Y. Shany, 'How Supreme is the Supreme Law of the Land? Comparative Analysis of the Influence of International Human Rights Treaties Upon the Interpretation of Constitutional Texts by Domestic Courts', 31 *Brook Journal of International Law* (2006) p. 341.

drawing heavily on international human rights law.[41] More importantly, the Constitution protects a legal construct which may broadly be termed the 'principle of consistent interpretation'. Under this approach to statutory or constitutional interpretation, the incorporation or transformation of international norms is not the sole means by which international law enters the municipal legal order. Accordingly, while international law which has not been incorporated or transformed into the domestic legal system does not form part of the law of the land, it may still have the effects of an incorporated treaty if local judges interpret national law by drawing heavily on international law.[42]

Our Constitution instructs local courts to construe domestic law in a manner that is consistent with the country's international obligations. This is made possible by the principle of consistent interpretation, a principle in terms of which domestic courts are obliged to interpret domestic law in a manner consistent with international law. As D'Aspremont would argue:

> [D]omestic courts are obliged to interpret domestic law in a manner consistent with international law. As a result, they necessarily heed international law and give weight to it in the domestic legal order. As such, the application of the principle of consistent interpretation does not endow international law with a self-executing character in domestic law – the question of the self-executing character of an international legal instrument being chiefly a question of international law rather that a question of domestic law. *However, the role that international can play through interpretation is far from negligible and it surely gives it an indirect effect in domestic law. The principle of consistent interpretation is sometimes a means to bypass missing requirements of incorporation and apply international law short of any measure of incorporation.*[43]

The principle of consistent interpretation places on judges a general duty to ensure that they seriously take heed of international law and pay due regard to it in the interpretation of constitutional and statutory provisions under the domestic legal order. As briefly stipulated above, the principle does not only call upon courts to interpret domestic law in a manner consistent with international law, but also to pay heed and give effect to international law. However, the principle of consistent interpretation does not confer on the instrument in question self-executing characteristics of some international treaties, but ensures that international human rights law performs a pivotal role and takes centre stage in the interpretation of domestic legislation affecting the enjoyment of human rights. In addition, the

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[41] J. D. Aspremont and F. Dopagne, 'Kadi: The ECJ's Reminder of the Abiding Divide between Legal Orders', 5 *Int'l Org L Rev* (2008) p. 371.

[42] *See generally* R. G. Steinhardt, 'The Role of International Law as a Canon of Domestic Statutory Construction', 43 *Vanderbilt Law Review* (1990) p. 1103; Y. Dausab, 'International Law vis-à-vis Municipal Law: An Appraisal of Article 144 of the Namibian Constitution from a Human Rights Perspective', in A. Bösl *et al.* (eds.), *Constitutional Democracy in Namibia: A Critical Analysis After Two Decades* (2010) p. 261, at p. 267 and J. Turley, 'Dualistic Values in an Age of International Legisprudence', 44 *Hastings Law Journal* (1993) p. 185.

[43] J. D'Aspremont, 'The Systemic Integration of International Law by Domestic Courts: Domestic Judges as Architects of the Consistency of the International Legal Order', in A. Nollkaemper and O. K. Fauchald (eds.), *The Practice of International and National Courts and the (De-)Fragmentation of International Law* (2012) p. 141, at pp. 143 and 144. *See also* the House of Lords' decision in: *A (FC) v. Secretary of State for the Home Department (Conjoined Appeals)* (2005) UKHL 7; and, for Canadian experiences, R. Provost, 'Judging in Splendid Isolation', 56 *American Journal of Comparative Law* (2008) p. 125.

principle may also prove to be useful where counsel or the court wishes to bypass the legal requirements of incorporation and ensure that international law influences the interpretation of domestic legislation without any measure of incorporation.

An accurate reading of the Constitution demonstrates that incorporation is not the 'all or nothing' procedure required for the application of international law in domestic courts. For purposes of the principle of consistent interpretation, there are two relevant constitutional provisions addressing the role of international law in the interpretation of legislation. First, section 326(2) stipulates that "[w]hen interpreting legislation, every court and tribunal must adopt any reasonable interpretation of the legislation that is consistent with customary international law applicable in Zimbabwe, *in preference to an alternative interpretation inconsistent with that law".* Second, section 327(6) follows this injunction by providing, in the context of the application of treaty law, that "[w]hen interpreting legislation, every court and tribunal must adopt any 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"*. There is no doubt that these provisions codify and reinforce the principle of consistent interpretation of legislation in line with principles of customary international law and the treaties or conventions that are binding on Zimbabwe. The phrase 'any international convention, treaty or agreement which is binding on Zimbabwe' must be interpreted to mean all conventions and treaties that have been duly ratified by the country since these are already binding on the country regardless of whether or not they have been incorporated.

The rule of interpretation enshrined in sections 326(2) and 327(6) of the Constitution impose an obligatory duty on the courts to follow the dictates of international law even in circumstances where there is another reasonably feasible interpretation that is inconsistent with international law. In other words, the court may not depart from the interpretation that is consistent with international law, in favour of an interpretation that is not consistent with international law. Thus, the discretion to choose which interpretation to follow is taken away in favour of an approach more in line with international human rights instruments. More importantly, however, the two provisions are seemingly targeted at 'forcing' conservative and nationalistic judges to consider perspectives given by the international legal system and to avoid being combative when the application of international law is in issue. This helps orientate judicial officers, particularly in dualist legal systems, away from interpretations and remedies that dominate the domestic sphere to those that are developed at the international level.

The two provisions referred to above amount to more than a mere common law presumption. A common law presumption that the legislature would not make laws that are inconsistent with international law is subject to rebuttal by the litigant against whom the presumption is being invoked. Thus, if one of the two alternative interpretations of legislation is inconsistent with international law, the other interpretation would normally be preferred, but it does not have to be the preferred interpretation if the interpretation that is inconsistent with international law seems to be more appropriate in the context of the legislation in question. Section 327(6)

requires more than this because it mandates the courts to prefer an interpretation which is consistent with international law provided the interpretation is reasonable, even if the other possible interpretation makes more sense within the context of the particular statute.[44] Given that the Constitution itself was adopted in the form of an Act of Parliament, it is arguable that the rules entrenched in 326(2) and 327(6) must equally apply to the interpretation of constitutional provisions, particularly those entrenching fundamental rights and freedoms.

4.3 *Domestic Courts as Architects of an Integrationist Approach to International Law*

Domestic courts can act as architects of an integrationist approach to the relationship between national and international law, whether through design or out of a desire to buttress conclusions they have already reached. More often, the application of international law in the national legal system is often a result of the rise of 'worldly judges'. Incorporation, transformation and consistent interpretation aside, the developing influence of international law in the national legal system sometimes arises from the general amenability of local judges towards the international legal system, regardless of whether the applicable rules of international law are strictly binding on the presiding judge.[45] In the Zimbabwean context, domestic courts have consistently referred to international law without necessarily referring to constitutional provisions governing incorporation of international treaties, the principle of consistent principle or the positive duty to consider international law when interpreting rights provisions in the Declaration of Rights.[46]

In *Mapingure v. Minister of Health and Others*,[47] the Court held that it was "both proper and instructive to have regard to [international law] as embodying norms of great persuasive value in the interpretation and application of our statutes and the common law".[48] Apart from demonstrating the absence of a systematic approach to the interpretation of rights and freedoms, this passage shows an inclination towards treating international merely as a source of law with persuasive value. This approach does violence to the purpose behind the peremptory obligation to consider international law when interpreting the Declaration of Rights. The use of the phrase 'must take into account international' suggests that international law is more than persuasive authority and should systematically influence the meaning of the provisions entrenching fundamental rights. There is an emerging or developing tendency for judges to view the national legal and human rights systems not as islands unto themselves, but as an intrinsic part or offshoot of the international legal order. Behind this tendency is a subtle rise of 'worldly judges' who view themselves as agents of the international legal order and cherish the steady influence of international law on the content of domestic court decisions.[49] Some local judges

[44] *See* O'shea, *supra* note 30, para. 7A-8, at para. 7A2.
[45] *See generally Mudzuru and Another v. Minister of Justice, Legal and Parliamentary Affairs* CCZ12/15.
[46] *Ibid.*, pp. 24–26.
[47] (2014), Judgment No. SC 22/14, Civil Appeal No. SC 406/12.
[48] *Ibid.*, at p. 16.
[49] K. Young, 'The World Through the Judge's Eye', 28 *AustYBIL* p. 27, at p. 42.

consider themselves to be guardians of the international legal system, but the emerging accommodativeness of the courts is often not based on a sense of a legal obligation imposed on them by the domestic legal system, but is rather predominantly grounded on the persuasive value of international law. This creates room for domestic deliberation and engagement with international law without necessarily giving the impression that judges are legally bound to follow international law.[50] Under such an approach to the interpretive value of international law, domestic courts are inclined to take ownership of the processes through which international law creeps into the legal system and to own the outcome or consequences of making decisions based on international law.

A survey of court decisions demonstrates that Zimbabwean courts do make reference to international law although few of them base their decisions squarely on it alone. In *Mapingure v. Minister of Health and Others*,[51] the Court considered the normative content of international law to be a very important factor in delineating the rights of women who are victims of sexual violence (rape). From the onset, however, the Court made it categorically clear that international instruments "cannot operate to override or modify domestic law unless and until they are internalised and transformed into rules of domestic law".[52] This observation echoes tremors of dualism. Yet, the Court underscored that it is appropriate and necessary for domestic courts, "as part of the judicial process, to have regard to the country's international obligations, *whether or not they have been incorporated into domestic law.* By the same token, it is perfectly proper in the construction of municipal statutes to take into account the prevailing international human rights jurisprudence."[53] If this decision is anything to go by, it indicates an inclination by the bench to consider and refer to international human rights instruments even where they have not been transformed into domestic law.

Further, courts have, without making any reference to their duties in terms of the interpretation clause or examining the legal status of international law in the domestic system, taken international law into account when making decisions.[54] In *Makoni v. Commissioner for Prisons and Another*,[55] the Constitutional Court of Zimbabwe was called to determine whether the imposition, on a convict, of a life sentence without the possibility of parole amounts to inhuman and degrading treatment in

[50] E. Benvenisti and G. W. Downs, 'National Courts, Domestic Democracy, and the Evolution of International Law', 20 *European Journal of International Law* (2009) pp. 59–72.
[51] Judgment No. SC 22/14.
[52] *Ibid*., at p. 14. To this end, the Court drew inspiration from section 327(2)(b) of the Constitution.
[53] *Ibid*. The Court relied on Gubbay CJ's holding in *Rattigan &Others v. Chief Immigration Officer &Ors* 1995 (2) SA 182 (ZSC) pp. 189G-190I and *S v. A Juvenile* 1990 (4) SA 151 (ZSC) p. 155G-I, where Dumbutshena CJ held that the "[c]ourts of this country are free to import into the interpretation of s 15(1) interpretations of similar provisions in International and Regional Human Rights Instruments such as, among others, the International Bill of Human Rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms, and the Inter-American Convention on Human Rights. In the end, international human rights norms will become part of our domestic human rights law. In this way our domestic human rights jurisdiction is enriched".
[54] *See Mudzuru v. Minister of Justice* and Others, pp. 38 and 42. For similar remarks, *see* pp. 47 and 49 of the same judgment.
[55] CCZ 8/16

contravention of the rights to human dignity and freedom from torture or cruel, inhuman treatment or punishment as enshrined in sections 51 and 53 of the Constitution. In addressing the legal issue at hand, the Constitutional Court observed that international and foreign law provide useful guidance in the interpretation of the rights in the Declaration of Rights. The Court summarised the relevance of international law in the following terms:

> In addition to considering all other relevant factors that are to be taken into account in the interpretation of a Constitution, courts and tribunals must take into account international law and all treaties and conventions to which Zimbabwe is a party and may, where appropriate, consider relevant foreign law. Furthermore, insofar as concerns statutory interpretation generally, the courts are enjoined by section 326(2) of the Constitution to interpret legislation in a manner that is consistent with international customary law. In similar vein, section 327(6) requires the adoption of an interpretation that is consistent with any treaty or convention that is binding on Zimbabwe.[56]

In the penal context, the Court correctly pointed out that a comparative analysis of international law "further fortifies the point that penological theory has evolved from sentencing as a tool of retribution to one of rehabilitation and the resocialisation of prisoners".[57] It observed that while the Mandela Rules are of a soft law variety, they are highly persuasive in influencing and regulating the treatment of prisoners and the administration of penal institutions generally. They are regarded as being the primary source of standards relating to treatment in detention and as the key framework used by monitoring and inspection mechanisms in assessing the treatment of prisoners."[58] In light of the relevant provisions of the Constitution, especially section 50 thereof which constitutionalised international standards, the Court saw "no reason to depart from the foreign and international jurisprudence that has developed on the subject over the part sixty years. As a result, the Court concluded "that an irreducible life sentence without the possibility of release in appropriate circumstances, constitutes a violation of human dignity and amounts to cruel, inhuman or degrading treatment or punishment in breach of sections 51 and 53 of the Constitution".[59] This is one of the cases where the Constitutional Court partly relied on international law to outlaw the oppressive elements of domestic laws and to promote the rights of persons sentenced to life imprisonment without the option of parole. However, it is unfortunate that the Court never saw its reliance on international law as a constitutional obligation, but as an elective strategy to solve pressing legal problems.

In *Mudzuru and Another v. Minister of Justice, Legal and Parliamentary Affairs*,[60] the applicants complained about the infringement of the fundamental rights of girl children subjected to early marriages and sought a declaratory order that section

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[56] *Ibid*., p. 6.
[57] *Ibid*., p. 9.
[58] *Ibid*., p. 12
[59] *Ibid*., at p. 14. *See also Kachingwe and Others v. Minister of Home Affairs NO and Another* (17/03) [2005] ZWSC 134 (18 July 2005), where the Supreme Court of Zimbabwe adopted a similar approach to the relationship between international and domestic law before the adoption of the current Constitution.
[60] CCZ12/15.

22(1) of the Marriage Act, which permitted children aged 16 years or older to marry, was unconstitutional. Without attempting an orderly explanation of the relevant parts of the interpretation clause or the relationship between international law and constitutionally enumerated rights, the Constitutional Court started the analysis on the merits with a vague statement that section 46(1)(c) of the Constitution imposes an obligation on the courts to take international law – including all treaties and conventions to which Zimbabwe is a party – into account when interpreting all provisions in the Declaration of Rights.[61] In the view of the Court, sections 22(1) of the Marriage Act and 78(1) of the Constitution arose from the provisions of international human rights law prevailing at the time of their respective enactment.[62] Ultimately, it would be difficult to ascertain the meaning of section 78(1) without paying due regard to the context of the obligations undertaken by Zimbabwe under the international treaties and conventions on matters of marriage and family relations at the time when the current Constitution became law.[63]

More importantly, however, the Court expressed the view that Article 1 of the Convention on the Rights of the Child (CRC) and Article 21(2) of the African Children's Charter rendered the provisions of section 22(1) of the Marriages Act and any other law permitting child marriage to be:

> inconsistent with the obligations of Zimbabwe under international human rights law to protect children against early marriage ... The abolition of the impugned statutory provisions would be consistent with the fulfilment by Zimbabwe of the obligations it undertook in terms of the relevant conventions and the Charter ... Section 78(1) of the Constitution was enacted for the purpose of complying with the obligations Zimbabwe had undertaken under Article 21(2) of the ACRWC to specify by legislation eighteen years as the minimum age for marriage and abolish child marriage … Zimbabwe had to see through its obligations under the conventions to which it is a party requiring it to specify eighteen years to be the minimum age of marriage and to abolish child marriage. As the obligations were specific in terms of what the states parties had to do, the compliance by Zimbabwe was also specific.[64]

This is the best it gets in the judgment, but the reader is left perplexed by the lack of clarity about the relationship between national and international human rights law. Are we a dualist or a monist state and what effect does each classification have on the life course of our jurisprudence on international law in domestic courts? What does the interpretation clause mean when it stipulates that when interpreting rights in the Declaration of Rights, every court 'must take into account international law and all treaties and conventions to which Zimbabwe is a party? In more than ten pages, the Constitutional Court discusses academic literature and international soft law documents, without making any attempt to explain how the information being discussed relates to the interpretation clause or the Declaration of Rights as a whole.

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[61] *Ibid.*, at pp. 25–26.
[62] *Ibid*., p. 26.
[63] At p. 26, the Constitutional Court made vague, but promising statements without explaining what the Court meant. In one of the paragraphs it claimed that 'regard must also be had to the emerging consensus of values in the international community of which Zimbabwe is a party, on how children should be treated and their well-being protected so that they can play productive roles in society upon attaining adulthood'.
[64] *Ibid*., at pp. 38 and 42. For similar remarks, *see* pp. 47 and 49 of the judgment.

In fact, the bulk of these pages explain why international law has failed to protect the young from the scourge of child marriage, without explaining the relevance of this failure to the enjoyment of children's rights under the Zimbabwean Constitution. In the circumstances, it is difficult to identify how this very general and vague discussion fits into the tools of interpretation, particularly international law, that are clearly outlined in section 46(1) and (2) of the Constitution. In the rare cases in which the Constitutional Court refers to international law, the purpose of the referral is usually to reinforce constitutional provisions rather than to introduce any progressive interpretation of the Constitution or legislation.

Whilst our courts appear to be manned by judges that are inclined to incorporate international law into our legal system, it is equally surprising that judicial analysis on how exactly international law becomes an integral part of domestic law is often done in a haphazard manner. There is no jurisprudence, for instance, that unpacks the relationship between the substantive provisions of the Declaration of Rights, the interpretation clause and the provisions relating to the position of international law in the domestic legal system. Court practice tends to indicate that judges predominantly refer to international human rights instruments when it is convenient for them to do so. Critical analysis on how international legal obligations translate into binding duties at the municipal level is scant although courts loosely refer to international instruments. The lack of a systematic approach to the relationship between international law and the provisions of the Declaration of Rights creates room for judges to differ in their application of international law in domestic courts. There is wide room for contradicting interpretations from different courts, especially at the level of the high courts and below. Thus, it is possible for national courts to reach very different decisions and to even reach decisions that restrict the application of international law.

5 The Relationship between National Law and Various Types of International Law

The Zimbabwean Constitution treats different types of international law differently with regards to their legal position in the realm of domestic law. This section explores the ways in which the Constitution anticipates conflicts between domestic law and international law to be resolved and fully explains the ambit of the applicable constitutional provisions.

5.1 *National Law and Customary International Law*

Section 326(1) of the Constitution stipulates that customary international law shall form part of the law of Zimbabwe unless it is inconsistent with the Constitution or an Act of Parliament. The consequence of this provision is that as long as a rule of international customary law is not in contradistinction with either any constitutional provision or an Act of Parliament, it becomes incorporated into the national law without any further enabling enactment. The position is, however, different with regards to international conventions, treaties and agreements which, pursuant to section 327 of the Constitution, neither bind Zimbabwe until they have been

approved by Parliament nor form part of Zimbabwean law unless an Act of Parliament transforms such convention, treaty or agreement into national law.

Just like in the United Kingdom, customary international law, as indicated in the foregoing, forms part of the law of Zimbabwe under the doctrine of incorporation which is to the effect that international law rules become part of domestic law without any further need for explicit adoption by Parliament or national courts. This, in essence, means that unless there is a contrary statutory provision, rules of customary international law are directly incorporated into national law and maybe operative therein by virtue of them being rules of customary international law.[65] The incorporation of customary international law rules remains operative unless there is a clear and unambiguous provision of national law, more specifically an Act of Parliament, which explicitly prohibits the use of the rules in question. Consequently, once it is determined that a customary international law rule exists and would be relevant to the case under consideration and that it is consistent with the Constitution and the other laws in Zimbabwe, that rule becomes, without more, part of national law and may be applied by national courts.

A number of cases, both domestic and foreign cases also provide support for the views posited above. In *Mann v. Republic of Equatorial Guinea,*[66] it was held that is a trite position that certain human rights may be regarded, by virtue of their content and universal acceptance, as having entered into the realm of customary law and thus become applicable to nations that may not have assented to the particular instruments protecting these rights by virtue of the superiority of international customary law over all other laws.[67] The same sentiments were echoed in the Court's *dicta* in *Barker McCormac Pvt Ltd v. Government of Kenya,*68 where it was confirmed that customary international law is part of national law and would be applied when the rules founded under it were consistent with domestic law. It follows that even if the country would not have assented or ratified some international treaty that protects certain rights, for example the laws that prohibit torture and degrading treatment, the contents of those laws would hence become part of the domestic law by virtue of their content and public acceptance despite the fact that Zimbabwe would not be party to relevant treaties like the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

The Constitution does not stipulate that customary international law shall 'automatically' become part of domestic law. The fact that the Constitution recognises it should not be taken to mean that the rights and obligations founded on customary international law will be enforced directly in national courts. Arguably, the position is that a customary international law rule will be incorporated only if it is that

[65] Dixon, *supra* note 3, p. 108.
[66] Case No.CA 507/07 [2008] ZWHHC.
[67] In the Zimbabwean context, however, the Constitution is, pursuant to section 2(1) and (2) thereof, the supreme law of the land and the yardstick upon which every other law is measured. Sections 2(1) and 326(1) read conjunctively clearly illustrate the position of Zimbabwe with regard to customary international law being part of municipal law only if it is 'consistent with the Constitution and statutory law'.
[68] 1983 (1) ZLR 137.

type of a rule that is justiciable in the domestic legal system and is a kind where implementation would not be contrary to basic constitutional precepts our legal system. As was correctly stated in *Simbi (Steelmakers) Pvt Ltd v. Shamu and Others*,[69] it is a well settled position that customary international law can be invoked as a definite and decisive part of our law. Even then, the rules founded on customary international law certainly cannot be applied so as to override and negate provisions embodied in Acts of Parliament and the supreme law of the land, the Zimbabwean Constitution. It follows that a customary international law rule, right or obligation that is to be incorporated within the national legal system, it should be one whose existence is compatible with the rules of the domestic legal system.

5.2 *National Law and International Conventions, Treaties and Agreements*

International conventions, treaties and agreements do not bind Zimbabwe until they have been approved by Parliament and do not form part of the domestic legal system unless they have been incorporated into the law through an Act of Parliament. Section 327(2) of the Constitution provides as follows:

> An international treaty which has been concluded by the President or under the President's authority
> (a) does not bind Zimbabwe until it has been approved by Parliament and
> (b) does not form part of the law of Zimbabwe until it has been incorporated in the law through an Act of Parliament.[70]

These provisions imply that even if a treaty is concluded by the president or an authorised functionary and Zimbabwe has become party to it, the treaty would not be binding unless and until Parliament has approved it and would not form part of the law of Zimbabwe unless and until it has been transformed into our law through an Act of Parliament. In the case of *Minister of Foreign Affairs v. Jenrich and Others*,[71] Uchena J observed that section 327(2)(a) of the Constitution can only mean that the agreement concluded by the president or by someone under the president's authority becomes binding on its being approved by Parliament. It needs not be domesticated for it to be binding on Zimbabwe. The only impediment to its attaining binding status is its approval by Parliament.

Section 327(2)(a) of the Constitution alone gives international treaties a binding effect even if they have not yet been transformed into Zimbabwean law, at least at the international plane. Furthermore, for a treaty, convention or agreement to become part of our law, it needs to have been transformed into the laws of Zimbabwe by an Act of Parliament. From the above, it follows that it is possible for a treaty to be binding but still not forming part of the laws of the country. This position was succinctly enunciated in the case of *Minister of Foreign Affairs v. Jenrich and Others*. Rights and obligations arising from treaties have to be transformed into national law by an Act of Parliament because Zimbabwe follows the dualist approach to

[69] Civil Appeal No. SC 477/14 [2015] ZWSC 71.
[70] Section 327(1) of the Constitution.
[71] HC 232/15 [2015] ZWHHC 232.

international law. As was observed in *Magodora & Others v. Care International Zimbabwe*:[72]

> I do not think that the courts are at large, in reliance upon principles derived from international custom or instruments, to strike down the clear and unambiguous language of an Act of Parliament. In any event, international conventions or treaties do not form part of our law unless they are specifically incorporated therein, while international customary law is not internally cognisable where it is inconsistent with an Act of Parliament.[73]

The above position can also be seen in the UK legal system. In the case of *Maclaine Watson v. Dept of Trade and Industry* (*Tin Council Cases*),[74] the House of Lords confirmed that a treaty to which the United Kingdom was a party does not alter its domestic laws except when that treaty becomes transformed into the laws of the country by statute. The same is true in the Zimbabwean context. Domestic courts have no basis to enforce treaty rights and obligations as long as the applicable treaty has not been domesticated through an Act of Parliament. As the *Magodora* case illustrated, even in the event that a treaty has been approved and technically becomes binding on Zimbabwe and has even been domesticated by an Act of Parliament and becomes part of Zimbabwean law, the laws and obligations contained therein cannot henceforth be used to override existing domestic laws. It follows that if there are inconsistencies between an international treaty and an Act of Parliament, the laws enshrined in the Act of Parliament will prevail because international treaties, conventions or agreements will not be invoked to strike down the clear and unambiguous language of an Act of Parliament. The provisions referred to and arguments proffered in this section do not apply to self-executing treaties as these treaties are directly enforceable at the domestic level even if certain constitutional requirements are not met. This argument is pursued in some detail below.

6 Self-executing Treaties

The question of what constitutes a self-executing treaty originated from American law and remains a complex and difficult issue even in the American legal system. In *Foster v. Neilson*, an early case decided by the United States Supreme Court, Chief Justice Marshall laid out the basis for distinguishing between self-executing and non-self-executing treaties.[75] A self-executing treaty is a treaty that is capable of being enforced in a court of law without prior legislative domestication by Parliament and a non-self-executing treaty is one that may not be enforced without the adoption of implementing legislation.[76] The idea of self-executing treaties plays a pivotal function

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[72] SC 24/14.
[73] At p. 6.
[74] [1988] 3 ALL ER 257.
[75] *Foster v. Neilson* 27 United States (2PET)253 (1829) Although this case is generally recognised as the leading case on the origin of the doctrine of self-executing treaties, one can trace the origin of the doctrine as far back as *Ware v. Hylton* 3, US (3DALL)199 (1796).
[76] *See generally Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 373 (7th Cir. 1985); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 808 (D.C. Cir. 1984) (Bork J., concurring), cert. denied, 470 U.S. 1003 (1985); *Vorhees v. Fischer & Krecke*, 697 F.2d 574, 575 (4th Cir. 1983); *British*

in distinguishing international or regional treaties that require an act of the legislature to become judicially enforceable from those that require an act of the legislature to take away or modify the court's power or duty to enforce such treaties.[77] Thus, the doctrine performs an important separation of powers function as it allocates between the judicial and legislative branches of the state, the responsibility for enforcing compliance with treaties by everyone i.e. the state, individuals and private entities. To minimise non-self-executing treaty violations by states parties, drafters of national constitutions usually empower the judiciary to enforce treaties at the behest of affected citizens without having to wait for authorisation by the legislature. This is usually done through the constitutionalisation of a provision that expressly stipulates that international law is an integral part of domestic law and is directly enforceable in the courts of the country in question.

The Zimbabwean Constitution follows a different route with regards to the legal position of self-executing treaties and, as has been shown above, does not anticipate direct enforcement of international treaty obligations without the adoption of implementing legislation. However, it gives the legislature the power to adopt an Act of Parliament which would facilitate the inclusion of some, not all, international treaties into the laws of Zimbabwe without courts having to follow the formalities relating to legislative domestication of international treaties. There are two forms of self-executing treaties envisaged in the supreme law of the land: First, self-executing treaties expressly declared to be so by an Act of Parliament and, second, self-executing treaties declared to be so by a resolution of Parliament provided that such treaty neither requires the appropriation of funds from the Consolidated Revenue Fund (CRF) nor modifies the law of Zimbabwe. These different versions of self-executing treaties and the conditions regulating their enforcement shall be dealt with in turn.

6.1 *Self-executing Treaties Declared to Be So by an Act of Parliament*

Self-executing treaties are an exception to the general rule that all treaties must be approved by Parliament and must have implementing legislation for them to acquire the force of law at the domestic level. In the Zimbabwean context, there are three explanations to this approach to international treaty obligations. First, it is both a cause and a consequence of the doctrine of dualism that has been discussed in some detail above. Second, it also forms part of our colonial legal heritage which follows the British parliamentary system in terms of which the legislature performs extensive supervision over how the executive exercises public power and performs public functions. As part of that colonial legal heritage, the provisions of the Constitution seek to preserve the power the legislature has over the executive branch of the state. Third, it emphasises the centrality of representative democracy in the new legal order, particularly the idea that major governance decisions should

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Caledonian Ainvays v. Bond, 665 F.2d 1153, 1160 (D.C. Cir. 1981); and T. Buergenthal, 'Self-Executing and Non-Self-Executing Treaties in National and International Law', (1992) P. 235 (IV) *RECUEIL DES COVRS* 303, 317.

[77] C. M. Vasquez, 'The Four Doctrines of Self-Executing Treaties', 89 *The American Journal of International Law* (1995) p. 695, at p. 696.

be made after consulting with Parliament, which has the mandate to make legislative decisions on behalf of the people.

The executive's duty to consult with Parliament is mooted and reiterated in the founding values, especially the principles of good governance.[78] The applicable provisions underline the significance of the principles of an electoral system based on adequate representation of the electorate";[79] the "observance of the principle of separation of powers;[80] and respect for the people of Zimbabwe, from whom the authority to govern is derived.[81] Cumulatively, these provisions have the effect of underlining the symbolic and empirical value of involving the legislature in executive decisions that generate treaty obligations at the international and domestic levels.

Against the backdrop described above, it is perhaps not surprising that our Constitution foresees and prescribes the constant involvement of Parliament in deciding whether or not a particular treaty is self-executing. To this end, section 327(4) stipulates as follows:

> An Act of Parliament may provide that subsections (2) and (3)
> (a) do not apply to any particular international treaty or agreement or to any class of such treaties and agreements; or
> (b) apply with modifications in relation to any particular international treaty or agreement or to any class of such treaties or agreements.

These provisions imply, in theory at least, that only Parliament has the authority to make a final decision on the self-executing or non-self-executing nature of an international treaty. In addition, Parliament should ideally exercise this power through a statute which unequivocally states that a particular treaty or class of treaties is self-executing. Where Parliament expressly confers on the executive the power to sign directly enforceable treaties belonging to a particular class, the need for domestication does not arise provided the executive complies with all the conditions stipulated in the parent Act of Parliament. Thus, the executive may not usurp the popular mandate of the legislature by classifying as 'self-executing' treaties that contravene the specific conditions enumerated in the principal Act of Parliament which describes the kind of treaties that are truly self-executing. A treaty that violates the applicable conditions may not be regarded as 'self-executing', particularly with regards to provisions that directly contradict the relevant Act of Parliament.

It is also within the exclusive preserve of Parliament to determine whether the provisions relating to ratification and domestication of international treaties apply with or without modifications to any particular treaty or class of treaties. This is stipulated in section 327(4)(b) read with section 327(2) and (3) of the Constitution. There are multiple possibilities foreseen in these provisions of the Constitution: First, the Act of Parliament may provide that a particular treaty or class of treaties signed by or under the authority of the president and ratified by Parliament does not need implementing legislation to be enforceable in the courts of Zimbabwe. In other words, Parliament

[78] *See* section 3(2) of the Constitution.
[79] Section 3(2)(b)(iii) of the Constitution.
[80] Section 3(2)(e) of the Constitution.
[81] Section 3(2)(f) of the Constitution.

would be acting within its constitutional authority if it were to adopt a piece of legislation stating the kinds of treaties that do not require domestication for them to have the force of law at the domestic level. The assumption here is that the international treaty in question would be compliant with other conditions of the legislative scheme governing the status of international instruments at the domestic level.

In addition, there is also a possibility that Parliament may, through an Act of Parliament, waive its authority to determine whether or not agreements that are not international treaties should be binding on Zimbabwe. Section 327(3)(a) and (b) provides that agreements that are not international treaties that have been concluded by or under the authority of the president with one or more foreign organisations or entities, and impose financial obligations on Zimbabwe, are not binding on Zimbabwe until they are approved by Parliament. These provisions and their relationship with section 327(4)(a) and (b) need to be unpacked. First, it needs to be emphasised that these provisions address the legal status of agreements that are not international treaties and have been signed between the government and foreign, not international, organisations. Second, it is also clear that these agreements are not binding on Zimbabwe, without the approval of Parliament, if they impose financial obligations on the country.

Third, a holistic reading of the provisions of section 327(3) and (4) suggest that Parliament, through an Act regulating the legal status of international treaties and other agreements that are not treaties, may waive its authority to determine whether or not agreements that are not international treaties should bind Zimbabwe. In essence, this implies that it is within the exclusive preserve of Parliament to provide in an Act of Parliament that agreements that are not international treaties are binding on Zimbabwe even if they impose financial obligations on the country. By way of speculation, this kind of approach may be necessary for national development projects that are jointly administered and implemented by the government and foreign companies. A good example here could be agreements relating to extensively huge dam constructions or energy generation projects that impose financial obligations on the state. In this respect, the need for Parliament to relinquish its oversight role arises from the further need to expedite decisions and ensure that national development is not held back by formalities that characterise parliamentary proceedings. In such cases, the fact that the agreements impose fiscal obligations on the state may not necessarily justify the involvement of the legislature in determining the legal status of such agreements, especially in light of the social and economic significance of national development projects.

Finally, the discussion in this section is premised on the supposed existence of an Act of Parliament regulating the legal position of self-executing international treaties or agreements that are not international treaties. Unfortunately, Zimbabwe has not yet adopted such a piece of legislation. However, once an Act of Parliament stipulating the kinds of international treaties or agreements that are self-executing is in place, Parliament does not necessarily have to approve of such treaties or agreements for them to be binding on Zimbabwe. In the same vein, Parliament would not have to enact legislation every time a self-executing treaty or agreement is

concluded for such treaty to become part of Zimbabwean law. This means that rights and obligations contained in self-executing treaties and agreements would automatically apply in Zimbabwe without having to wait for Parliament to approve or enact legislation to that effect. This approach gives meaning to rights entrenched in self-executing treaties or agreements and promotes the principle of expediency. It is thus unfortunate that Zimbabwe does not have in place an Act of Parliament regulating the legal position of different international treaties or agreements in the domestic legal system. It would make sense if the issues discussed in this section were addressed in a specific piece of legislation.

6.2 *Self-executing Treaties Declared to Be So by Parliamentary Resolutions*

Our Constitution also confers on Parliament the duty to determine, through resolutions, whether or not certain international treaties are self-executing. The relevant provisions are couched in the following terms:

> Parliament may by resolution declare that any particular international treaty or class of international treaties does not require approval under subsection (2), but such a resolution does not apply to treaties whose application or operation requires—
>
> i. the withdrawal or appropriation of funds from the Consolidated Revenue Fund; or
> ii. any modification of the law of Zimbabwe.[82]

There are enormous similarities between the provisions of section 327(4) and (5) of the Constitution, especially with regards to Parliament's power to declare any particular treaty or class of treaties to be self-executing and, as such, to not require the adoption of implementing legislation for them to have the force of law on the domestic plane. However, there is a huge variation on the legal method to be used by Parliament to do so and the conditions governing the self-executing character and scope of the international treaty in question. The matter relating to method can be easily disposed of by indicating that under section 327(4), Parliament should ideally stipulate the classes of self-executing treaties in a statute drafted and adopted for that purpose. However, under section 327(5), Parliament performs the same function through resolutions that are made to respond to the exigencies of the prevailing situation and the demands of each period in the country's history, present or future. It suffices to reiterate that both provisions underline the importance of consulting with the people, through their elected representatives, in issues relating to whether or not international treaties should directly have the force of law in the domestic legal system.

With regards to the conditions governing the self-executing character and scope of international treaties, it is imperative to notice that section 327(5) prescribes the circumstances under which a Parliamentary resolution suffices for an international treaty to be self-executing. It provides that a Parliamentary resolution suffices for this purpose only if the 'application or operation' of the treaty in issue requires "(a) the withdrawal or appropriation of funds from the CRF or (b) any modification of the law of Zimbabwe". With regards to the first condition, it is patent that the objective of the

[82] Section 327(5) of the Constitution.

provision is to block the executive from assuming concrete financial obligations without first prompting Parliament to make laws to that effect. To this end, not even Parliament has the authority to declare by resolution an international treaty to be self-executing if that treaty requires the withdrawal or appropriation of funds from the CRF. If Parliament wishes to do that, it only has one option, i.e. to adopt legislation to that effect. The underlying tone of the applicable constitutional provisions is that decisions that impose on the state financial obligations should not be made lightly, even in the context of ratifying or domesticating international treaties.

Lastly, a parliamentary resolution that an international treaty is self-executing does not apply to a treaty that requires the modification of the law of Zimbabwe. If Parliament makes such a resolution, the later remains null and void. According to the separation of powers doctrine, law-making is a function preserved for Parliament, the only branch of the state which is closest to representing the will of the people. Nonetheless, Parliament is constitutionally required to perform this function publicly and in a transparent manner that is open to everyone.[83] Section 141 of the Constitution provides that Parliament must:

> (a) facilitate public involvement in its legislative and other processes and in the processes of its committees;
> (b) ensure that interested parties are consulted about Bills being considered by Parliament, unless such consultation is inappropriate or impracticable; and
> (c) conduct its business in a transparent manner and hold its sittings, and those of its committees in public …

Parliament's duty to ensure constant public access to and involvement in all law-making processes is indirectly built into provisions regulating the processes by which treaties become self-executing. This partly explains why the Constitution provides that Parliament lacks the authority to declare an international treaty to be self-executing by a mere resolution if that treaty requires the 'modification of the law of Zimbabwe'. Accordingly, both the executive and Parliament may not connive to modify the statutory laws of Zimbabwe by arranging for Parliament to pass resolutions stipulating that certain international treaties that modify domestic laws are self-executing. This constitutional prohibition is indirectly anchored on the idea that no laws should be passed without the involvement of the public in the law-making process and that if Parliament is to declare an international treaty which modifies our law to be self-executing, it should perform this function through an Act of Parliament. The assumption here is that the Act of Parliament authorising Parliament to declare a treaty to be self-executing would be adopted after meaningful public access to and involvement in the making of that law. This way, the general public would still have an influence on whether or not a particular treaty or class of treaties is self-executing.

[83] *See* section 141 of the Constitution.

7 Conclusion

This chapter sought to analyse the role of international human rights law in the interpretation and application of fundamental rights in the domestic legal sphere. By way of theoretical background, it briefly unpacked the doctrines of monism and dualism as philosophical postulates against which the application of international law in domestic legal systems should be measured. The theory of dualism is hinged on the premise that international law and national law operate in different spheres and deal with different subject matters. As such, it governs the interaction between sovereign states where as national law deals with domestic issues within a state. These dichotomous standpoints have been sustained by two further theories, namely, incorporation and transformation, which govern the reception of international law in domestic legal systems. The former takes a monist stance by stipulating that international law has direct legal effect at the domestic level whilst the latter reflects an 'extreme' dualist position by emphasising that rules of international law have no legal force unless they are consciously transformed into the domestic legal system by a legislative act. It has been shown that this binary divide between monism and dualism or incorporation and transformation does not reflect the reality on the ground as many legal systems equivocate between these divides, depending on a number of factors such as the type of international law at issue, the legislative language used to explain the role of international law in the domestic legal system and whether or not the treaty is self-executing.

Under the Zimbabwean legal system, international law directly influences the interpretation or content of domestic law in two respects. First, the Constitution provides that customary international law forms part of Zimbabwean law unless it is inconsistent with the Constitution or an Act of Parliament. Accordingly, customary international law needs not be incorporated into domestic law by legislation for it to be binding on all agencies of government. Even if legislation stipulates otherwise, domestic courts are mandated to interpret such legislation in a manner that is consistent with customary international law. Second, international treaties are another direct source of law at the domestic level provided that they have been ratified and domesticated. Unfortunately, Zimbabwe is generally not good when it comes to the domestication of international treaties, and this is perhaps the most unlikely root for international law to become part of our legal system. To this end, it is recommended that the government take all necessary steps to domesticate all treaties to which it is a state party. This will enhance accountability for violations of human rights at the domestic level.

International human rights law can also influence the development of international law in a number of indirect ways. Firstly, the Constitution imposes on courts the peremptory obligation to take international law into account when interpreting the provisions of the Declaration of Rights. The duty to 'take into account' does not, however, mean that the court is required to interpret the right in exactly the same way it has been interpreted by international courts, treaty-monitoring bodies and other forums. It simply means that an examination must be made into the relevant provisions of international law; but these provisions need not necessarily be applied

to the particular facts of the case if there are other overriding considerations arising out of alternative rules of interpretation.

Secondly, the principle of consistent interpretation requires decision-makers to interpret domestic law in a manner that is consistent with customary international law, general principles of international law and international treaties as opposed to any other alternative interpretation that is not so consistent. Combined with the rise of 'worldly' judges who have an inclination to rely on international and regional instruments to enrich domestic judicial decision-making, the principle of consistent interpretation encourages considerable reliance on international law regardless of whether or not international treaties have been signed by the states involved in the dispute in question. It is recommended that courts warm up to the task of ensuring 'internationalised' decision-making in human rights related disputes and avoid being bound by strict rules of signature, ratification and domestication.

Finally, this chapter demonstrated that the idea of self-executing treaties plays a pivotal function in distinguishing between international treaties that require an act of the legislature to become judicially enforceable and those that require an act of the legislature to take away or modify the court's duty to enforce such treaties. The Constitution confers on Parliament the power to adopt legislation to facilitate the inclusion of some, not all, international treaties into the laws of Zimbabwe without courts having to follow the formalities relating to the domestication of international treaties. As shown above, there are two forms of self-executing treaties envisaged in the supreme law of the land: First, self-executing treaties expressly declared to be so by a piece of legislation and, second, self-executing treaties declared to be so by a resolution of the legislature provided that such treaty neither requires the appropriation of funds from the Consolidated Revenue Fund nor modifies the law of Zimbabwe. Treaties protecting fundamental rights rarely fall into any of these categories and it is uncommon for Parliament to rely on any of these powers to ensure the direct application of human rights obligations without the signing, ratification and domestication of the relevant treaties by the executive organ of the state.

5 Foreign Law, Constitutional Interpretation and the Challenges of Legal Transplantation in Zimbabwe

Nkosana Maphosa*

1 Introduction

"Ours is a nascent constitutional order." In Chief Justice Luke Malaba's opinion,[1] Zimbabwe is on the age of 'experiential constitutionalism' judged by the way in which litigants have sought to test some of the provisions in the Constitution of Zimbabwe Amendment (No.20) Act, 2013 (hereinafter referred to either as 'the 2013 Zimbabwean Constitution', 'the Constitution of Zimbabwe 2013' or simply 'the Constitution'). This observation is possibly evinced and sustained by the reported gradual decline in the number of constitutional applications between 2015 and 2017 wherein there was a total of 101 filed cases in 2015; 76 in the following year; and a total of 70 in 2017.[2] For the Chief Justice, this dramatic decline in constitutional cases can be easily explained away due to the dwindling constitutional optimism and experimentation which suddenly normalised. He argues in the main:

> [T]hat trend is normal and attests to experimental constitutionalism. In the formal years of every Constitution, citizens are keen to test its provisions, in the process fuelling litigation. This gives a false impression of the Court's workload. That stampede to test the provisions slows down as the Court interprets the provisions and makes definitive pronouncements on various constitutional issues. These give guidance to litigants and legal practitioners.[3]

Also, in the same context in which the above sentiments were intimated, the Chief Justice noted with serious concern the "apparent failure by some judicial officers of subordinate courts and legal practitioners to comply with the Constitutional Court Rules when referring matters to the Court. This has resulted in many of the cases so referred being struck off the roll," and that his major worry was "about the time and resources wasted".[4] The 15 January 2018 statement could be construed as one of the epochs that underline the 2013 constitutional jurisprudence. In practical terms, the words intimated by the Chief Justice introduce one of the compellingly important aspects, that pertaining to the approach to constitutional interpretation. In the main, they probe the question as to how the Constitutional Court should resolve a constitutional matter fraught with facial procedural irregularities. Should these be condoned in the 'public interest' to promote and protect fundamental human rights and freedoms as dictated by the Constitution? Linked to this consideration is whether or not the focus of the Constitutional Court in such matters should be 'materialistic' in nature, in other words, focus on 'time and resources' or rather in the converse it should focus on justice specifically access to justice for the litigants. There are no hard and fast rules on this since they are both important, but the sentiments of the

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[1] L. Malaba, 'The Official Opening of the 2018 Legal Year,' 15 January 2018.

[2] *Ibid*., at p. 9.

[3] *Ibid.*

[4] *Ibid*., p. 10.

Chief Justice invite questions as to constitutional interpretation in general and the role and discontents of foreign law in particular.

For Chief Justice Godfrey Guwa Chidyausiku, who is Chief Justice Malaba's immediate predecessor, foreign law has an important jurisprudential and practical contribution.[5] His 16 January 2017 parting statement reflected on his judicial journey, and therefore the tipping-point milestones he reportedly achieved as the Chief Justice of the Republic of Zimbabwe since 5 July 2001 respectively. However, his sentiments on the launching of the Judicial Service Commission (JSC) Law Reports in particular are crucial because they speak to the role (and judicial perceptions on) of foreign law in Zimbabwe. For the most part, Chief Justice Chidyausiku was extremely appalled by the privatisation and consequent commercialisation of law reports containing reported decisions (and thus important precedent) particularly by "third parties who compile the judgements into Law Reports which are then sold back to the judges".[6] And for this reason, he justified the "bold decision" that the JSC had to "take over the process of compiling Law Reports on behalf of the Judiciary".[7] To operationalise this decision, a decision was made to constitute an Editorial Board chaired by the Chief Justice, deputised by the Deputy Chief Justice, and comprised of the Judge President of the High Court, the Senior Judge in the Labour Court and the President of the Law Society of Zimbabwe. And consequently an editorial team was tasked to produce the inaugural JSC Law Reports spanning 1 July 2015 to 31 December 2015. The sentiments of the Chief Justice in the context of the 124 judgments contained in the first JSC Law Reports, which he considered "truly world class" is what sets a tipping-point context for the evaluation of the prospective contribution of foreign law in constitutional interpretation, and ultimately the judicial enforcement of human rights and freedoms in Zimbabwe. For that reason, the views of the erstwhile judiciary head are quoted verbatim below, as a unit of analysis:

> [I] have quickly perused through the Law Reports and note that it lists cases from other jurisdictions which were either applied or referred to in the reported decisions. I was impressed to learn that Judges in the preparation of their judgments went as far afield as Scotland, New Zealand, Canada, Namibia and The Netherlands, among other countries, in their search for the correct position at law deciding the matters that were placed before them. Congratulations to those Judges whose judgements found their way into the Judicial Service Commission Law Reports. This is how you make your name or distinguish yourself as a Judge. *Ex tempore* judgements do not find their way into Law Reports. If you specialise in that, no-one will ever know that you were a Judge, except your relatives.[8]

Accordingly, the above excerpt attests to the fact that foreign law has been (and may) be judiciously relied on to better understand and improve the Zimbabwean legal system. Moreover, it arguably demonstrates the view that in a globalised legal order, judges ought to consider relevant comparative law pronouncements and legislative declaration provided they do not fall foul of the standards of 'liberal democracy' and

[5] G. G. Chidyausiku, 'Speech Delivered on the Occasion of the Official Opening of the 2017 Legal Year', 16 January 2017.
[6] *Ibid*., p. 25.
[7] *Ibid*., pp. 25–26.
[8] *Ibid*., pp. 26–27.

'accuracy' enunciated below. Although the Chief Justice's 16 January 2017 statement applauded the judges whose decisions were found reportable and thus constituting a progressive contribution to the law; he however did not address the merits and demerits of foreign and/or comparative law nor speak to the importance of developing judicial canons on the use of non-Zimbabwean precepts in constitutional interpretation. Foreign law may very well speak directly or indirectly to the legal issues at hand, but it is usually unfit and should therefore be adapted to marry the local socio-economic, cultural and political context. The last thing the judiciary wants to do is to uncontrollably import alien legal norms, histories, cultures, institutions and so on from other jurisdictions. There is a strand of literature which identifies and supports the use of unproblematic and potentially problematic foreign law in interpretation. This literature is provided for in the subsequent paragraphs. In practical terms, an important consideration which still remains complex under the 2013 Zimbabwean Constitution is whether or not courts have developed canons on the application of foreign law. The answer is arguably in the non-affirmative despite the fact that lately the Constitutional Court of Zimbabwe has consistently applied and/or referred to various foreign laws (cases, legislation, journals, law texts, etc.) from countries such as South Africa, India, Australia and Canada.

The contribution of foreign law is easily discernible in constitutional making or constitutional reform projects. Although the dominant intention of the reformers would be to craft a people's constitution, meaning one grounded in local context, which follows the principles of participatory democracy; nonetheless constitutional reform experiences from other jurisdictions and international law cannot simply be ignored. The work of Kersting[9] somewhat buttresses this point. "It is a culmination of a conference of expert constitutional drafters and reformers from selected African countries such as South Africa, Kenya and European countries particularly, Germany. In the main, the intent of the conference was to share ideas on constitution making to guide Zimbabwe craft a better, transformative and democratic constitution." Some of the delegates in that conference included seasoned experts such as Professor Liebenberg who delivered a paper on the "South African Bill of Rights and the lessons Zimbabwe ought to have learnt from it".[10] Liebenberg argued with force that: "[T]he basic departure point is that in the absence of an independent, courageous and vigorous judiciary and civil society, a Bill of Rights cannot fulfil its objectives. Its transformative potential will remain unrealised."[11]

Although sovereign countries are not compelled to consider legal developments from other countries, it is nonetheless advisable for them to take into account accepted 'good practices' which put strong and inclusive institutions such as the judiciary at the epicentre of constitutionalism and therefore practically speaking its core elements, for example, the separation of powers, independence of the judiciary, judicial review, the enforcement of human rights and freedoms, etc. The work of

[9] N. Kersting (ed.), *Constitution in Transition: Academic Inputs for a New Constitution in Zimbabwe* (2009).
[10] S. Liebenberg, 'Reflections on Drafting a Bill of Rights: A South African Perspective', in *ibid.*, p. 21.
[11] *Ibid.*

Mhodi[12] speaks directly to the doctrine of constitutionalism, its status and evolution in Zimbabwe. And the work of Mavedzenge[13] and Marumahoko[14] address the issues of inclusivity and participatory constitution making in Zimbabwe. Despite arguments pointing to the endogenous nature of a Constitution (and therefore supporting a domestic law inclined interpretive process) another growing body of literature further reinforces the important function of exogenous factors such as international and foreign law in constitutional interpretation. The 2013 Zimbabwean Constitution adopts a cocktail approach to constitutional interpretation. Foremost, it establishes a two-tier system of interpretation by distinguishing between binding (where judges have a positive injunction to use a particular rule) and non-binding (persuasive force, where judicial officers are conferred with judicious discretion to decide whether or not a specific rule if (in) applicable).

Also, the Constitution creates a dichotomy amongst hierarchized norms characterised by the domestic normative systems which epitomises a grand norm Constitution whose founding values and principles, national objectives and so on should guide the interpretive endeavour. The primacy of the Constitution even in interpretation stems from the long-established practice that the Constitution expresses the will of the people, was negotiated by them and as such has legitimate purpose and therefore is better suited to create a sense of collective constitutional polity and identity, define the structures of government desired by the 'people' and provide for human rights and freedoms-and their enforcement. Using this classification, the 2013 Zimbabwean Constitution acquires a binding and grand norm (bestows legal validity and therefore creates a compatibility exercise) like character.

Furthermore, the continuum embodies externalist or exogenous tools of constitutional interpretation. These are typified by the reference to international law and foreign law. An essential point is necessary at this stage: the most notable difference is that the 2013 Constitution confers judicious discretion on judges to apply relevant foreign law. The converse is true for international law and all treaties and conventions to which Zimbabwe is a party[15] which courts are mandated to use when interpreting the Declaration of Rights. However, as practice has shown, courts prefer to deter to foreign decision each time they are confronted with a legal matter. This has prompted scholars to probe whether or not the practice of courts truly reflects the constitutional injunction that foreign law is really discretionary?

The 2013 Zimbabwean Constitution was adopted in May 2013 as a mind map and tool to re-configure and re-engineer Zimbabwean society. For scholars such as Moyo, this Constitution is a transplant of the Constitution of the Republic of South

[12] P. T. Mhodi, 'The Constitutional Experience of Zimbabwe: Some Basic Fundamental Tenets of Constitutionalism which the New Constitution Should Embody', (University of Kwa-Zulu Natal, 2013).
[13] J. A. Mavedzenge, 'An Examination of the Relationship between Public Participation in Constitution Making Processes and the Objective to Write a Democratic Constitution: The Case of Zimbabwe's 2010-2013 Constitution Making Exercise', (University of Cape Town, South Africa, 2014).
[14] S. Marumahoko, 'Constitution-Making in Zimbabwe: Assessing Institutions and Processes', (University of the Western Cape, South Africa, 2016).
[15] Section 46(1)(c) of the Constitution.

Africa, 1996.[16] Accordingly, in certain grey and novel matters, the Constitutional Court should be empowered to consider decisions from other jurisdictions preferably those in the same legal family. Wilson17 puts it succinctly as follows:

> [B]y looking overseas, by looking at other legal systems, it has been hoped to benefit the national legal system of the observer, offering suggestions for future developments, providing one's own national system and look at it more critically, but not to remove it from first place on the agenda. Comparative studies have been largely justified in terms of the benefit they bring to the national legal system. In some areas it is easy to see why. In countries that have adopted codes or constitutions which originated in another system, it has been natural for legal scholars to look at the way that system has developed and has been developed in its original habitat.[18]

Moreover, Wilson adds with equal force and clarity that "this looking at other systems for the benefit of one's own is not confined to doctrinal systems," but also "happens even among common law countries, where one finds cases being cited in courts from other common law jurisdictions and where legal scholars show a natural interest in developments in their areas of expertise in other common law jurisdictions".[19] The scholars Currie and De Waal confirm Wilson's perspective in South Africa because they observe and contend that "many of the Constitutional Court's judgments indeed read like works of comparative law".[20]

Nevertheless, according to these eminent jurists, over the years, the South African apex Court has become circumspect to foreign and comparative law in the broader scheme of constitutional 'interpretation'. They add with brevity that "[t]he Court appears to be more concerned on whether foreign case law provides a safe guide to the interpretation of our (South African) Bill of Rights".[21] The rationale for such a watchful approach is to be found in the case of *Sanderson v. Attorney-General, Eastern Cape*,[22] where the Constitutional Court of South Africa cautioned that "[t]he use of foreign precedent requires circumspection and acknowledgement that transplants require careful management".[23] In Zimbabwe, section 46(1)(e) of the 2013 Zimbabwean Constitution states that "[w]hen interpreting this Chapter, a court, tribunal, forum or body may consider relevant foreign law". By way of introduction, the reasoning of the Constitutional Court in the *Mudzuru* case to the extent that it relates to constitutional interpretation in the context of constitutional rights offers vital guidance. According to the Court:

> [S]ection 46(1)(a) of the Constitution obliges a court when interpreting a provision contained in Chapter 4 to give full effect to the rights and freedoms enshrined in the Chapter. The court is required by s 46(1)(d) to pay due regard to all provisions of the Constitution, in particular, the

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[16] A. Moyo, *Selected Aspects of the 2013 Zimbabwean Constitution and the Declaration of Rights* (2019).
[17] G. Wilson, 'Comparative Legal Scholarship', in M. McConville and W. Hong Chui, *Research Methods for Law* (2012).
[18] *Ibid*., p. 87.
[19] *Ibid*., p. 88.
[20] I. Currie and J. D. Waal, *The New Constitutional & Administrative Law Volume 1 Constitutional Law* (2001) p. 334.
[21] *Ibid*., pp. 334–335.
[22] 1998 (2) SA 38 (CC).
[23] Para. 26. *See also* Currie and De Waal, *supra* note 20, pp. 334-335.

> principles and objectives set out in Chapter 2. The purpose of interpreting a provision contained in Chapter 4 must be to promote the values and principles that underlie a democratic society based on openness, human dignity, equality and freedom, and in particular, the values and principles set out in s 3 of the Constitution.[24]

Some of the constituents of section 46(1) of the Constitution are cast in light of international law which enjoins states parties to hold in good faith and observe the rights and obligations in a treaty to which they are a party. The Vienna Convention on the Law of Treaties (1980) is the bedrock of such legal provision, and therefore underlies section 46(1)(c) of the 2013 Zimbabwean Constitution.

Foreign law is distinguishable from domestic, municipal or national law in many respects. In practical terms, domestic laws of Zimbabwe do not have an extraterritorial effect, meaning they are generally inapplicable (except to say they might have a persuasive value depending on the Constitution of the country concerned) in other countries such as South Africa, India, Zambia, Botswana, Tanzania, Malawi and Canada. Typical examples of national law include constitutions, statutes/legislation, indigenous law, subsidiary legislation and the body of precedent emanating from courts. However, to further augment domestic laws, courts may consider developments in other countries for purposes of enriching their legal systems. This is true in the context of human rights protection. Therefore, the various legal families such as the common law and civil law systems matter the most here. From constitutional practice, most judges from common law jurisdictions usually consider the judgments of their contemporaries to further develop their municipal systems. And so, some of the fundamental questions which arise include: what value should courts attach to foreign law when interpreting fundamental human rights and freedoms? What is the approach of the Constitutional Court of Zimbabwe to the application of foreign law particularly when it comes to Chapter 4 of the Constitution? In the main, have courts developed clear canons on the application and role of foreign law on the interpretation of fundamental human rights and freedoms? The next section below briefly examines elementary aspects of constitutional interpretation.

2 Constitutional Interpretation

2.1 *Definition*

According to Currie and De Waal, "constitutional interpretation is the process of determining the meaning of a constitutional provision".[25] Thus, interpretation could be read to denote the quest by justices of the Constitutional Court when presented with a 'constitutional matter'[26] to carve out, find or construct an appropriate meaning to a particular provision/tenet of the Constitution. In other words, it can be argued

[24] *Mudzuru & Another v. Ministry of Justice, Legal & Parliamentary Affairs (N.O) & Others* CCZ 12/2015 p. 43.
[25] Currie and De Waal, *supra* note 20, p. 332.
[26] In terms section 332 of the Constitution of Zimbabwe 'constitutional matter' denotes "a matter in which there is an issue involving the interpretation, protection or enforcement of this Constitution".

that constitutional interpretation refers to the judiciary's deliberate attempt to ascertain the legislative intent given the peculiar merits of the case presented before it. Also, for Currie and De Waal, the overarching objective of interpretation "is to ascertain the meaning of a provision in the Bill of Rights in order to establish whether law or conduct is inconsistent with the provision".[27] The process involves two equally important steps: determining the meaning or scope of a fundamental right and whether or not the challenged law or conduct conflicts with the fundamental rights.[28]

2.2 *Main Sources of Constitutional Interpretation*

This section summarises the major sources of constitutional interpretation based on Professor Bobbit, Kelso, Currie and De Waal's seminal works.[29] These provide a constitutional basis for the approach to constitutional interpretation. Professor Bobbit is one of the leading authorities in constitutional interpretation.[30] Contemporary contributions by scholars such as Currie and De Waal and Kelso are, for the most part, a refinement of his major work.[31] According to Bobbit, the main sources of constitutional meaning are textual, structural, historical, doctrinal, prudential and ethical.[32] These are explained by Professor Kelso as follows:[33]

2.2.1 Contemporaneous Sources of Meaning

These are primary sources to determine constitutional meaning. They are three specific sub-categories as explained below. Kelso has further observed that contemporaneous sources of meaning "are sources which exist at the time a constitutional provision or amendment is ratified".[34]

2.2.1.1 Constitution's Text in Determining Constitutional Interpretation Direction[35]

Kelso considers the Constitution's text as an important contemporaneous source of meaning in constitutional interpretation.[36] Carving meaning therefore involves making a value judgement: "a judge must decide whether to read the text literally (and thus risk missing the spirit, or purpose, behind why the text was adopted) or whether to interpret the provision in light of both its letter and spirit".[37] In respect to this argument, there is precedent against narrow, strict and literal constitutional

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[27] Currie and De Waal*, supra* note 20, p. 332.
[28] *Ibid.*
[29] *See generally* R. R. Kelso, 'Styles of Constitutional Interpretation and the Four Main Approaches to Constitutional Interpretation in American Legal History', 29 *Valparaiso University Law Review* (1994) and Currie and De Waal, *supra* note 20, pp. 335–337.
[30] *Ibid*., p. 124.
[31] *Ibid*., p. 126.
[32] *Ibid*.
[33] *Ibid.*
[34] *Ibid*., p. 128.
[35] *S v. Zuma* 1995 (2) SA 642 (CC) para. 20.
[36] Kelso, *supra* note 29, p. 128.
[37] *Ibid.*

interpretation in favour of a more liberalised and purposive approach.[38] Currie and De Waal concur with Kelso.[39] They opine that purposive interpretation is "helpful in that it recognizes that the interpretation of the Bill of Rights involves a value judgment."[40] The Kelso inquiry, as confirmed by Currie and De Waal, has permeated our law via the *Mudzuru* case.[41] Nonetheless, Currie and De Waal further contend that a generous interpretation may sometimes become inimical to progressive legal jurisprudence. They conceptualise of it as "the most perplexing of all the principles of constitutional interpretation".[42] These scholars also claim that a generous interpretation "is supposed to ensure that individuals receive the full measure of the fundamental rights and freedoms referred to".[43] The contrary, however, is that generous interpretation "becomes problematic when the other principles and rules of constitutional interpretation point to a different, narrower, meaning of a provision".[44] Moreover, Kelso has also argued with equal force and brevity that:

> [I]f the judge chooses to interpret a provision in light of both its letter and spirit, the judge must then decide how to determine the purpose, or purposes, of the text. Some purposes are stated in the Constitution itself … Such purposes, however, are very general and do not provide unequivocal guidance on how to interpret specific constitutional provisions. They may provide, however, some background understanding of the constitutional enterprise embarked on by the framers and ratifiers.[45]

With this overview, it is essential to note that the Constitutional Court is endowed with immeasurable constitutional interpretation competence under the 2013 Zimbabwean Constitution to realise the constitutional objective and therefore determine a positive jurisprudential paradigm. On the whole, the Constitution envisages a transformative, just and egalitarian society, articulates invaluable values and principles and national objectives that courts must consider when teasing out the meaning of any constitutional provision including the Declaration of Rights (which enlists rights and freedoms). Overall, an effective and successful constitutional system arguably depends on the courts' ability and determination to uncover meaning, purpose and scope of the Constitution. Kelso has argued boldly that:

> [O]nce a judge determines the spirit or purposes of a constitutional provision, the judge must decide the extent to which these purposes will be allowed to override the literal meaning of the text when conflicts arise. Factors which might be relevant in making this determination include the clarity of the textual language (the more clear the language, the more weight it is given); how much conflict exists between the letter and spirit of the provision (a clear conflict between letter and spirit suggests either that the letter of the language was not well-drafted or the judge has misidentified the provision's purposes); and does the literal meaning trample on fundamental

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[38] *See United States v. Whitridge* 197 U.S. 135**,** 143 (1905) (Holmes, J.). "The general purpose is a more important aid to the meaning than any rule which grammar or formal logic may lay down."
[39] Currie and De Waal, *supra* note 20, p. 336.
[40] *Ibid.*
[41] *Mudzuru and Another v. Minister of Justice* 2016 (2) ZLR 45 (CC), Law Reports citation.
[42] Currie and De Waal, *supra* note 20, p. 336.
[43] *Ibid*., pp. 328–329. *See also Minister of Home Affairs (Bermuda) v. Fisher* [1980] AC 319 (PC).
[44] *Ibid*., p. 336.
[45] Kelso, *supra* note 29, p. 129.

rights otherwise protected (suggesting that the literal meaning is not well-drafted, given our framers and ratifiers' commitment to protecting certain fundamental rights).[46]

Resultantly, a progressive approach to interpretation is one that is underpinned by a mutually shared constitutional vision, values and principles such as is in the 2013 Zimbabwean Constitution. It is therefore pertinent for judicial officers to deliberate on cases as informed by this aspiration. However, this is usually a cumbersome and complicated endeavour as constitutional interpretation is mooted in literature. Those grounded in legal philosophy would recall seminal but perplexing scholarship by legal jurists like John Austin, Herbert Hart, Kelsen, Lon Fuller, Ronald Dworkin, Holmes and others. The notorious Hart versus Fuller debate and Dworkin versus Hart fall-out highlight the complex nature of legal interpretation. Cognisant of this, judges are required to consider certain values and principles such as those contained in section 3 of the Constitution. However, an argument has been made that in principle the 2013 Zimbabwean Constitution is transformative and progressive in nature. Its preamble is forward-looking and sets the general tone for the whole constitutional enterprise. As a result, constitutional interpretation must be conceptualised holistically taking into account constitutional supremacy and other auxiliary mechanisms such as judicial independence, separation of powers, judicial review, the fundamental human rights and freedoms and good governance. A corollary to the rule of law is that judges should interpret the Constitution in such a manner as to realise the intent of the drafters. They have an enormous task to promote social justice and democracy. And accordingly, they must come to terms with the inherent constitutional vision and deal with constitutional matters holistically, contextually and purposively fully aware that their decisions can have wide-reaching economic, social and political consequences. The 2013 Zimbabwean Constitution therefore embodies the country's broader ambitious vision and aspirations. The courts are therefore presented with a fruitful opportunity to turn the constitutional vision into reality and thereby drive wheels of social change and shared prosperity. At the court's behest lies the country's rule of law outlook and development prospects. This sometimes means adopting an external focus and drawing inspiration from comparative and foreign jurisprudence.

2.2.1.2 Structure of the Government Contemplated by the 2013 Zimbabwean Constitution

The structure contemplated in the Constitution is vital in the context of constitutional interpretation. The drafters of the 2013 Zimbabwean Constitution were alive to this fact because there included the separation of powers, the rule of law, constitutional supremacy and good governance as founding principles and values. For purposes of the present discussion, it is important to note that the distribution of power is a factor to be considered by courts when interpretation the constitution. The effects of the *trias politica* doctrine are evident in the Constitution: power is distributed among the executive, judiciary and legislative branches. The tiers of government are articulated. Inherent in the constitutional enterprise is the fact that power is derived

[46] *Ibid*., p. 130.

from the people (codification of popular sovereignty) and that it is limitable and reviewable owing to the doctrine of constitutionalism.

2.2.2 The History Surrounding the Constitutional Provision's Drafting and Ratification

The decision of the Constitutional Court in the *Mudzuru* case illustrates this point well. Justice Hlatshwayo specifically considered the legislative history of section 78(1) of the Constitution to justify his holding to outlaw early marriages in Zimbabwe. The approach to consider the history surrounding a constitutional provision finds credence in scholarship.[47] Kelso provides the basis for invoking history and argues that "these historical sources may aid in determining the provision's purpose, or purposes. A judge must decide which of these sources are appropriate to use, what weight to give each, and at what level of generality to view historical insights".[48] Accordingly, the 2013 Constitution should be analysed within the framework of Article VI of the Global Political Agreement and the complex debates and criticisms surrounding the Lancaster House Constitution. In practical terms, the history surrounding constitutional provisions can easily be found in the constitutional drafting documents including sentiments made by the drafters/negotiators themselves. In the context of exogenous constitutional interpretation, the question is always whether or not a foreign precedent is in tune with the local context.

2.3 *Subsequent Events*

The conventional wisdom on interpretation provides that subsequent events such as court decisions, legislative and executive practice also influence constitutional interpretation.

2.4 *Non-Interpretive Considerations*

For Kelso non-interpretive guidelines incorporate arguments pertaining to the consequences of a judicial pronouncement from the perspective of justice or sound social policy considerations of politics.

2.5 *Individual Bias*

Furthermore, the literature on constitutional interpretation supports the view that interpretive bias, specific case bias, party and individual bias may also influence constitutional interpretation.

[47] *Ibid*., p. 129.
[48] *Ibid*., p. 130.

3 The Challenges of Legal Borrowing

Mhango[49] relying on Tebe and Tsai[50] argues that legal borrowing is "the process of importing legal doctrines or rationales from other legal sources or domains in order to persuade someone to adopt a certain reading of a constitution".[51] For Osiatynski,[52] "borrowing is inevitable because there are a limited number of general constitutional ideas and mechanism".[53] The complex debates on the application of foreign law abroad span various jurisdictions. And for Tushnet, these discussions are "a tempest in a teapot".[54] Foreign law has therefore become ubiquitous and an important epoch to frame discussions on constitutional interpretation in both developed and developing countries (Global North and Global South), and particularly in countries that follow the common law tradition such as, among others, Zimbabwe, South Africa, the United States of America (US) and Canada. Sitaraman reinforces the observations made in Tushnet and highlights the academic debates on the subject of non-domestic norms. According to Sitaraman, the remarks of the Justices of the US Supreme Court further buttress the above analysis. For some, the use of foreign law is akin to "moods, fads or fashions," for Justice Scalia the trend "can make the opinions of Americans essentially irrelevant," and for Justice Ginsburg it denotes a "unified concept of what dignity means."[55]

In the main, Sitaraman evaluates the "use and abuse of foreign law in constitutional interpretation".[56] His examination of the typology or ten modes on the use of foreign law range from non-problematic, potentially problematic and troublesome uses of foreign law in constitutional interpretation through the prism of two epochs: arguments from liberal democracy, arguments from methodological and accuracy. By and large, he argues that the proper approach should not be to overgeneralise on the suitableness or unsuitableness of foreign law but to consider its opportunities, pitfalls and discontents influenced by the 'trouble-some' uses of foreign law in constitutional interpretation.

And for efficaciousness, Sitaraman recommends a focused approach wherein scholars should lean towards a specific mode or continuum on the use and abuse of foreign law, as opposed to an ominous and absolute analysis. Consequently,

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[49] M. O. Mhango, 'Separation of Powers and the Political Question Doctrine in South Africa: A Comparative Analysis', (University of South Africa, 2018).
[50] N. Tebe and R. Tsai, 'Constitutional Borrowing', *Michigan Law Review* (2009) p. 463.
[51] Mhango, *supra* note 49, p. 70.
[52] *See also* W. Osiatynski, 'Paradoxes of Constitutional Borrowing', 1 *International Journal of Constitutional Law* (2003) p. 244.
[53] Mhango, *supra* note 49, p. 70.
[54] M. V. Tushnet, 'Referring to Foreign Law in Constitutional Interpretation: An Episode in the Culture Wars', 35 *University of Baltimore Law Review* (2006) pp. 299–312. This scholar examines references to foreign law by the Supreme Court and individual justices. Some of the cases discussed in Professor Tushnet's paper include *Atkins v. Virginia*, 536 U.S. 304*; Lawrence v. Texas*, 539 U.S. 558 (2003); Roper *v. Simmons*, 543 U.S. 551 (2005); *Printz v. United States* 521 U.S. 898 (1997); *Knight v. Florida* 528 U.S. 990 (1999); and *Grutter v. Bollinger* U.S. 306.
[55] G. Sitaraman, 'The Use and Abuse of Foreign Law in Constitutional Interpretation', 32 *Harvard Journal of Law & Public Policy* (2009) p. 655.
[56] *Ibid*.

Sitaraman correctly posits that "the foreign law debate should focus specifically on the few potentially problematic uses, rather than on 'foreign law' more generally".[57] Moreover, Sitaraman provides an exhaustive American (US) "typology of the uses of foreign law in order to provide insight into whether foreign law can appropriately be used in constitutional interpretation, when it can be used, and what the stakes and parameters are in each case".[58] The piece focuses on two considerations: the practical ways in which foreign law can be used and limited categorisation of foreign law and its attendant impact.[59] The article can be categorised according to the arguments about the use and typology of foreign law.

The Sitaraman piece creates a multi-layered structure on the use of foreign law in constitutional interpretation. It creates a continuum or hierarchy of units whose place is determined by their (un)constitutional effects. The trouble-free or untainted function of foreign law occupies the first level and is comprised of linguistic considerations, the rationale to illustrate contrasts, logical reinforcements and factual propositions. Sitaraman calls these 'unproblematic uses of foreign law' because they do not undermine the democratic values provided for in the Constitution. The second layer is composed of partially problematic constitutional variables. Sitaraman calls these 'potentially problematic uses of foreign law' since they can acquire a different and troublesome mould in certain instances (under this categorisation, their empirical consequences, direct application and persuasive reasoning). The most radical nuance which occupies the Sitaraman base are the 'troublesome uses' which are three-fold: authoritative borrowing, aggression and no usage.

4 Application of Foreign Law by the Constitutional Court

In *Liberal Democrats*,[60] the Constitutional Court dismissed a constitutional application which sought to expunge the former president's, Robert Mugabe, resignation as involuntary. In the opinion of the Court, the applicant dismally failed to prove their case. The Constitutional Court relied on foreign law to make a ruling on legal costs. Some of these decisions include *Affordable Medicines Trust and Others v. Minister of Health and Others*[61] and *De Lacy and Another v. South African Post Office*[62] to uphold the court's discretion to order costs as appropriate according to Rule 55(1) of the Constitutional Court Rules. The same strand is seen in *Mpofu & Anor v. The State*[63] (a case dealing with the deliberate transmission of HIV/AIDS), the court referred to the case of *Sunday Times v. The United Kingdom,*[64] to amplify the meaning of the right to equal protection of law. Moreover, in the *Mudzuru* case, the Court annulled section 22(1) of the Marriage Act [Chapter 5:11] "and any other

[57] *Ibid*., p. 653.
[58] *Ibid.*
[59] *Ibid.*
[60] *Liberal Democrats & 4 Others v. President of the Republic of Zimbabwe E.D. Mnangagwa N.O & 4 Others* CCZ 7/18.
[61] 2006 (3) SA 247 (CC) paras. 296H-297E.
[62] 2011 (9) BCLR 905 (CC).
[63] CCZ 5/2016.
[64] (1970-80) 2 EHRR 245 para. 49.

practice or custom which authorised a person under the age of eighteen to marry as being inconsistent with section 78(1) of the Constitution".[65]

This decision is distinguishable from those cases which were decided under the now repealed first Constitution of Zimbabwe, which came into effect on 18 April 1980, in many respects. Importantly, the Supreme Court jurisprudence then, particularly on section 24(1) of the defunct Constitution, supports this argument. As such, an argument is made in Kersting's 2009 treatise that the successor to (being section 85(1) of the 2013 Constitution) had to be broader and all encompassing. Accordingly, Kersting refers to several cases which were dismissed on the basis of a restricted interpretation of standing. However, in this contribution, the *Mudzuru* case is relied on as an example of a constitutional matter where foreign law (decisions) were applied and/or referred to assist the court to interpret the Constitution of Zimbabwe 2013.

In *Mudzuru*, the applicants, aged 18 and 19 years, brought an application before the Constitutional Court challenging the constitutional validity of section 22(1) of the Marriages Act [5:11] and the Customary Marriages Act [Chapter 5:07]. The applicant argued that the first impugned statute was contrary to the dictates of the 2013 Constitution because it empowered minors (persons below 18 years) to enter into a marriage, exposing them to unconscionable abuse or harmful practices and therefore constituted a serious violation of their fundamental human rights, as protected under the 2013 Constitution. The Customary Marriages Act was challenged on the basis that it was silent on the marriageable age. Amongst the provisions relied on by the applicants are sections 78(1) (which states that "every person who has attained the age of eighteen years has the right to found a family") and 81(1)[66] (on children's rights) of the 2013 Zimbabwean Constitution.

The Court ruled that the effect of section 78(1) was to prescribe 18 years as the marriageable age in Zimbabwe. And therefore, that "no person can enter into marriage including an unregistered customary law union or any other union including one arising out of religion or a religious rite before attaining the age of eighteen (18)".[67] Consequently, the Court declared section 22(1) of the Marriages Act and the Customary Marriages Act unconstitutional since they diverged from the dictates of the Constitution which provided for 18 years as the age of entering into any marriage, customary or religious union. The conclusion in the *Mudzuru* case was prompted by an analysis of multiple sources of law including international, regional, domestic and foreign ones which were heavily inclined towards the prohibition of early marriages, and therefore favoured a human rights protection approach.

In the above case, the Court was asked to adopt "a broad, generous and purposive interpretation of s 78(1) as read with s 81(1)".[68] The core of their contention was that section 78(1) could not "be subjected to a strict, narrow and literal interpretation to

[65] L. Malaba, 'Superior Courts and the Consolidation of the Rule of Law in Zimbabwe', The Herbert Chitepo Memorial Lecture, Great Zimbabwe University (11 October 2019) p. 18.
[66] Section 81 of the Constitution. *See also Mudzuru*, *supra* note 41, p. 2.
[67] *Ibid.*
[68] *Ibid*., p. 3

determine its meaning if regard" was "had to the contents of similar provisions on marriage and family rights found in international human rights from which s 78(1) derives inspiration".[69] Thus said, the intent of this contribution is to examine and introduce a discussion on the (mis)use of foreign law and its discontents in constitutional interpretation. Accordingly, the *Mudzuru* decision is used here as an epoch to highlight the importance of these alien decisions at the domestic level. The stance of the Constitutional Court in framing section 85(1) of the Constitution buttresses this view. This contentious aspect in the decision was triggered by the hotchpotch reliance on two separate grounds, being section 85(1)(a) and (d) of the Constitution, which either entitle "any person acting in their own interests", or "any person acting in the public interest", "to approach a court, alleging that a fundamental right or freedom enshrined in this Chapter (Chapter 4) has been, is being or is likely to be infringed, and the court may grant appropriate relief, including a declaration of rights and an award of compensation".[70]

On the contrary, the respondent contended that the applicants lacked the right to approach the Constitutional Court because there was no sufficient proof that "any of their own interests was adversely affected by the alleged infringements of the fundamental rights of the girl child" and that none of the applicants alleged that she entered in marriage with the boy who made her pregnant. In other words, the respondent's contention was that "the applicants were no longer children protected from the consequences of early marriages by the fundamental rights of the child enshrined in section 81(1) of the Constitution".[71]

Furthermore, it was also the respondent's argument that applicants failed to meet the standard required to rely on section 85(1)(d) of the 2013 Constitution. The applicants failed to produce cogent evidence of girls "whose rights had been infringed and on whose behalf they purported to act".[72] In practical terms, the contention was that the applicant failed to discharge evidence that were acting in the public interest. It is this latter point which caused the court to invoke foreign decision particularly on the approach to the interpretation of *locus standi* in an open and democratic society. For the Malaba bench, the matter could not solely be dismissed on the literal construction of the Constitution because more was required-a liberalised nuanced construction which sought to protect rather than abrogate or undermine Chapter 4 rights and freedoms.

The Court noted that one of the pertinent albeit preliminary issue pertained to the capacity in which the applicants were acting in claiming the right to approach the court on the claims they advanced.[73] In the same case, the Court outlined the general rules on *locus standi* and importantly the corpus of section 85(1)(a) and (d) of the 2013 Constitution. And the succeeding paragraphs will demonstrate that foreign law played a crucial role to persuade the Court to reason and hold the manner it did. Accordingly, the Court held that a hodgepodge reliance on multiple grounds under

[69] *Ibid.*
[70] Section 85(1)(a) and (d) of the Constitution.
[71] *Mudzuru*, *supra* note 41, p. 5.
[72] *Ibid.*
[73] *Ibid*., p. 8.

section 85(1) is impermissible. It thus reasoned that "in claiming *locus standi* under section 85(1) of the Constitution, a person should act in one capacity in approaching the court and not in act in two or more capacities in one proceeding".[74] The context of these otherwise unassailable sentiments is that the applicants had sought to base their claim on two grounds under the standing provision.

Nevertheless, the Court found in favour of the applications, as it was demonstrated that they had genuinely believed to be acting in the public interest and not in their personal capacities. The inquiry thereafter transitioned to consider if the requirements of 'public interest' were fulfilled. Conversely, in relation to section 85(1)(a) the Court held that it "requires that the person claiming the right to approach the court must show on the facts that he or she seeks to vindicate his or her own interest adversely affected by an infringement of a fundamental right or freedom".[75] And therefore, the section 85(1)(a) leg constituted the traditional or narrow concept of standing.

In the opinion of the Court, section 85(1) had another dimension which was *sui generis* and therefore novel and unfamiliar in most legal systems. This meant there were neither domestic laws nor precedent to guide the Constitutional Court. Accordingly, the Court turned to Canadian jurisprudence (foreign law) specifically *R v. Big M Drug Mart Ltd*[76] and *Morgentaler Smoling and Scott v. R*[77] to interpret standing. These decisions served the important purpose of providing the Constitutional Court with interpretive guidance on the second leg of section 85(1)(a) of the Constitution, on direct access. For the Malaba Court, the import of these decisions:

> illustrate the point that a person would have standing under a provision similar to s 85(1)(a) of the Constitution to challenge unconstitutional law if he or she could be liable to conviction for an offence charged under the law even though the unconstitutional effects were not directed against him or her per se. It would be sufficient for a person to show that he or she was directly affected by the unconstitutional legislation. If this was shown it mattered not whether he or she was a victim.[78]

In the main, the court held that the *Mudzuru* case applicants were not victims of the alleged infringements of the rights under section 81(1) of the Constitution, and they could not benefit personally from a declaration of unconstitutionality of any legislation authorising child marriage. Moreover, there is a strand of additional foreign decisions (specifically from South Africa, Australia, India and Canada).[79]

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[74] *Ibid.*
[75] *Ibid.*, p. 9.
[76] (1985) 18 DLR (4th) 321.
[77] (1988) 31 CRR.
[78] *Mudzuru*, *supra* note 41, p. 10.
[79] Such as: *Ferreira v. Levin NO and Others* 1996 (1) SA 984; *R v. Inhabitants of the County of Bedfordshire* [1855] 24 LJQB 81; *Lion Laboratories Limited v. Evans* [1985] QB 526; *O'Sullivan v. Farrer* [1989] 168 CLR 2010; *Mckinnon v. Secretary Department of Treasury* [2005] FCAFC 142; *D v. National Society for the Prevention of Cruelty to Children* [1978] AC 171; *Sinclair v. Miming Warden at Maryborough* [1975] 132 CLR 473; *Lawyers for Human Rights & Anor v. Minister of Home Affairs & Anor* 2004 (4) SA 125 (CC) and *SP Gupta v. The Union of India & Ors* (1982) 2 SCR 365.

Regarding section 85(1)(d) of the Constitution, the Constitutional Court held the contention by the respondents that the applicants lacked standing was erroneous in view of the fact that children are a vulnerable group in society whose interests constitute a category of public interest. Consequently, the Court reasoned that the section under review rested on the presumption that the effect of the infringement of a fundamental right impacted upon the community at large or a segment of the community such that no identifiable or determinate class of persons who would have suffered legal injury. This jurisprudential reasoning was heavily influenced by foreign law, particularly South African authorities. According to the Court, the reliance on South African law was based on the fact that section 38(d) of the Constitution of the Republic of South Africa, 1996[80] "is in identical terms as s 85(1)(d) of the Constitution".[81] Having reflected on the requirements required obtaining access in terms of section 85(1)(d) and consequently the meaning of 'public interest' as influenced by foreign law, the Court concluded that "the applicants had no personal or financial gain to derive from the proceedings. They were not acting *mala fides* or out of extraneous motives as would have been the case if they were meddlesome busy bodies seeking a day in court and cheap personal publicity."[82]

The cumulative impact of foreign law (and some domestic decisions) is crisply demonstrated in the extract below, where the Constitutional Court stated that:

> [T]he liberalisation of the narrow traditional conception of standing and the provision of the fundamental right of access to justice compel a court exercising jurisdiction under s 85(1) of the Constitution to adopt a broad and generous approach to standing. The approach must eschew over reliance on procedural technicalities to afford full protection to the fundamental human rights and freedoms enshrined in Chapter 4. A court exercising jurisdiction under s 85(1) of the Constitution is obliged to ensure that the exercise of the right of access to judicial remedies for enforcement of fundamental human rights and effective protection of the interests concerned is not hindered provided the substantive requirements of the rule under which standing is claimed is satisfied.[83]

The portion of the judgment which follows the Court's pronouncement strikes at the core of foreign law. The influence of the jurisprudence of the Constitutional Court of South Africa is beyond doubt. In *Ferreira v. Levin NO & Others* (which the Constitutional Court of Zimbabwe, relied on in the case of *Mudzuru*), Judge Chaskalson emphasised the importance of a broad nuance to *locus standi* in constitutional matters.

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[80] *See* section 38 of the Constitution of the Republic of South Africa, 1996 states that:
Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are-
(a) anyone acting in their own interest;
(b) anyone acting on behalf of another person who cannot act in their own name;
(c) anyone acting as a member of, or in the interest of, a group or class of persons;
(d) anyone acting in the public interest; and
(e) an association acting in the interest of its members.

[81] *Mudzuru*, *supra* note 41, p. 22.

[82] *Ibid*., p. 23.

[83] *Ibid*., p. 14.

Additionally, to interpret the fundamental rights implicated in the matter, the Court considered applicable international laws such as the Convention on the Rights of the Child (CRC), the African Charter on the Rights and Welfare of the Child (ACRWC), Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), Universal Declaration of Human Rights (UDHR), Convention on Consent to Marriage and Minimum Age of Marriage and Registration of Marriages 1962, among others.

Foreign law (South African) was also used in the *Greatermans* case to confirm that founding values and principles such as "section 3(2)(k) of the Constitution does not confer a fundamental right in itself. It is not justiciable."[84] The same strand is seen in the Court's reasoning on the presumption against retrospectively wherein it cites the South African case of *Curtis v. Johannesburg Municipality*;[85] Canadian precedent particularly the case of *British Columbia v. Imperial Tobacco Canada Ltd*,[86] academic PW Hogg in *Constitutional Law of Canada*,[87] and section 11(g) of the Canadian Charter of Rights. *Greatermans* is cited here because it raises issues on the legality of retrospective application of civil law and therefore the likely impact of retrospectivity on fundamental human rights. The applicants contended the retrospective application of the law violates the right to equal protection of the law (the Court dismissed this claim), labour rights and property rights. In the main, the Court considered primary and secondary sources of law in foreign jurisdictions such as South Africa and Canada. These were used to amplify the Court's understanding of key constitutional issues, scope and application of rights in the context of labour. Nonetheless, the Constitutional Court has not developed guidelines on the application of foreign law in domestic decisions.

5 Brief Commentary on the Use of Foreign Law in Constitutional Interpretation

The use of foreign law in constitutional interpretation should be understood in light of the interpretation provision which bestows a judicious discretion on a court, tribunal, forum or body to apply it.[88] Constitutional interpretation has gained primacy for the main reason that the 2013 Zimbabwean Constitution contains elaborate fundamental rights and freedoms which are more or less similar to inalienable human rights enshrined in international law instruments such as the Universal Declaration of Human Rights , the International Covenant on Civil and Political Rights the International Covenant on Social, Economic and Cultural Rights, the African Charter on Human and People's Rights ,among others. The constitutional rights follow the conventional classification of human rights particularly civil and political rights, social, economic and cultural rights and collective rights.

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[84] At p. 12 where the court relied on a decision of the Constitutional Court of South Africa *Minister of Home Affairs v. National Institute for Crime Prevention and Reintegration of Offenders (NICRO) and Others 2005* (3) SA 280 (CC).
[85] 1906 TS 308 at 311. The Court does rely on Zimbabwean cases as well.
[86] [2005] 2 SCR 473
[87] 3rd edition (1992) at p. 111.
[88] Section 46(1)(e) of the Constitution.

The Declaration of Rights is touted as an auxiliary instrument of constitutionalism to limit the power of government by bestowing fundamental entitlements on every person. Over years, particularly under the Lancaster House Constitution, human rights discussions became an important item to frame discussions on the rule of law or lack of it thereof in Zimbabwe. Despite the home-grown feature of the 2013 Zimbabwean Constitution, certain alien and international and foreign norms found their way into the new burgeoning Constitution. And in certain provisions, such as section 48 on the right to life, the drafters took exception to the comparative provisions such as in the phraseology in section 12 of the Constitution of South Africa. And the nascent constitutional jurisprudence of the Constitutional Court has on numerous moments resorted to foreign law to interpret the Declaration of Rights.

The intent here is not to demonstrate the approach (whether it is liberal, conservative, progressive or regressive) but to rather create an entry point upon which the contribution of foreign law abroad can be understood. Although there is limited scholarship on the subject in Zimbabwe, the work of scholars such as Sitaraman and Tushnet cited above helps us to appreciate variant perspectives on the use of foreign law in interpretation. And therefore selected cases such as *Mudzuru* and *Greatermans* could be used to introduce discussions on this important subject. As demonstrated above, the Court in both *Mudzuru* and *Greatermans* heavily relied on foreign decisions (and international law) to interpret the Constitution. In that light, it is necessary to add a caveat, that this contribution is not for a strictly endogenous interpretation approach (where the court confines itself only to domestic laws) nor a heavily laden exogenous interpretive approach (where the court embarks on a literal copy and paste transplantation exercise) to interpret the Constitution.

An emerging body of scholarship has evaluated the Constitutional Court's approach to standing. In *Mudzuru*, the Court relied on Canadian jurisprudence to interpret section 85(1)(a) of the Constitution, particularly the second leg which surmises 'own interests' to include indirect interests of a commercial nature. However, the unit of analysis in the cited case is that the Court directly resorted to foreign jurisprudence without embarking on an analysis of democratic values and accuracy concerns. This raises important questions because constitutional interpretation is essential in a democratic establishment founded on equality, freedom, dignity and reasonableness. An erudite constitutionalist and human rights expert has argued that:

> [T]he interpretation of fundamental human rights and freedoms is an important aspect of constitutional law. If rights are wrongly or narrowly interpreted, citizens will not adequately enjoy what is constitutionally due to them. The interpretation clause is part of the Declaration of Rights under the Zimbabwean Constitution. It provides courts, legal practitioners and law-and policy-makers with guidance on how to interpret the provisions of both the Declaration of Rights and Acts of Parliament. To give appropriate meaning and content to the rights and freedoms set out in the Declaration of Rights, it is important to ensure that human rights are interpreted in a way that pays homage to the letter and spirit of the interpretation clause.[89]

[89] Moyo, *supra* note 16, p. 48.

In the main, section 46(1)(e) of the Constitution providing for the role of foreign law in interpretation should be understood in its constitutional history. Despite the 19 amendments to the former Constitution, Moyo nevertheless contends that constitutional analysis was done haphazardly since "there was no interpretation clause that stipulated, in a comprehensive manner, how courts had to interpret the provisions of the Declaration of Rights".[90] Moreover, this scholar posits that "the interpretation clause anticipates huge transformation in the way courts and other decision-making bodies interpret and limit the fundamental rights and freedoms protected in the Constitution".[91] In addition to this observation, by virtue of incorporating new and arguably progressive norms which serve to re-engineer society and therefore achieve social justice, human rights, security and health, there is need for the development of judicial canons on the application of certain tenets. That Zimbabwe is in its nascent constitutional phase is undisputable.

In the context of foreign and comparative law, there is need to guard against whimsical and uncontrolled application of foreign law devoid of any analysis grounded on chapter 2, chapter 3, and chapter 4 and indeed other segments of the Constitution, which define the overall constitutional purpose. The argument should apply even in cases where the constitutional norms and institutions were borrowed from elsewhere: courts should discover the true intentions behind these values, principles and objectives. The Constitutional Court jurisprudence so far has not produced clear guidelines on the application of foreign law and how to militate against its discontents. For that reason, Sitaraman's work is useful. This scholar tests ten typologies (modes) of foreign law against the values of liberal democracy and accuracy.

First, he argues that borrowing the language used by foreign courts is not inimical to constitutional progress. He argues that quoting language "does not undermine expressive, democratic, or institutional competence values because the court is merely using words, not their underlying reasoning and the sources themselves are not authoritative".[92] Neither is it 'methodologically troubling' but instead it demonstrates that a judge is conversant in human rights language and therefore comparative and international developments. Accordingly, certain terminologies have found themselves into our domestic decisions through universalisation of use.

Secondly, Sitaraman argues that foreign law can be relied on to illustrate constricts with national practices or law.[93] He cites the perspective of Professor Vick Jackson who argued that foreign law served as "interlocutors, offering a way of testing, understanding of one's own traditions and possibilities by examining them in the reflection of others".[94] In the main, he concludes that drawing sharp contrasts "does not gravely implicate any of the values at stake in the foreign law debate".[95] In terms of this argument, the innocuous reference to a foreign statute or constitution provides

[90] *Ibid.*
[91] *Ibid.*
[92] Sitaraman, *supra* note 55, pp. 664–665.
[93] *Ibid*., p. 665.
[94] *Ibid.*
[95] *Ibid.*

a reflective lens to understand domestic laws and regulations and therefore how to apply them.

Thirdly, for Sitaraman, using foreign law for logical reinforcement is unproblematic. To buttress this perspective, he cites the work of Professor Steven Calabresi and Stephanie Zimdahl, particularly the various ways "in which the court looks to foreign law and practice to demonstrate that its decisions are logical and supported by reason".[96]According to this perspective,[97] judicial decisions are home grown "but the court uses foreign sources to show that its interpretation is not unreasonable".[98] For Sitaraman, logical reinforcement follows a particular sequence: the judge makes a decision based on municipal sources or his own logical reasoning and thereafter looks abroad and finds that others have made the same decision.

The last pillar under 'unproblematic uses of foreign law' in Sitaraman is factual propositions. Sitaraman argues that courts can rely on exogenous sources of law to establish factual propositions about history, practices, structure, or anything else.

The fifth pillar which falls under 'potentially problematic uses of foreign law' in Sitaraman is known as empirical consequences. The argument is that foreign law "might be useful for judges to identify what consequences to a certain rule might have been if adopted".[99] Accordingly, Sitaraman argues that the courts would seek to ascribe the occurrence or non-occurrence of an event to a certain legal norm.

The sixth pillar falls under the same continuum as the fifth one. Sitaraman posits that in some instances foreign law could be applied directly by the courts.[100] The reason for this could be that the Constitution requires or suggests "looking to foreign or international law for interpretation".[101] Under the 2013 Constitution, judges may rely on foreign law when interpreting the Declaration of Rights. Accordingly, Sitaraman posits that the use of foreign law via direct application merges into the foundational debate and theories of constitutional interpretation. The conferral of discretion under section 46(1)(1) should also be seen in light of Morrison's observation that discretion is a relative concept and as such it always makes sense to ask: 'discretion under which standards?' or 'discretion as to which authority?'.[102]

Furthermore, foreign law may be relied on for persuasive reasoning. The argument is that different nations may face similar situations and therefore one judge's analysis of a situation may be helpful to another judge elsewhere. And therefore, in terms of this pillar, foreign law provides an example of an intelligent person reasoning through a legal problem.

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[96] *Ibid*., p. 666.
[97] *Ibid*., pp. 666–667.
[98] *Ibid.*
[99] *Ibid*., p. 670.
[100] *Ibid*., p. 672.
[101] *Ibid.*
[102] W. Morrisson, *Jurisprudence: from the Greeks to Post-Modernism* (Cavendish Publishing Limited, 1997) p. 424.

The last three categorisations in the Sitaraman piece are termed 'troublesome uses of foreign law'.[103] They include authoritative borrowing whereby a court or judge uses foreign law as if it were binding precedent on his court. Sitaraman invokes the writings of Professor Schauer to distinguish between substantive reasons and content independent reasons for relying on a rule. He argues that "a substantive reason for following a rule is a reason grounded in an inherent value of the practice- the practice could be efficient, desirable, or fair"[104.] Furthermore, 'content-independent reasons' "are reasons for following a rule that derive solely from the fact of another stating rule".[105] And therefore, Sitaraman contends that authoritative borrowing is the use of foreign materials for content-independent reasons. He nevertheless opines that borrowing is disadvantageous because: "it offends democratic values by directly implementing the law of a foreign country without judges considering domestic values and interpretive materials", and "it is methodologically problematic because it requires a considerable amount of knowledge about a foreign jurisdiction's law, culture, history and tradition on that judges are unlikely to possess".[106]

The penultimate troublesome pillar is called aggression. According to Sitaraman, this is a process whereby judges collect similar court decisions "that adhere to a particular position, aggregates them into a larger total, and uses numerical consensus to indicate the validity of the widely held position".[107] However, this component gives normative force and legitimacy to the numerical dominance of the particular position. Sitaraman argues that aggregation "should be the locus of future debates on the uses of foreign law".[108] The last component under the Sitaraman troublesome architecture is 'no usage.' As the name suggests, this is where judges refrain from using foreign law.

Overall, the Sitaraman reading is useful because it demonstrates that foreign law could aid constitutional interpretation specifically in jurisdictions such as Zimbabwe were the constitutional jurisprudence on fundamental human rights and freedoms is still emerging. Therefore, critical and yet evolving key questions should be asked about how to adapt the exogenous tools of constitutional interpretation to suit local context and values. For Sitaraman, the fact that "the majority of ways in which foreign law can be used are not necessarily problematic", implies "any broad zero sum debate over foreign law use is largely overblown".[109] Moreover, Sitaraman recommended that the disciplinary parameters on the use of foreign law in constitutional interpretation be fleshed out. Therefore, implying that conceptual and contextual considerations be resolved. Lastly, the literature emphasises the point that aggregation is the most complex mode of foreign law use and as a result it raises fundamental themes and issues in constitutional interpretation.

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[103] Sitaraman, *supra* note 55, pp. 677–691.
[104] *Ibid.*
[105] *Ibid.*
[106] *Ibid.*
[107] *Ibid.*
[108] *Ibid.*
[109] *Ibid.*, p. 691.

6 Conclusion

Critical discussions about the role of foreign law are not only justified by the constitutional codification and conferral of discretion on the judiciary to consider relevant foreign law. However, the discourse on foreign law in constitutional interpretation spans most jurisdictions particularly those which fall under the common law system. On the other hand, the enactment of the 2013 Zimbabwean Constitution has resulted in 'critical constitutional reflexity' because it invites a series of fundamental (both conceptual and practical) questions which hinge on constitutionalism and its core elements such as the independence of the judiciary, the separation of powers doctrine, judicial review, etc. In the context of interpretation, the approach of the judicial branch as demonstrated by the views of Chief Justice Chidyausiku and the nascent constitutional projects particularly the *Mudzuru* and *Greatermans* decisions, demonstrate sustained and growing references, reliance and/or application of foreign law in domestic decisions. As was demonstrated above, this constitutional strand caused the former judiciary leader to applaud those judges who had invoked foreign precedent to develop Zimbabwean constitutional jurisprudence and impliedly rebuked non-usage of foreign law.

An assessment of the few cases delivered by the apex court proves that we should reframe the discussions on the role of foreign law in constitutional interpretation. The proposed inquiry is one which transitions from the advantages and disadvantages of using foreign law into how it is/should be used in practice. Although foreign law is important, there is a dearth of literature in Zimbabwe about what Sitaraman termed the 'values of foreign law' (arguments based on liberal democracy and accuracy) and the typologies on foreign law in constitutional interpretation. Accordingly, the protection of fundamental human rights and freedoms under Chapter 4 of the Constitution, to the extent that their interpretation also hinge on foreign law, should be grounded on a casuistic analysis of the ways in which the Constitutional Court has used and could use foreign law effectively.

Arguably, the *Mudzuru* decision reflects a cocktail and nuanced role of foreign law in interpretation. Not only has the Constitutional Court borrowed foreign linguistic human rights formulations, but it has also used foreign decisions from India, Australia, South Africa, Canada among others, for purposes of logically reinforcing its domestically inclined decisions, and to draw sharp contrasts between its holdings and those of foreign courts. Moreover, this demonstrates piecemeal analysis infused with the domestic values and principles, particularly the *Mudzuru* decision, in relation to the first leg of section 85(1)(a) formulation which appears to be a nuanced application of authoritative borrowing which in itself is an example of a troubling mode of foreign law typology. Not only do the democratic values in Zimbabwe and Canada diverge but the temptation to misinterpret, misapply and even adopt a shallow application of foreign doctrines is real due to differences in history, culture, structure, politics and economy. Accordingly, the Constitutional Court should be circumspect in how certain alien doctrines are applied.

Moreover, some of the typologies such as aggression call for a more robust analysis in the Zimbabwean context. In the main, this contribution has demonstrated that the use of foreign law raises concerns based on legal borrowing and/or transplantation. Critical questions which the scholarship should engage with involve the constitutional diligence to avoid importing foreign norms and institutions which are unsuitable to the local context. It is still early to reach a definitive conclusion on this aspect. Although some of the decisions are progressive in some respects, the Constitutional Court should adopt a critical reflective analysis when confronted with section 46(1)(e) inspired interpretation to realise the objective of fulfilling the fundamental rights and freedoms. In sum, the post-2013 constitutional jurisprudence arguably point to default foreign application mode as opposed to a discretionary use of same as enunciated in the 2013 Constitution. Accordingly, this critical disjuncture between theory and practice is what has made some countries to become critical in their approach to foreign lan

6 Limitations of Rights in Zimbabwe

Valantine Mutatu*

1 Introduction

The birthmark of the 2013 Constitution ushered in a positive legal framework, at the very least in the discourse of human rights in Zimbabwe.[1] The Bill of Rights in the 2013 Constitution encompasses a wide range of fundamental human rights ranging from civil and political rights, socio-economic rights, minority rights, developmental rights to group rights amongst others within its ambit.[2] These variety of rights are justiciable, therefore implying that they inherently attract different approaches in the enjoyment of these rights and freedoms; different approaches in litigation of the rights; and different approaches in their limitation. In summary, recognised grounds of limiting rights in the Bill of Rights are mainly related to limitations acceptable in terms of laws of general application and other special circumstances such as during state of emergency. Although these rights are not absolute, it should not go without mentioning that the few legally recognised channels upon which they can be limited are narrow, stringent and demand a considerable burden of justification, reasonability and rationality to escape legal inquiry, scrutiny and challenge. With this reasoning in mind, the essence of this research is to assess legally recognised avenues in the limitation of rights protected under the Bill of Rights. To this end, this chapter is divided into five segments. In respective format, the first segment deals with the introduction and the historical background of limitation of rights and freedoms; the second segment deals with the limitations of rights under international law; the third segment deals with limitation of rights under Zimbabwean law and; the fourth segment is the conclusion.

2 Historical Background of Limitations of Human Rights and Freedoms

The proliferation of rights is an ancient development that can be traced back to the Stone Age. Inasmuch as rights can be expressed by any recognised means, what matters most is the protection of these rights and freedoms against arbitrary or excessive infringements. The ability to protect these fundamental rights marks the definition of a constitutional democracy.[3] The protection of these rights has developed over the years, with the current protection now encoded in various

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[1] This was mainly achieved through the adoption of an expanded Bill of Rights in the Constitution of Zimbabwe (Amendment No.20) Act 2013. The current Bill of Rights is a significant progression from the narrow Bill of rights which was provided for under the 1980 Constitution.

[2] *Ibid*.

[3] D. Ahmed and E. W. Bulmer, 'Limitation Clauses', *International Institute for Democracy and Electoral Assistance*, 1 November 2014, <www.idea.int/publications/catalogue/limitation-clauses>, visited on 12 November 2020.

revolutionary credos both at 'international level[4] and municipal level.[5] The concept of limitation of human rights and freedoms is as old as the concept of human rights itself. The idea of limitations is based on the recognition that most human rights are not absolute but rather reflect a balance between individual and community interests.[6]

In our history, the 1961 Constitution of Southern Rhodesia and the 1979 Constitution of Zimbabwe-Rhodesia recognised the protection of human rights and freedoms. However, the rights were less justiciable.[7] From 1965 up until 1987 there was prevalent violation of human rights since the nation was under a state of public emergency whereby some rights were suspended.[8] However, the amendments that came into force after 1980 made human rights and freedoms more justiciable as compared to the previous guarantees of rights in the former constitution.[9] This positive development in the safeguarding of rights was further redefined by the coming into effect of the current Constitution which entrenches a more justiciable Bill of Rights.

3 Limitation of Human Rights and Freedoms under International Law

International law generally recognises that rights are not absolute in nature; this conclusion can be gleaned from the fact that international law is permissible to the conditional limitation of rights.[10] In terms of the Universal Declaration of Human Rights (UDHR) [11] and the International Covenant on Civil and Political Rights

[4] *See* the Universal Declaration of Human Rights; the International Covenant on Civil and Political Rights; the United Nations Convention on the Rights of the Child; the African Charter on Human and Peoples' Rights; the European Convention on Human Rights.

[5] Many constitutions have a bill of rights, for instance the Constitution of the Republic of South Africa, Act 106 of 1996.

[6] D. McGoldrick, 'The Interface between Public Emergency Powers and International Law', 2:2 Oxford University Press (2004) p. 383; E. I . A. Daes, The Individual's Duties to the Community and the Limitations on Human Rights and Freedoms under Article 29 of the Universal Declaration of Human Rights: A Contribution to the Freedom of the Individual under Law: Study, <digitallibrary.un.org/record/52410>, visited on 13 November 2020.

[7] H. Chitimira, 'Selected Challenges and Prospects of the Zimbabwe Constitution of 2013 in the Protection of Human Rights and Constitutional Democracy in Zimbabwe', 28 *Stellenbosch Law Review* (2017) p. 354.

[8] During this period the nation was literally run by states of public emergencies with the government of the day doing all it takes to stifle any dissent and opposition. *See generally* J. Hatchard, 'Emergency Powers in Zimbabwe: An Overview of Post Independence Development', 18 *Zambia Law Journal* (1986) pp. 35-37.

[9] Chitimira, *supra* note 7.

[10] International law recognises that rights can be limited subject to reasonable restrictions necessary in a democratic society based on openness, justice, human dignity, equality and freedom. *See* A. S. Butler, 'Limiting Rights', 33 *Victoria University of Wellington Law Review* (2004) p. 117. *See also* Article 15(2) of the Convention on the Rights of the Child (CRC) which states that the right of the child to freedom of association and to freedom of peaceful assembly can be limited by the law. Such limitation must however be necessary in a democratic society in the interests of national security or public safety, public order, the protection of health or morals or the protection of the rights and freedoms of others.

[11] Article 29(3) of the UDHR.

(ICCPR),[12] human rights and freedoms are subject to both internal[13] and external limitations.[14] It is therefore apparent from international instruments that establish human rights that there is room for limitations of human rights and freedoms.[15] However not all rights can be limited as there are classified human rights that are now regarded as absolute.[16] The implication is that these absolute rights cannot be limited by any means, not even during a state of public emergency.[17]

3.1 *Internal Limitations of Rights*

In terms of the UDHR and the ICCPR, human rights and freedoms are subject to both internal and external limitations.[18] The UDHR is the first international instrument to incorporate human rights. Because of its history and intended purpose, the UDHR contains what are commonly referred to as first and second generation rights. First generation rights are civil and political rights. It is generally regarded as a declaration

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[12] ICCPR was adopted by the General Assembly on the 16th of December 1966 and entered into force on the 23rd of March 1976.

[13] Article 9 of the UDHR provides that: "No one shall be subjected to arbitrary arrest, detention or exile." *See also* Article 12 of the UDHR. Article 13(1) of the UDHR provides that: "Everyone has the right to freedom of movement and residence within the borders of each State." The internal limitation here is that the right can only be enjoyed when one is within the borders of his or her state. *See also* Article 7 of the African Charter on the Rights and Welfare of the Child [ACRWC] which provides that the right to freedom of expression is "subject to such restrictions as are prescribed by laws". Section 10(1) of the ACHPR provides that "every individual shall have the right to free association *provided that he abides by the law*". *See also* Articles 8, 9(2), 12, 13(1), 11, 12(2) of the ACHPR. *See also* Article 12 of the ICCPR which provides for the right to freedom of movement states that:

"The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant." *See also* Articles 5(2), 9, 14, 18, 19, 21, 22 of the ICCPR.

[14] *See* the right to freedom of expression is limited by Article 20 of the ICCPR which provides that any propaganda and advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law. *See* Article 29(2) of the UDHR. *See also* V. Mavi, 'Limitations of and Derogations of Human Rights in International Human Rights Instruments', 38 *Acta Juridica Hungarica* (1997) p. 109.

[15] *See* Article 29(2) of the Universal Declaration of Rights, 1948 which is an international instrument that heralded the recognition of human rights discipline at international level; *See also* Articles 12 on the right to privacy, Article 14 on the right to seek and enjoy in other countries asylum from prosecutions, Article 15 on the right to nationality and Article 17 on the right to property of the UDHR.

[16] *See* the right not to be tortured or subjected to cruel, inhuman and degrading treatment or punishment, the right not to be placed in slavery (Article 8(1) of the ICCPR), the right to human dignity. *See* Article 4(2) of the ICCPR which provides that this right cannot be limited even during a state of public emergency. *See also* R. Tripathi, 'Non Derogable Human Rights: A Comparative Study of Indian Constitution and International, Regional Instruments', 2 *Indian Journal of Law and Justice* (2002) pp. 66–78, where the author was discussing about the rational for the existence of non-derogable rights. According to him the theoretical and philosophical basis of non-derogable rights can be inferred from the natural law theory. *See also Mukoko v. Attorney-General* SC 11-12 where the aapplied for permanent stay of prosecution on the basis that her right to dignity was violated when she was abducted and tortured by state agents. Permanent stay of prosecution was granted.

[17] *See* Article 4(1) of the ICCPR.

[18] UDHR, *supra* note 13.

of rights. At international law member states determine limitations of human rights and freedoms.[19]

An internal limitation refers to an adjective which apparently qualifies the scope of a protected right or freedom.[20] Internal limitation means that the limitation of a right is found in the provision that provides for the right itself.[21] An example of an internal limitation of a human right is where the provision which provides for the right contains the word 'arbitrary'. Where a provision states that something must not be done in an arbitrary manner, it simply means that if that conduct is not done arbitrarily or in accordance with due process, the conduct will still be lawful even if it limits the enjoyment of a human right.

Internal limitations are usually characterised by the use of the phrases like 'prescribed by law',[22] 'in conformity with law',[23] 'established by law',[24] 'in accordance with law',[25] 'pursuant to law'[26] and 'provided by law'.[27] These phrases are commonly referred to as claw-back clauses. Limitations of human rights and freedoms should be prescribed by or in accordance with a law put into place by a state party.[28] The phrase 'as prescribed by law' as used in international conventions and treaties means that the limitation of human rights must be in accordance with a national law of general application.[29] That national law must be consistent with the international instrument that establishes the right.[30] For a law to qualify as a law of general application, it must be clear and accessible to everyone.[31] The idea that human rights

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[19] R. Murray and M. Evans, *The African Commission on Human and Peoples' Rights and International Law* (Cambridge University Press, Cambridge, 2008) p. 123, where the author was commenting on the limitations of human rights and freedoms under the African Charter. The author is of the view that the non-existent of a limitation clause in the African Charter coupled with the principle that a state party determine the law which provides the extent to which human rights can be limited is more harmful than good since the African Commission may not be able to monitor state parties' behavior. The author concluded that the limitations are not defined exactly in the Charter, arguably leaving it purely to the discretion of states and thus, in effect, allowing rights to be denied.

[20] Butler, *supra* note 10, p. 120.

[21] *For instance*, Article 10(2) of the Convention on the Rights of the Child (CRC) provides that: "The right to leave any country shall be subject only to such restrictions as are prescribed by law and which are necessary to protect the national security, public order, public health or morals or the rights and freedoms of others and are consistent with the other rights recognized in the present Convention." *See also* Article 13(2) of the CRC.

[22] Article 18 of the ICCPR; *See also* Articles 9, 10 and 11 of the European Convention.

[23] Article 21 of the ICCPR.

[24] Article 9 and 14 of the ICCPR; *See also* Article 6 of the European Convention.

[25] Article 13 of the ICCPR; Article 2 of the European Convention.

[26] Article 5(2) of the ICCPR.

[27] Article 12 of the ICCPR.

[28] *See* Article 13(2) of the CRC.

[29] *See* Articles 18(3), 19(3), 20(2), 22(2) of the ICCPR; Article 10(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms; Article 9(2) of the African Charter on Human and Peoples' Rights; and Article 4(1) of the ICERD.

[30] This is generally referred as the principle of legality; *see also Malawi African Association and Others v. Mauritania*, African Commission on Human and Peoples' Rights Communication No. 54/91-61/91-98/93-164/97-196/97-210198, para. 102.

[31] B. Lockwood *et al*., 'Working Paper for the Committee of Experts on Limitation Provisions', 7 *Human Rights Quarterly* (1985) p. 38. *Keun-Tae Kim v. The Republic of Korea*, Communication No. 574/1994, CCPR/C/64/D/57411994, para. 25.

and freedoms can only be limited by a law of general application does not provide sufficient protection since the legislature has unrestricted power to make laws that can be arbitrary and discriminatory.[32] This judiciary has the mandate to determine whether the law is reasonable where an infringement of human rights has been alleged.[33] However, these limitations must be determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and meeting the just requirements of public morality, public order, public health and the general welfare in a democratic society.[34]

Internal limitations are easily identifiable in socio-economic rights. The enjoyment of these rights is subject to the availability of resources and the state is only supposed to take reasonable steps with a view of progressively achieving the full realisation of the rights.[35] Besides the limitation of human rights being placed on the hinges of available resources, the International Covenant on Economic, Social and Cultural Rights (ICESCR) places a margin of leverage on member states to enact laws that determine the extent to which the rights can be afforded. The limitations should however be compatible with the nature of the rights and solely for the purpose of promoting the general welfare in a democratic society and in the interests of national security[36] or public order or for the protection of the rights and freedoms of others.[37] The implication of this measure is to guard against state parties enacting laws that determine how human rights can be limited without international oversight.[38] Therefore, the limitation must be aligned to the internationally recognised grounds of proportionality,[39] rationality and reasonableness.[40] It has been argued that proportionality includes aspects of suitability, subsidiarity and rationality in the narrow sense.[41] In international law, human rights and freedoms may be limited where it is 'necessary in a democratic society'.[42] The phrase is however not defined

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[32] *Ibid*.

[33] Lockwood *et al.*, *supra* note 31, p. 801.

[34] Article 29(2) of the Universal Declaration of Human Rights. *See also* Article 10(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

[35] Article 2(1) of the International Covenant on Economic, Social and Cultural Rights.

[36] *Kenneth Good v. The Republic of Botswana,* African Commission on Human and Peoples' Rights, Communication No. 313105, para. 188.

[37] *Keun-Tae Kim* case, *supra* note 31. *See also* Article 27(2) of the African Charter which provides that rights and freedom shall be exercised in respect of the rights of others, collective security, morality and common interest.

[38] O. M. Garibaldi, 'General Limitations on Human Rights: The Principle of Legality', 17 *Harvard International Law Journal* (1976) p. 503; *see also* Lockwood *et al.*, *supra* note 31, p. 44.

[39] In *Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v. Nigeria,* African Commission on Human and Peoples' Rights, Comm Nos. 140/94, 141/94, 145/95 (1999) the African Commission it was held that a limitation may not erode a right such that the right itself becomes illusory.

[40] I. Maja, 'Limitation of Human Rights in International Law and the Zimbabwean Constitution', *Zimbabwe Electronic Law Journal* (2016) pp. 4–6.

[41] *Ibid*.

[42] This can be traced to Article 29 of the Universal Declaration of Human Rights. It should be noted that in the ICCPR the phrase is absent from the articles guaranteeing freedom of movement, religion and expression. However, it is found in Articles 14, 21 and 22 of the ICCPR which provides for the rights to a public trial, peaceful assembly and freedom of association respectively. *See also* A. Kiss, 'Permissible Limitations on Rights', in L. Henkin, *The International Bill of Rights: The Covenant on Civil and Political*

in international human rights instruments probably because what constitutes democracy differs across state parties and it changes from time to time.[43] Every limitation of human rights and freedoms must be subject to challenge.[44] To say that the limitation is 'necessary' means that it must be based on one of the grounds justifying limitations recognised by the relevant provision, responds to a pressing public or social need, pursues a legitimate aim[45] and must be proportionate to the aim that is sought to be achieved.[46]

3.2 *External Limitations*

Rights in general can be susceptible to external limitations. At international law, this implies that rights may be limited or restricted by means of provisions that fall outside of the 'right enabling clause'. The external limitations are usually sheltered under the roof of a general limitation clause[47] or a state of public emergency clause. However, in most instances human rights conventions and other rights enabling instruments at international law usually accommodate a great deal of flexibility and leverage on state parties to enact laws to determine the scope, content and limit of human rights subject to laws of general application. To this end, the exercise of rights in general should be regulated by state parties in accordance with laws of general application**.** Consequently, any limitation of rights should be in conformity to principles related to reasonableness, rationality, fairness, equality and *'necessity in a democratic society'.*[48] Human rights and freedoms can also be limited during a state of public emergency albeit to the extent strictly required by the exigencies of the situation.[49] During a state of public emergence, state parties can pass laws that may derogate rights enshrined in international instruments.[50] Article 4 of the ICCPR provides some requirements which must be satisfied for limitations of human rights and freedom

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Rights (Columbia University Press, New York 1981) p. 490, for a discussion on the reasons and effect of such omission. The phrase 'necessary in a democratic society' appears in each limitation clause in the European Convention and this therefore makes every limitation qualified.

[43] Lockwood, *supra* note 31, p. 56.

[44] S. Joseph, 'A Rights Analysis of the Covenant on Civil and Political Rights', 5 Journal of International Legal Studies (2005) p. 70; *see also Mike Campbell v. The Republic of Zimbabwe* SADC (T) No. 2/2007; *Anudo Ochieng Anudo v. United Republic of Tanzania* Application No. 012/2015, para. 101; *see also* Articles 9(4), 13, 14 of the ICCPR; Article 37(d) of the CRC. Article 8 of the UDHR provides that: "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law." *See also* Article 13 of the ICCPR.

[45] *Ibid.*

[46] *Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda* case, *supra* 39, para. 42, it was stated that the justification of limitations must be strictly proportionate with and absolutely necessary for the advantages which follow.

[47] For example *see* Article 29 of the UDHR. *See also* Article 27(2) of the ACHPR which states that the rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest. Communications 105/93, 128/94, 152/96 (joined), *Media Rights Agenda and others v. Nigeria* (2000) AHRLR 200 (ACHPR 1998) (12thAnnual Activity Report), paras. 68 and 77 established that the only legitimate limitation to rights in the ACHPR is Article 27(2) of the ACHPR;

[48] *See* Articles 14, 21 and 22 of the ICCPR which provides for the rights to a public trial, peaceful assembly and freedom of association respectively.

[49] *See* Article 4 of the ICCPR. *See also* Joseph, *supra* note 44, p. 81.

[50] *Ibid*., p. 82.

during state of public emergence to be legal. Derogations of human rights during state of public emergence must be proportional to what is meant to be achieved.[51] Although these are some of the legally recognised ways of infringing on rights, this does not translate into implying that all rights can be limited. The reason being that in international law there are some civil and political rights that cannot be limited or derogated under any circumstances.[52] Prime examples are the right to life, right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment, right not to be held in slavery, the right to freedom of thought, conscience and religion' cannot be limited even during a state of public emergency.

4 Limitation of Rights: The Zimbabwean Context

The word 'limitation' as used in the field of human rights entails a restriction or restrictions that are imposed on the enjoyment of certain rights and freedoms. The drafters of the 2013 Zimbabwean Constitution[53] had it on the back of their minds that to keep in touch with these democratic principles and values it is necessary for certain rights to be limited, at least under extreme and limited permissible circumstances. As already highlighted, rights in general are not absolute.[54] Human rights and freedoms limitations are necessary since they are meant to balance the enjoyment of rights and freedoms by other citizens,[55] for public order, safety, health, morality and also for democratic values.[56] Limitations on the enjoyment of human rights and freedoms can only be lawful if it is in accordance with the Constitution. The Constitution is the supreme law of Zimbabwe and any law, practice, custom or conduct inconsistent with it is invalid to the extent of the inconsistency.[57] Therefore, any infringement or supposed limitation of rights if not consistent with the Constitution of Zimbabwe will be deemed unconstitutional.[58] Suffice to say that the current Constitution recognises the limitation of rights and freedoms through internal and external means. The Constitution makes provision for the limitations of rights externally through the general limitation clause and also during a state of public emergency.[59]

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[51] *Ibid.*

[52] Article 4(2) of the ICCPR provides that the right not to be put under slavery cannot be derogated even during state of public emergence; *see also* Joseph, *supra* note 44, p. 78

[53] Constitution of Zimbabwe Amendment (No.20) Act, 2013.

[54] I. Currie and J. de Waal, *The Bill of Rights Handbook*, 6th edition (Juta Law Publication, South Africa, 2013) p. 150.

[55] *See* section 86(1) of the Constitution.

[56] Currie and de Waal, *supra* note 54.

[57] *See* section 2(1) of the Constitution.

[58] *Chimakure and Others v. Attorney-General* 2013 (2) ZLR 466 (S) at 495G-H. *See also S v. Sibanda* 1989 (2) ZLR 69 (S) where the conduct of the police in denying the appellant his right to a legal practitioner was held to be unconstitutional and the prosecution which was carried out in the absence of legal representation set aside.

[59] Section 87(1) of the Constitution of Zimbabwe. *See also* Article 4 of the ICCPR.

4.1 *Internal Limitations*

As has already been highlighted, internal limitations refer to the limitation that is found within the provision that establishes a right or freedom.

For instance, section 49(1)(b) of the Constitution provides that "[e]very person has the right to personal liberty, which includes the right not to be deprived of the liberty or *without just cause*". This simply entails that the right to liberty can be limited internally where it is justified to do so in an open and democratic society,[60] for instance where the right holder has committed an offence and is arrested. Section 49(2) clearly provides that "no person may be imprisoned merely on the ground of inability to fulfil a contractual obligation". It appears the Constitution did not change civil imprisonment where a party wilfully fails to file to satisfy a contractual obligation.

4.1.1 Civil and Political Rights

Zimbabwe is a state party to the International Convention on Civil and Political Rights[61] which establishes a wide range of civil and political rights and states parties' obligations. Zimbabwe is therefore under an obligation to ensure that these rights are respected, protected, promoted and fulfilled. Civil and political rights are covered from section 48 to 74 of the Constitution. Usually, the enjoyment of civil and political rights and freedoms is limited for the purposes of national security, public order, safety, health and for democratic values.

The right to life is limited for the purpose of public order in that it can be infringed if the right holder has been convicted of murder committed in aggravating circumstances.[62] The Constitution provides safeguards to ensure that the right to life can only be limited under exceptional circumstances since a death penalty can only be effected in accordance with a final judgment of a competent court.[63] This gives the right holder an opportunity to approach every court in the jurisdiction in a bid to avoid the death penalty. The right holder is also given an opportunity to seek

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[60] *See* the case of *Chinamhora v. Angwa Furniture's and Anor* 1996 (2) ZLR 664 (S), paras. 681–682 where the Supreme Court was called to determine the constitutionality of civil imprisonment. Gubbay CJ noted that there are basically two requirements that must be met in order to justify the deprivation of personal liberty: the deprivation may only be sanctioned "in execution of the order of a court and that the decree of imprisonment can only be made to secure the fulfilment of an obligation imposed on him by law". The Court went on to hold that civil imprisonment of a person who is unwilling to pay the debt but who is in a position to do so is constitutional. *See also* Bull *v.* A-G and Another 1986 (1) ZLR 117 (SC), at p. 119. In this case the Supreme Court noted that the right to liberty can be infringed where there is reasonable suspicion that a person has committed an offence. *See also* Immigration Officer and Anor *v.* Narayansamy 1916 TPD 274, at p. 276.

[61] Zimbabwe ratified the ICCPR on 13 May 1991.

[62] Section 48(2) of the Constitution of Zimbabwe. In the case of *S v. Mutero* SC 53-18, where the appellant had raped and murdered a three-year-old child of his girlfriend, the Supreme Court held that the murder was committed in aggravating circumstances. The Court went on to dismiss the appeal against the death penalty imposed by the High Court. Article 6(2) of the ICCPR provides that death sentence "may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime …"

[63] Section 48(2)(b) of the Constitution of Zimbabwe. *See also* Article 6(2) of the ICCPR.

presidential pardon before the right can be infringed.[64] Where the accused has been convicted and sentenced to death, even if he appeals against the sentence only, the conviction will also be deemed to have been appealed against.[65]

The right to freedom of expression and freedom of the media has an internal limitation in that the provision itself stipulates that the right holder cannot enjoy the right in a manner that can lead to incitement of violence,[66] that advocate hatred,[67] that maliciously injure another person's reputation or dignity [68] or that is malicious or lead to unwarranted breach of a person's right to privacy, public order and public safety.[69] In the case of *Banana v. Attorney-General* [70] the Supreme Court was called upon to determine whether the right to freedom of expression infringes the right of the accused to fair trial.[71] It has been held that the right to freedom of expression is very important in a democratic society and therefore it has to be jealously guarded.[72] It was held in *Banana v. Attorney-General* that the right to freedom of expression in the context of legal proceedings must be exercised reasonably, especially where the person targeted is awaiting trial on a criminal charge.[73] The Court held that there is need to balance the right of the public to information and of the media to report and express views freely, against the right of an accused to a fair trial.

The right to access to information has several internal limitations. The right can only be enjoyed if the information is required in the interests of public accountability,[74] if the information is required for the exercise or protection of a right.[75] In terms of section 62(3) of the Constitution a person can only seek for the correction or the deletion of untrue information, erroneous or misleading information held by the state or any institution or agency of government if that information relates to right holder himself. This therefore means that only the person whose information is held has the *locus standi* to approach courts of law. Section 62(4) of the Constitution is quite interesting in that it provides for the enactment of legislation to give effect to the right to access to information. The legislation may provide for restriction of access to information in the interests of defence, public security or professional confidentiality.

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[64] Section 48(2)(e) of the Constitution of Zimbabwe. *See also* Article 6(4) of the ICCPR and *Makoni v. Commissioner of Prisons* CCZ 08-16.
[65] *S v. Mutero* SC 28-17.
[66] Section 61(5)(a) of the Constitution. *See also Chimakure and Others* case*, supra* note 58.
[67] Section 61(5)(b) of the Constitution.
[68] Section 61(5)(c) of the Constitution of Zimbabwe; *see also Zimbabwe Lawyers for Human Rights and Another v. President of Zimbabwe and Anor* 2003 (2) ZLR 444 (H), at para. 448H.
[69] *Chimakure and others* case, *supra* note 58, at para. 506C.
[70] *Banana v. Attorney-General* 1998 (1) ZLR 309 (S).
[71] The case involves the former non-executive president of Zimbabwe who was being charged of several counts of sodomy, attempted sodomy and indecent assault. The case had attracted a lot of publicity after one of his aide police officer was convicted and in the process implicated him as the reason why he committed murder. The applicant wanted the matter to be stayed since he believed that there would not be a fair trial because of the publicity the matter had attracted. He feared that the court would be clouded with a negative attitude thereby affecting its impartiality.
[72] *Banana* case, *supra* note 70; *see also United Parties v. Minister of Justice, Legal and Parliamentary Affairs & Ors* 1997 (2) ZLR 254 (S), at p. 269.
[73] *Ibid.*
[74] Section 62(1) of the Constitution of Zimbabwe.
[75] Section 62(2) of the Constitution of Zimbabwe.

In the *Banana* case, the Court outlined some circumstances where the right to access to information can be limited. These include where information sought: (i) would disclose the identity of an informer whom it is necessary to protect; (ii) would disclose police techniques of investigation which it is similarly to protect; (iii) might imperil the safety of the witness; or (iv) would otherwise not be in the interest of the public.[76]

The right to demonstrate and present petitions is subject to internal limitations in that it can only be exercised 'peacefully'.[77] This is one of the most litigated rights in Zimbabwe especially under the Public Order and Security Act which has since been repealed.[78] In the *Democratic Assembly for Restoration and Empowerment (DARE) & Others v. Saunyama N.O. & Others* and the case of *Zimbabwe Divine Destiny v. Saunyama & Other*s,[79] the Court found that section 27 of the Public Order and Security Act[80] which allowed the regulating authority of an area to ban public demonstrations was an infringement to the right to demonstrate and to present petitions.[81] *In MDC-T v. Officer Commanding Bulawayo Central District Police N.O. & Others*, the Court held that the right to demonstrate can only be limited where the responsible authority has managed to establish on a preponderance of probabilities that there is a real likelihood that the demonstration will not be peaceful. A mere allegation that it will not be sufficient is not sufficient.[82] In this case the respondents had not authorised the applicant to hold a demonstration on the basis that the previously held demonstration was not peaceful and that they have not enough manpower to provide security to the applicant. The Court viewed this as a lame excuse since the police has a constitutional mandate to protect the citizens. It was

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[76] *Banana* case, *supra* note 70.

[77] Section 59 of the Constitution: *see* Article 21 of the ICCPR and Article 11 of the ACHPR. *See also MDC-T v. Officer Commanding Bulawayo Central District Police N.O. & Others* HB 126-16 where Makonese J stated that: "The right to demonstrate only applies to peaceful gatherings and does not protect intentionally violent protests. There will be interference with the right to demonstrate if the authorities prevent a demonstration from going ahead; halt a demonstration, take steps in advance of a demonstration in order to disrupt it; or store personal information on people because of their involvement in a demonstration." *See generally* G. Feltoe, G. Linington and F. Mahere, 'Worlds Apart: Conflicting Narratives on the Right to Protest', *The Zimbabwe Electronic Law Journal* (2016) where the authors were analysing the DARE cases. *See also* General Comment No. 32: The Nature of the General Legal Obligations Imposed on State Parties to the Covenant.

[78] *See Dzamara and Others v. Commissioner General of Police and Others*; *MDC-T v. Officer Commanding Byo Central District Police N.O. & Others* HB 126-16. The POSA was the main law of general application that was being used to limit the right to demonstrate. The Act requires that a notice be given to the regulatory authority of the intended demonstrations. The notice should also include the names and particulars of the organisation on whose behalf the gathering is convened. The purpose of the gathering, its anticipated number of participants, the route of the processions are all to be included. The time and place where the procession will end or begin is also to be disclosed. Pursuant to section 27(1) of the POSA on 1 September 2016 the police officer commanding the Harare district issued a notice prohibiting for two weeks the holding of all public processions and demonstrations in the Central Business District of Zimbabwe. *See* Statutory Instrument 101A of 2016.

[79] HH 589-16.

[80] Public Order and Security Act, [Chapter 11:17], 2001. The POSA has since been repealed and was replaced by the Maintenance of Peace and Order Act [Chapter 11:23]

[81] DARE case, *supra* note 77.

[82] *Ibid*. *See also Forum Party of Zimbabwe and Others v. Minister of Local Government* 1996 (1) ZLR 461 (H) where Adam J said at 486 that a situation cannot be said to have arisen if it has no facts.

therefore the Court's view that the decision of the respondent was arbitrary, indiscriminate and disproportionate restriction on the right of the applicant to demonstrate.[83]

4.1.2 Socio-Economic and Cultural Rights

The phrase 'socio-economic rights' is a short name for social, economic and cultural rights that are accepted as necessary for individuals and groups to live sustainably in dignity and freedom within society.[84] Since human rights are said to be intertwined and interdependent, some of the socio-economic rights are believed to be pillars for human dignity.[85] Article 55 of the Charter of the United Nations imposed an obligation on the international world to ensure that socio-economic are progressively realised.[86] This is an acknowledgment that these rights are inherently limited in their scope and enjoyment.

The 2013 Constitution introduced socio-economic rights in its Bill of Rights[87] whereas the 1980 Constitution did not provide for these rights as fundamental rights.[88] Like any other rights, socio-economic rights are not absolute.[89] Socio-economic rights are usually crafted in such a manner that they are limited internally. The enjoyment of socio-economic rights is generally subject to the availability of resources. The fact that socio-economic rights are subject to progressive realisation points that there is an element of flexibility in terms of the obligations of states and also in their enforcement.[90] In terms of the current Constitution the right to education,[91] right to

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[83] The Court went on to state that: "It ought to be noted that the freedom to take part in a peaceful assembly was of such importance that the right could not be restricted in any way, on flimsy grounds. A fair balance has to be struck on the one hand, the general interest requiring the protection of public safety and, on the other, the applicant's freedom to demonstrate."

[84] G. Farese, 'Socio-Economic Rights', in *International Human Rights, Social Policy and Global Development*, April 2020, p. 105, <www.researchgate.net/publication/342039515_International_Human_Rights_Social_Policy_and_Global_Development_Critical_Perspectives>, visited on 3 December 2020.

[85] Kiss, *supra* note 42, p. 104.

[86] *Ibid*., p. 105. *See also* Article 55 of the Charter of the United Nations which provides that: "With a view to the creation of conditions of stability which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:
a. higher standards of living, full employment, and conditions of economic and social progress and development:
b. solutions of international economic, social, health, and related problems; and international cultural and educational co-operation;"

[87] *See* sections 73–77 of the Constitution of Zimbabwe. *See also* Chitimira, *supra* note 7, p. 358; T. Kondo, 'Socio-Economic Rights in Zimbabwe: Trends and Emerging Jurisprudence', 17:1 *African Human Rights Law Journal* (2017) p. 165.

[88] Chitimira, *supra* note 7, p. 352. *See also* T. Chiviru, 'Socio-Economic Rights in Zimbabwe's New Constitution', 36 *Strategic Review for Southern Africa* (2014) p. 111.

[89] *Ibid.*

[90] L. Chenwi, 'Unpacking Progressive Realisation, Its Relation to Resources, Minimum Core and Reasonableness, and Some Methodological Considerations for Assessing Compliance', 46 *De Jure* (2013) p. 744.

[91] Section 75 of the Constitution of Zimbabwe Amendment (No. 20) Act, 2013.

health care,[92] right to food and water,[93] rights of the elderly,[94] rights of persons with disabilities[95] and environmental rights[96] are subject to availability of resources.

The current Constitution also limits the enjoyment of the right to have access to basic health-care services to citizens and permanent residents of Zimbabwe.[97] Of interest is that the rights of veterans of the liberation struggle are not subject to availability of resources.[98] The fact that socio-economic rights are subject to the availability of resources and that the right can only be realised progressively have raised questions as to the justiciability of the rights. More often in litigation where government institutions were drawn to court to fulfil these socio-economic rights, they often advance an argument that they have no sufficient funds but they are taking reasonable measures to ensure the progressive realisation of the rights.[99]

The issue of separation of powers is also another critical issue which affects the litigation of socio-economic rights. The issue of resource allocation is the preserve of the executive usually through budget allocations. For a court of law to determine how such resources are allocated may be taken as usurpation of executive functions by the judiciary. In cases where there is an allegation of the limitation of socio-economic rights, the state must show that there is tangible progress towards the realisation of rights.[100] The state must not only state that there is a policy which is aimed to realise the right in question but also that the policy is being implemented.

4.2 *External Limitations of Human Rights and Freedoms*

The first thing that comes to one's mind when you hear of external limitation is the general limitation clause[101] and limitation of rights during state of public emergency.[102] The current Constitution has a general limitation clause which sets out the circumstances under which human rights as contained in the Bill of Rights can be limited. The insertion of the general limitation clause in the Constitution simply entails that human rights and freedoms are not absolute. Human rights and freedoms are enjoyed taking into consideration for the rights of other persons.[103] The human rights and freedoms are limited in terms of a set out formula. This formula is not new to our legal system but it has been put in our Constitution for the first time. It was part of our law since the Constitution codified the criteria as enunciated in the case

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[92] Section 76 of the Constitution of Zimbabwe.
[93] Section 77 of the Constitution of Zimbabwe.
[94] Section 82 of the Constitution of Zimbabwe.
[95] Section 83 of the Constitution of Zimbabwe.
[96] Section 73 of the Constitution of Zimbabwe.
[97] Section 76(1) of the Constitution of Zimbabwe.
[98] Section 84 of the Constitution of Zimbabwe.
[99] Chenwi, *supra* note 90, p. 745, where she argues that the obligation on the state is to move as expeditiously and effectively as possible towards the full realisation.
[100] *Ibid.*
[101] Section 86 of the Constitution of Zimbabwe.
[102] Section 87 of the Constitution of Zimbabwe.
[103] Section 86(1) of the Constitution of Zimbabwe provides that the fundamental rights and freedoms set out in this Chapter must be exercised reasonably and with due regard for the rights and freedoms of other persons.

of *Nyambirai v. National Social Services Authority*. In that case the Supreme Court held that:

> the court will consider three criteria in determining whether or not the limitation is permissible in the sense of not being shown arbitrary or excessive. It will ask itself whether:
> (i) the legislative objective is sufficiently important to justify limiting a fundamental right;
> (ii) the measures designed to meet the legislative objective are rationally connected to it; and
> (iii) the means used to impair the right or freedom no more that is necessary to accomplish the objective.[104]

The right to freedom of assembly and association is one of the most litigated rights. This right is subject to external limitations[105] because the literal reading of it shows no limitation.[106] The right should therefore be limited by a law of general application. The main law of general application limiting this right is the Maintenance of Order and Peace Act (MOPA.)[107]

4.2.1 Laws of General Application

Section 86 of the Constitution provides that human rights and freedom enshrined in the Bill of Rights can only be limited by a law of general application.[108] The requirement that human rights and freedoms can only be limited in terms of a law of general application is consistent with the principle of rule of law.[109] The phrase law of general application as used in human rights and freedoms jurisprudence entails that any infringement of a human right or freedom must be sanctioned or based on the law.[110] The term 'law' is defined in section 332 of the Constitution to mean any provision of the Constitution, an Act of Parliament or a statutory instrument, or any unwritten law in force in Zimbabwe,[111]

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[104] Juxtapose this criteria with section 86(2)(a) – (f) of the Constitution of Zimbabwe.

[105] *See* the case of *Dzamara, supra* note 78. In re *Munhumeso and Others* 1994 (1) ZLR 49 (S).

[106] Section 58(1) and (2) provides that every person has the right to freedom of assembly and association, and the right to assemble or associate with others. Moreover, no person may be compelled to belong to an association or to attend a meeting or gathering.

[107] This Act replaces the Public Order and Security Act [Chapter 11:17] commonly known as POSA.

[108] Currie and de Waal, *supra* note 54; *Majome v. ZBC and Others* CCZ 14-16; *Makani and Another v. Arundel Schools*; *Ismael v. St Georges*; *Dzvova v. Minister of Education*; *Chavhunduka* case *supra* note 108; *Chimakure case*, *supra* note 58.

[109] *Chimakure* case, *supra* note 58. The principle of the rule of law is one of the founding values and principles of the Constitution as provided for in section 3.

[110] Currie and De Waal, *supra* note 54, p. 155.

[111] In t*he Sunday Times v. The United Kingdom* (1979-80) 2 EHRR 245*,* 'law' was held to include unwritten law such as common law as well as statutes and subordinate legislation. The case arose from the newspaper's intention to publish an article discussing evidence pertaining to the negligence of a drug manufacturer in producing thalidomide. The manufacturer and the parents of the deformed children were in the process of negotiating settlements. An interdict against the newspaper was issued on the grounds that the publication would be in contempt of court. Upon hearing the complaint, the European Court of Human Rights held that the *Sunday Times'* right to freedom of expression had been violated. The restrictions imposed by the common law rules of contempt of court satisfied the requirement of 'prescribed by law'. The contempt rules served a legitimate purpose, but because they were not 'necessary in a democratic society' to preserve the 'authority of the judiciary', the interference was impermissible.

including customary law.[112] The Constitution also provides that the law to be administered by the courts of Zimbabwe is the law that was in force on the effective date,[113] as subsequently modified.[114] For a law to qualify as being of general application it must be sufficiently clear, precise that those affected by it can ascertain the extent of their rights and obligations.[115] It must also be accessible to all.[116] A law of general application should provide adequate safeguards against abuse.[117] It is however not necessary for the safeguards to be written in the law itself.[118] If a conduct limiting the enjoyment of rights and freedoms is not sanctioned by law, such conduct is unlawful and cannot be justified.[119] In the case *Minister of Safety and Security and Another v. Xaba*,[120] where police officers had compelled a suspect to have surgery so as to remove a bullet that they believed would provide evidence connecting the suspect to a crime he was alleged to have committed, there was no law which provided for that. As a result, it was held that there was no law of general application and the infringement was unlawful. In the *Makani* case, the Court held that a private contractual stipulation is not a law and that section 86(2) of the Constitution has no direct bearing on the constitutionality or enforceability of the contract of admission at a school.[121] The question of the validity of conduct or law which falls within the ambit of a law of general application cannot be determined by reference to the Constitution but by reference to the provisions of the law of general application unless the constitutionality of the law is itself being attacked.[122]

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[112] Currie and de Waal, *supra* note 54, p. 156. *See also Du Plessis v. De Klerk* 1996 (3) SA 850 (CC), para. 44.

[113] Effective date refers to the date on which the current Constitution came into operation. The current Constitution came into force on the 22nd of May 2013.

[114] Section 192 of the Constitution of Zimbabwe.

[115] Currie and de Waal, *supra* note 54, p. 156; *South African Liquor Traders Association v. Chairperson, Gauteng Liquor Board* 2009 (1) SA 565 (CC), pp. 25–28. In the *Chavhunduka*, *supra* note 108, para. 563, the Supreme Court held that section 50(2)(a) of the Law and Order (Maintenance) Act which criminalises the publication of false statements that may cause alarm and despondency could not meet the requirement of being 'under the authority of any law' because its language was so broad and broad that it can be interpreted in many ways. In *The Sunday Times v. The United Kingdom* (1979-80) 2 EHRR 245, the European Court of Human Rights in interpreting what the expression 'prescribed by law' meant stated that the law concerned must be adequately accessible, the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case, and a norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct;

[116] *Masiya v. Director of Public Prosecutions*, Pretoria 2007 (5) SA 30 (CC).

[117] Lockwood *et al.*, *supra* note 31, p. 49.

[118] *Ibid. See also* B. Rose, 'Limitations on Human Rights in International Law: Their Relevance to the Canadian Charter of Rights and Freedoms', 6 *Human Rights Quarterly* (1984) p. 190.

[119] *See* Woolman and Bishop 'Constitutional Law of South Africa', 2nd edition (Juta Law Publications, Johanneburg 2012) pp. 34-–47; *see also Dladla and Anor v. City of Johannesburg and Ors* 2018 (2) SA 327 (CC) and *August v. Electoral Commission and Others* 1999(3) SA 1(CC), para. 23.

[120] 2003 (2) SA 103 D.

[121] *See also* Currie and de Waal, *supra* note 54, p. 156, and *Barkhuizen v. Napier* 2007 (5) SA 323 (CC), para. 26.

[122] Woolman and Bishop, *supra* note 119.

4.2.2 Reasonableness and Justifiability of the Limitation

The law of general application limiting human rights and freedoms should be fair, reasonable,[123] necessary and justifiable in an open and democratic society that is based on openness, justice, human dignity, and equality and freedom. Since there is a presumption of constitutionality in Zimbabwe, there is the presumption that the legislation is reasonably justifiable in a democratic society.[124] When determining the reasonableness and justifiability of a limitation, the court takes into consideration the following: (1) the nature of the rights; (2) the importance of the purpose of the limitation; (3) the nature and extent of the limitation; (4) the relation between the limitation and its purpose; and (5) less restrictive means to achieve the purpose.[125] The reasonableness of the law limiting human rights entails that the law in question should not infringe rights more than the purpose it needs to achieve.[126] That law must be one that serves a constitutionally acceptable purpose and must be sufficiently proportional with the benefits it is designed to achieve.[127] A law limiting human rights and freedoms should do so for reasons that are permissible in an open and democratic society.[128] Since there is a presumption of constitutionality,[129] the onus of establishing on a preponderance of probability that the law is not reasonably justifiable in a democratic society lies on the challenger.[130] In the case of *Woods and Others v. Minister of Justice, Legal and Parliamentary Affairs and Others*[131] the Supreme Court of Zimbabwe had an occasion to determine the meaning of the phrase 'reasonably justifiable in a democratic society'. The Court noted that the phrase 'democratic society' is an elusive concept and cannot have one precise definition.[132] There have also been difficulties in determining what is meant by 'democratic society'. In the case of *Commissioner of Taxes v. CW (Pvt) Ltd*[133] Gubbay CJ noted that "there is no single immutable standard of what constitutes a democratic society.''[134] Since it has been said that human rights and freedoms are not absolute, in determining what is reasonably justifiable in a democratic society the court has to be guided by the fact that there is always the presumption of constitutionality in favour of the legislation.[135]

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[123] *Capital Radio (Pvt) Ltd v. Broadcasting Authority of Zimbabwe* 2003 (2) ZLR 236 (S).
[124] *Ibid.*
[125] Currie and De Waal, *supra* note 54, pp. 158–160.
[126] *Ibid,.* p. 162. *See also* the *Dzamara* case, *supra* note 78, where the Court stated that: "It cannot be said that overall police action in this case amounts to a disproportionate restriction on their freedom of assembly and their right to demonstrate, since prevention of crime, as part of public security is a legitimate reason for imposition of restrictions on a demonstration that has shown propensity for degenerating into unlawful activities."
[127] *Ibid.*
[128] Currie and de Waal, *supra* note 54, p. 163; *see also* section 86(2) of the Constitution of Zimbabwe.
[129] *Zimbabwe Township Developers (Pvt) Ltd v. Lou's Shoes (Pvt) limited* 1983 (2) ZLR 376 (S), para. 382.
[130] *Ibid.*
[131] 1995 (1) SA 703 (ZS).
[132] *Woods and Others v. Minister of Justice, Legal and Parliamentary Affairs and Others* 1995 (1) SA 703 (ZS).
[133] 1989 (3) ZLR 361 (S)
[134] *Ibid.*
[135] *Zimbabwe Township Developers (Pvt) Ltd v. Lou's Shoes (Pvt) Ltd* 1983 (2) ZLR 376 (S) para. 382E.

In *Woods and Others v. Minister of Justice and Others,*[136] where the applicants were challenging section 141(1)(a) of the Prison Regulations 1956 which limits the right of Class D prisoners' freedom of expression. The said provision only allows the prisoner to send and receive one letter per four weeks. The letters were also supposed to be checked by the prisons officers to effectively censor all outgoing and incoming mails for subversive content or physical contraband. The Supreme Court reasoned that the said provision is "'unnecessarily broad' and it lacks the quality of reasonableness".[137] The Court went on to held that section 141(1)(a) of the Regulations is not reasonably justifiable in a democratic society in the interests of public safety or public order.

In *Nyambirai v. NSSA,* the Supreme Court concluded that the law providing for compulsory payment of contributions by employees and employers was reasonably justifiable in a democratic society.[138] The Court considered the rationale behind the compulsory contributions by employees to a social welfare scheme. In *Mangwiro v. Minister of Justice* the Court held that section 5(2) of the State Liabilities Act, which provides that state property cannot be attached to satisfy a judgment against the state, is not justifiable in a democratic society based upon openness, justice, fairness, human dignity, equality and freedom. The Court therefore stated that thus proportionally the respondents justifications are neither reasonable nor necessary and in fact are destructive of the applicant's rights.[139]

In *James v. Zimbabwe Electoral Commission and Others*[140] the Constitutional Court was called upon to determine whether section 119(2)(i) of the Electoral Act limits the right of a suspended councillor to stand for and hold public office. The Court held that the provision cannot be justified as being necessary in the general public interest.[141] It was the Court's view that the nature and extent of limitation imposed by the provision far exceeded the means necessary to achieve its primary purpose. The limitation imposed by section 119(2)(i) of the Electoral Act was held to be not reasonably justifiable in a democratic society based on respect for liberties and freedom.[142]

In determining the proportionality between the harm done by the infringing law and the benefits of the infringing law, a court is supposed to weigh up the competing values. In doing so the court has to determine whether the means used by the state to limit a right or freedom are suitable for the achievement of the legitimate objective pursued.[143] There will be justification for limiting a right where there is no danger of direct, serious and proximate harm to national defence or security, public safety,

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[136] *Woods and others* case, *supra* note 132.
[137] *Ibid.*
[138] *See also Capital Radio* case at para. 279C-D where it was held that section 6, 9(1) and (2) are unconstitutional.
[139] The matter is yet to be confirmed by the Constitutional Court.
[140] 2013 (2) ZLR 659 (CC).
[141] *James v. ZEC and Others* p. 667G-H.
[142] *Ibid.*
[143] In the case of *Zimbabwe Township Developers* case*, supra* note 135*,* it was held that the court will only interfere where the restriction is oppressive.

public morality, public order, public health,144 regional or town planning, or in the general public interest.[145] In the case of *S v. Makwanyane*, the Court had this to say:

> the balancing process, the relevant considerations will include the nature of the right that is limited, and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy, and particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question.[146]

The fact that the infringement is enshrined in a law does not automatically make the limitation constitutional since it must be one that is "sufficiently clear, accessible and precise that those affected by it can establish the extent of their rights and obligations"[147] and must be applied equally to all for it to be regarded as a law of general application.[148] A party cannot approach a court arguing that his or right is or has been infringed by a certain conduct or law where there is no legislative provision to that effect.[149] Currie and de Waal argue that "courts of law can also develop limitations of human rights by virtue of their power to develop common law".[150] A law of general application "should apply generally to all citizens and not target a few individuals".[151]

4.2.3 Nature of the Right or Freedom

When determining the reasonableness of a law limiting the enjoyment of a right or freedom, the court considers the nature of the right and the purpose the law limiting the right want to achieve. The right to freedom of expression has been held in a plethora of cases to be of great significance in a democratic society.[152] The purpose

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[144] *See* the case of *Dzamara, supra* note 78. where the Court reasoned that: "Equally, they did not speak in their response to the concerns raised *in limine* regarding infringing the rights of others, given that Africa Unity Square is indeed extensively used on a daily basis by members of the public. Offices and business also surround the square. Continuous demonstrations do create potential health and safety issues, traffic problems sanitary problems, all of which cannot be overlooked by those who seek to take over such public spaces. These problems can justify limitations on the exercise of freedom of assembly and the right to demonstrate."

[145] *Chimakure and Others* case, *supra* note 58; in *Superintendent Central Prison Fatehgarh v. Ram ManoharLohia* 1960 SCR (2) 821 the Supreme Court of India stated that: "The limitation imposed in the interests of public order to be a reasonable restriction, should be one which has a proximate connection or nexus with public order, but not one far-fetched, hypothetical or problematical or too remote in the chain of its relation with public order."

[146] *S v. Makwanyane & Another* 1994 (3) SA 868 (A) p. 104.

[147] Currie and De Waal, *supra* note 54, p. 156; *In re Munhumeso & Ors* 1994 (1) ZLR 49; *see also* the comments made by McNally JA in the *Chavhunduka* case, *supra* note 108, para. 570.

[148] *President of the Republic of South Africa v. Hugo* 1997 (4) SA 1 (CC), at p. 99.

[149] *Minister of Safety and Security and Another v. Xaba* 2003 (2) SA 103 (D). *See also August v. Electoral Commission and Others* 1999 (3) SA 1 (CC), para. 23.

[150] Currie and de Waal, *supra* note 54, p. 156.

[151] *Ibid.*

[152] In *United Parties v. Minister of Justice & Ors* 1997 (2) ZLR 254 (S), at para. 268C-F, freedom of expression was held to serve the following objectives: (1) it helps an individual to obtain self-fulfilment; (2) it assists in the discovery of truth, and in promoting political and social participation; (3) it strengthens the capacity of an individual to participate in decision-making; and (4) it provides a mechanism by which

of the court is therefore to balance the two.[153] In *Netone Cellular (Private) Limited and Another v. Econet Wireless (Private) Limited & Another*,[154] the Supreme Court was called upon to balance the right to privacy and the right of access to information. The first appellant submitted that the subpoena sought by the respondent in the Court was too broad and unreasonably infringed the appellant's right to privacy. The Court then concluded that:

> This case buttresses the point that invasion of privacy when permissible should be rational and should not unnecessarily place a harsh and oppressive burden on the party whose right is infringed. When the first appellant's right to privacy is weighed against the other rights that accrue to the first respondent, it is clear, in the circumstances of this case, that the first appellant's right to privacy must prevail.

In *Banana v. Attorney-General*, the Court reasoned in obiter that the right to fair trial must be given priority over the right to freedom of expression. The Court had noted that on a hierarchy of constitutional rights, there can be no doubt that the right to receive a fair trial is the central precept of our criminal law and must be given priority.[155]

4.2.4 Purpose of the Limitation

In determining the reasonableness of the law limiting the enjoyment of a right, the court has to consider the purpose of the limitation.[156] In determining the purpose of the limitation, the court must have regard to the intention of Parliament when the provision in question was enacted.[157] In *Nyambirai v. National Social Security Authority and Another*,[158] the Supreme Court was called upon to determine whether the compulsory contribution to a social security was infringing the right to property. The Court held that in determining the permissible limitation of rights the courts should ask itself whether the legislative objective is sufficiently important to justify limiting a fundamental right; the measures designed to meet the legislative objective are rationally connected to it and the means used impair the right or freedom no more than is necessary to accomplish the objective. In this case the Court considered the purpose of the limitation and concluded that:

> For a national social security scheme to be viable and effective, contributions payable by employees and employers to it must be made compulsory. To allow such funding to be optional would place the very existence and life-span of the scheme in jeopardy. As stressed by the Minister, it is the Government's national responsibility to care for its people who have no social

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it would be possible to establish a reasonable balance between stability and social change. *See also* Banana case *supra* note 70, and *Handyside v. The United Kingdom* (1979-80) 1 EHRR, at p. 754, para. 49.

[153] *Bernstein v. Bester NO* 1996 (2) SA 751 (CC), at para. 67.

[154] *Netone Cellular (Private) Limited and Another v. Econet WIreless (Private) Limited & Another*, Civil Appeal No. 695/15) [2018] ZWSC 47.

[155] *Banana* case, *supra* note 70, p. 315.

[156] *Chimakure and Others* case, *supra* note 58, para. 515G-H; *see also* the *DARE* case, *supra* note 77.

[157] *Chavhunduka* case, *supra* note 108, para. 565. *See also R v. Zundel* (1992) 10 CRR (2d) 193 (Can SC)

[158] 1995 (9) BCLR) 1221 (ZS).

> security and no means to provide for themselves at old age. Government cannot afford to carry the burden for such a scheme alone. It is necessary to finance it through contributions by employees and employers.[159]

The Court went on to say that "[t]o my mind, the limitation on the applicant's right, that is, the compulsion to contribute to a national pension scheme, is far outweighed by the objective to which the limitation is directed. For that objective is of major import."[160] In *S v. Makwanyane* the Court had to consider the purpose of the limitation of the right to life in an open and democratic a society. The Court concluded that the right to life and dignity are of great importance in an open and democratic society. There were no compelling reasons to justify the limitation of those rights.

In terms of the Constitution, the purpose of limiting the right to freedom of expression is to avoid incitement of violence,[161]avoid advocacy of hatred or hate speech,[162] malicious injury to a person's reputation or dignity[163] and malicious or unwarranted breach of a person's right to privacy.[164] *In Chavhunduka and Others v. Minister of Home Affairs and Others* the Court had to determine the effect of section 50(2)(a) of the Law and Order (Maintenance) Act on the right to freedom of expression. The Court held that the above cited provision limits the right to freedom of association.

4.2.5 Less Restrictive Means to Achieve the Purpose

Human rights and freedom enshrined in the Bill of Rights are meant to be enjoyed to the fullest way possible. They can only be limited in exceptional circumstances where there is a reasonable justification for such limitation.[165] Instead of infringing rights, the person or law infringing the right must look for other means that does to not violate a human right or freedom to achieve the intended purpose.[166] The African Commission in its Declaration of Principles of Freedom of Express stated that "sanctions should never be so severe so as to interfere with the exercise of the right

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[159] *Ibid.*
[160] *Ibid.*
[161] Section 61(5)(a) of the Constitution.
[162] Section 61(5)(b) of the Constitution.
[163] Section 61(5)(c) of the Constitution.
[164] Section 61(5)(d) of the Constitution; Human Rights Committee; *Keun-Tae Kim v. The Republic of Korea*, Communication No. 57411994, CCPRIC/64/D/57411994, 4 January 1999, para. 12.
[165] *Chavhunduka* case, *supra* note 108; *Woods* case, *supra* note 132.
[166] In *Castells v. Spain* (1992) 14 EHRR 445, at para. 46, the European Court of Human Rights stated that: "[The] dominant position which the Government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to unjustified attacks and criticisms." In African Commission on Human and Peoples' Rights, *Zimbabwe Lawyers for Human Rights & Associated Newspapers of Zimbabwe v. Zimbabwe* Communication No. 284/03, para. 176, the African Commission stated that: "In law, the principle of proportionality or proportional justice is used to describe the idea that the punishment for a particular offense should be proportionate to the gravity of the offense itself. The principle of proportionality seeks to determine whether, by State action, there has been a balance between protecting the rights and freedoms of the individual and the interests of society as a whole." The Commission concluded that the closing of the newspapers of the complainants infringed their right to freedom of expression.

to freedom of expression".[167] In the *Nyambirai* case the Court held that one of the criteria used in determining whether the limitation is reasonably justifiable in a democratic society is to consider whether the means used to impair the right or freedom are no more than is necessary to accomplish the objective.[168] The necessity of limiting any right or freedom must be convincingly established.[169] In *Zimbabwe Lawyers for Human Rights & Associated Newspapers of Zimbabwe v. Zimbabwe*, the African Commission stated that "in order to determine that an action is proportional, a number of questions should be asked, such as: Are there sufficient reasons to justify the action?, Is there a less restrictive solution? Does the action destroy the essence of the rights guaranteed by the Charter?"[170] In the *DARE* case, Judge President Chiweshe noted that the limitation imposed by section 27(1) of the POSA "has the effect of imposing greater restrictions than are necessary to achieve its purpose".[171]

The European Court of Human Rights has held that criminal defamation laws should only be used as a last resort, when there is a serious threat to the enjoyment of other human rights.[172] The Court was of the view that instead of criminalising statements which are viewed as false, civil proceedings for defamation should rather be preferred.[173] In *S v. Ncube and Others*[174] it was held that the sentence of administering strokes on a person convicted of a crime was so unfit as to be grossly disproportionate to what would have been appropriate.[175] In the *Capital Radio case* Sandura JA in his dissenting judgment concluded that the limitation imposed by section 12(2) and 12(3) of the Broadcasting Services Act176 were more than necessary to accomplish the legislative objectives and as such they are not

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[167] African Commission on Human and Peoples' Rights, Declaration of Principles on the Freedom of Expression.
in Africa, para. 1 of Principle XII ("Protection of Reputation"); *see also* Human Rights Committee, General Observation No. 34, Article 19: Freedom of Opinion and Freedom of Expression, para. 33. The European Court in in *Tolstoy Miloslavsky v. The United Kingdom*, Application No. 18139/91 (1995), para. 55, noted even though damages were provided by law, they are not necessary in a democratic society.

[168] *See* James case, *supra* note 141, where the Constitutional Court found that section 119(2)(i) of the Electoral Act which limit the right of a suspended councillor to stand for a public office far exceeded the means necessary to achieve the primary purpose. *See also Chimakure* case, *supra* note 58, paras. 515D-E.

[169] *Chimakure* case, *supra* note 58, paras. 516B-C. *See also Thorgeirson v. Iceland* (1992) 14 EHRR 843, para. 63.

[170] *Ibid.*

[171] *DARE* case, *supra* note 77, para. 13 of the cyclostyled judgment.

[172] ECtHR, *Gavrilovic v. Moldavia*, Application No. 25464/05 (2009), para. 60.

[173] ECtHR, *Radio France and all v. France*, Application No. 53984/00 (2004), para. 40; ECtHR, *Raichinov v. Bulgaria*, Application No. 47579/99 (2006) 50; ECtHR, *Kubaszewski v. Poland,* Application No. 571/04 (2010), para. 45; ECtHR, *Lyashko v. Ukraine,* Application No. 210/40/02 (2006), para. 41 (f); *ECHR, Fedchanko v. Russia*, Application No. 33333/04 (2010). Application 15469/04 (2009); *ECHR, Lombardo et al. v. Malta*, Application No. 7333/06 (2007).

[174] 1987 (2) ZLR 2.

[175] *S v. Ncube and Others* 1987 (2) ZLR, at p. 265.

[176] [Chapter 12:06]

reasonably justifiable in a democratic society.[177] In the *Chavhunduka* case the Court stated that instead of limiting the right to freedom of expression by criminal liability, the government can take other less restrictive measures like political action whereby it will provide appropriate evidence to refute the allegation which would have been made.[178] The Court noted that since section 50(2)(a) of the Law and Order (Maintenance) Act had not been utilised since the country obtained independence that only shows that it was no longer serving the intended purpose. It went on to conclude that "[t]here are other ways of achieving this legitimate aim far less arbitrary, unfair and invasive to free expression".[179]

4.2.6 The Relationship between Purpose and Extent of the Limitation

In the *Chavhunduka* case, it was stated that section 50(2)(a) of the Law and Order (Maintenance) Act, which criminalises the publication of false information which may cause fear, alarm and despondency "has the effect of overriding the most precious of all the protected freedoms, resting as it does at the very core of a democratic society". The Court concluded that the provision could not stand the reasonableness in an open and democratic society test because it "fails for want of proportionality between its potential reach on one hand and the 'evil' to which it is claimed to be directed on the other."

In *James v. ZEC and Others* after the Constitutional Court held that section 119(2)(i) of the Electoral Act limit the right of a suspended councillor to stand and hold public office, the Court stated that "[t]here must be a rational connection between the objective of the derogation and the implementing law. Moreover, the means employed should not impair the right in question more than is necessary to achieve the declared objective."[180] The Court noted that section 86(2) of the Constitution is actually a restatement of the criteria for permissible derogation from constitutional rights as was stated in *Nyambirai v. NSSA and Another*. The Court further held that the reasons advanced by the Attorney-General for justifying the limitation of the right to stand for a public office did not meet the test of the criteria established in section 86(2) of the Constitution. There was no "rational connection between the undeniably valid objective of protecting and preserving public assets and the need to disqualify a suspended councillor from standing for re-election".[181] The Court however noted that the purpose of the provision is noble but that was not enough to limit the right of the applicant to stand for public office. It is the duty of the court to ensure that constitutional rights are not rendered nugatory.[182]

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[177] *Capital Radio (Pvt) Limited v. Broadcasting Authority of Zimbabwe and Others*, S-99-2000, p. 295B-C.
[178] Chavhunduka case, *supra* note 108, para. 566. *See also Die Spoorbond and Anor v. South African Railways*, 1946 AD 999, paras. 1012–1013.
[179] *Chavhunduka* case, *supra* 108, para. 567.
[180] James case, *supra* note 141, p. 666 C-D; *see also* Ncube case, *supra* note 175, at p. 264F; *Minister of Home Affairs and Others v. Dabengwa and Another* 1982 (1) ZLR 236 (S), at p. 244B-C.
[181] *Ibid.*
[182] *Ibid.*

In the *Chimakure* case, the Court noted that there is a direct and vital relationship between the exercise of freedom of expression and the preservation of public peace and tranquillity.[183] In a dissenting judgment in *Capital Radio (Pvt) Limited v. Broadcasting Authority of Zimbabwe and Others*, Sandura JA was of the view that there was "no rational connection between forbidding non-resident citizens of Zimbabwe from investing in private broadcasting" and that there was "no rational connection between the total prohibition of foreign investment in private broadcasting and the legislative objective of ensuring 'compliance and monitoring of the provisions of the Act".[184] Sandura JA went on to say that there was "no rational connection between the total prohibition of foreign investment in private broadcasting and the defence and security of Zimbabwe".[185] The observations by Sandura JA makes good law and the courts are urged to follow that approach.

In *S v. Makwanyane* it was noted that despite the fact that the death penalty serves the purpose of deterrence of crimes, the Court concluded that the death penalty "can never be a worthy purpose of punishment in the enlightened society to which we South Africans have now committed ourselves".[186] In the *Chavhunduka* case, the Court observed that the provision which was being challenged by the applicants had not been employed by the state since this country attained independence in 1980, which "strongly suggests that it is not rationally connected to, and essential for, the intended objective of avoiding public fear, alarm or despondency and so to the securement of public safety or order".[187] The Court also noted that the provision was too broad that it "gives rise to the inevitable consequence of failing to confine and impair the exercise by the applicants of their right to freedom of expression as little as possible".[188]

4.3 *Limitations of Rights during State of Public Emergency*

In terms of the current Constitution, human rights and freedoms can be limited during public emergency.[189] The Constitution of Zimbabwe does not define what is meant by state of public emergency.[190] That being the case, the provision that provides for the declaration of state of public emergency can be abused by the executive. It is however common cause that a state of pubic emergency can be declared where

[183] *Chimakure* case, *supra* note 58, para. 506.
[184] *Capital Radio* case, *supra* note 177, p. 285G-H,
[185] *Ibid*., para. 286A. It is important to note that this was after Chidyausiku CJ in the majority judgment had concluded that the applicant had no *locus standi* to challenge section 11(1) of the Broadcasting Services Act [Chapter 12:06] as read together with para 9(1)(b) and (c) of the Fifth Schedule.
[186] *Makwanyane* case, *supra* note 146, p. 185.
[187] *Chavhunduka* case, *supra* note 108, p. 567.
[188] *Ibid.* McNally JA in the same case, at p. 570 also commented that: "The section is too widely expressed, too unclear as to its limitations, and too intimidating (because no-one can be sure whether what he says or writes will not attract prosecution and imprisonment). That is why it cannot stand."
[189] *See* section 87 of the Constitution.
[190] This is also the position with the Zambian Constitution.

there is a threat to the existence or security of a state.[191] Section 113 of the Constitution fall short of international standards since it does not state what is regarded as a situation which the president can declare a state of public emergency.[192] This provision can be abused by the president[193] and the court may be reluctant to question the discretion of the president, and thereby ultimately contributing to the derogation of human rights.[194] Section 3(4)(b) of the Emergency Powers Act195 also empowers the president to make regulations which are even inconsistent with subsection (2) of the same provision.[196] Further the position in Zimbabwe is that state of public of emergency can be declared for only a part of the country.[197] This is not in line with international standards since at international law the effects of a situation where a state of public emergency can be declared must be one which affects the whole population.[198]

Such limitation should however be provided by a written law[199] which must be published in a government Gazette.[200] This law can provide for the summary arrest, detention or restriction of movement of people, deportation of non-Zimbabwean,[201] removal of persons from any part of the country to another where it appears to the Minister to be expedient in the public interest,[202] regulation and control of persons employed or engaged in any trade or profession,[203] among others.[204] The law limiting

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[191] Currie and de Waal, *supra* note 54, p. 816; Mavi, *supra* note 14, p. 110*;* C. Beyani, 'International Law and the Lawfulness of Derogations from Human Rights during States of Emergency in Zambia', *Zambian Law Journal* (1998) p. 103. *See also* Article 4 of the ICCPR.

[192] *Ibid.*

[193] J. Hatchard, 'The Constitution of Zimbabwe: A Model for Africa?', 35 *Journal of African Law* (1991) p. 79 where the author was discussing about the reasons why the state of public emergency remained in force even after independence of Zimbabwe. In *S v. Hove* 1976 RLR 127 MacDonald ACJ (as he then was) warned of the likelihood of the Emergency Powers Act being abused by the president. He stated that the purpose of the Act is "to prevent a state of emergency degenerating into a state of anarchy by conferring extraordinary powers on the President to deal with it."

[194] *Ibid.*

[195] Emergency Powers Act [Chapter 11:04].

[196] Section 3(2) of the Emergency Powers Act generally provides for what can be included in a law which has been put in place in when a declaration of state of public emergency is made.

[197] *See* paragraph 2(2) of the second schedule of the Constitution.

[198] *Lawless* case ECHR Series A Vol. 3 (1961) [28].

[199] Section 87(1) of the Constitution. *See also* paragraph 2(1) of the Second Schedule of the Constitution. The written law referred to must provide for the measures to deal with situations arising during state of public emergency.

[200] Section 87(2) of the Constitution. *See also* principle ii of the Siracusa Principles.

[201] Section 3(2)(b) of the Emergency Powers Act.

[202] Section 3(2)(c) of the Emergency Powers Act.

[203] Section 3(2)(d) of the Emergency Powers Act.

[204] *See* section 3(2)(e-l) of the Emergency Powers Act:

(e) the taking of possession or control on behalf of the State of any property or undertaking;

(f) the regulation and control of companies registered in or persons carrying on business in Zimbabwe, including the suspension or discharge of persons employed by any such company or other person or, in

the case of a company or association, concerned with the management thereof;

(g) the acquisition on behalf of the State of any property other than land;

(h) the entering and search of any premises;

(i) the assistance to be afforded to persons affected by a natural disaster;

rights must not be greater than is strictly required by the emergency.[205] Human rights are in most cases violated during public emergencies, when states employ extraordinary powers to address threats to public order.[206]

In Zimbabwe, the use of emergency powers has been characterised by detention without trial.[207] The Preventive Detention (Temporary Provisions) Act of 1959 when it was renewed in 1964, the renewal was held to be unconstitutional in *Nkomo v. Minister of Justice and Another.*[208] In the case *of Dabengwa and Anor v. Minister of Justice, Legal and Parliamentary Affairs* it was established that the applicants were re-detained even after they were acquitted.[209] In terms of the current Constitution, human rights and freedoms can be limited during public emergency.[210] Such limitation should however be provided by a written law[211] which must be published in a government Gazette.[212] In actual fact, the president has to officially proclaim the start of a state of public emergency and this is aimed at giving a signal for the existence of grave danger to the state.[213] In declaring a state of public emergency, the president may make regulations outlining rights that maybe limited and penalties

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(j) the payment of compensation and remuneration to persons affected by any regulations or order made in
terms of this section;
(k) the arrest of any person contravening or offending against any regulations or order made in terms of this
section;
(l) the penalties to be imposed for any contravention of or failure to comply with any regulations or order made in terms of this section."

[205] Section 87(3) of the Constitution.

[206] Hatchard, *supra* note 8, pp. 35–70, where he was analysing the violations of human rights in Zimbabwe in period of state of public emergency going back from the 1965 when Ian Smith declared a Unilateral Declaration of Independence. He argues that during the UDI period there was widespread detention without trial. The same *modus operandi* was utilised by the ZANU PF regime when it wanted to deal with dissidents from Matebeleland. This resulted in the detention of the leaders like Dumiso Dabengwa. *See* the cases *Dabengwa and Masuku, supra* note 180, 1982 (4) SA 301 (SC); *Minister of Home Affairs v. Dabengwa 1984* (2) SA 344 (SC). This has been the case in Zimbabwe where members of the security forces descent heavily on citizens. *See also York v. Minister of Justice* and *S v. Slatter 1983* (2) ZLR 144 (H).

[207] *Ibid*. Detention without trial can be traced from the Preventive Detention (Temporary Provisions) Act, Chapter 74 of the Laws of Southern Rhodesia of 1959, the Emergency Powers (Maintenance of Law and Order) Regulations 1965, which empowered the Minister of Law and Order to order the detention of any person where it appeared to the Minister that it was 'expedient in the public interest', and the Emergency Powers (Maintenance of Law and Order) Regulations 1983. A state of public emergency in the then Southern Rhodesia was first introduced in 1965. It remained in force even after independence up until July 1990. During all these years, the state of public emergency was being renewed by Parliament every six months.

[208] [1964] R.L.R. 520.

[209] In the case of *Bull, supra* note 60, it was established by the Court that the persons the applicant wanted to be released were once released by an order of the High Court only to be re-arrested after their release. Reasons for their re-arrest were not proffered.

[210] *See* Section 87 of the Constitution.

[211] Section 87(1) of the Constitution; *see also* paragraph 2(1) of the Second Schedule of the Constitution.

[212] Section 87(2) of the Constitution; *see also* principle ii of the Siracusa Principles, the Human Rights Committee's General Comment 5 CCPR/C/21/Rev.1/1989.

[213] Article 4(1) of the ICCPR.

for contravention of the regulations.[214] The law limiting rights must not be greater than is strictly required by the emergency.[215] The rationale behind this safeguard is to guard against violations of human rights when the situation does not warrant such justification in the maintenance of public order.[216] The question as to whether or not the measures adopted by a state to deal with a situation that threatens the existence of the nation are proportional to the exigencies of the situation is a matter which needs the application of a legal standard to the existing facts on which the emergency is alleged to exist.[217]

There are however certain rights that cannot be limited even during state of public emergency because they are considered absolutely fundamental and indispensable to the protection of the human being.[218] These rights include the right to life, the right to human dignity, the right not to be tortured or subjected to cruel, inhuman or degrading treatment or punishment, the right not to be placed in slavery or servitude, the right to a fair trial[219] and the right to obtain an order of *habeas corpus*.[220] The right to legal representation cannot be limited even during a state of public emergency.[221] Since the right to liberty is the one which is usually derogated in a state of public emergency,[222] the Constitution provides for the establishment of the Detainees Review Tribunal.[223] People are usually subjected to detention without trial during public emergency.[224] The Tribunal is supposed to be informed within ten days after the initial detention of the name of the detainee, the place of detention and reasons for such detention.[225] The Tribunal is supposed to review such cases and the detainees should be allowed to be represented by legal practitioners either assigned to them by the state or at their own expense.[226] In *Hickman and Anor v. The Minister of Home Affairs and Anor* where the Minister had submitted the case of the petitioners for review but review had not taken place, with the Tribunal arguing that there are a lot of cases pending, the Court held that the delay was not reasonable. It should however be noted that because of lack of resources or utter ignorance the right to legal representation at the state's expense may not be realised since there are specified offences where the state can offer free legal representation. In *Minister of Home Affairs v. Dabengwa and Another*, the Supreme Court held that

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[214] Currie and De Waal, *supra* note 54, p. 820.
[215] Section 87(3) of the Constitution. *See also* Currie and De Waal, *supra* note 54, p. 819, as well as Article 4 of the ICCPR.
[216] *Ibid.*
[217] *Ibid.*
[218] *Ibid. See also* Article 4(2) of the ICCPR.
[219] Currie and De Waal, *supra* note 54.
[220] Section 87(4)(b) of the Constitution.
[221] Paragraph 4(1)(b) of the second schedule of the Constitution. *See also* cases of *Dabengwa and Masuku, supra* note 180, where the Supreme Court held that the rights was enshrined in the second schedule of the Constitution and could not be derogated by any provision.
[222] Currie and De Waal, *supra* note 54, p. 820.
[223] Paragraph 3(1) of the second schedule of the Constitution of Zimbabwe.
[224] Dumbutshena CJ, in *Austin and Anor v. Chairman, Detainees' Review Tribunal and Another* 1986 (4) SA 281 (ZS), stated that detention during public emergency is an evil but a necessary evil.
[225] Paragraph 5(1) of the Second Schedule of the Constitution of Zimbabwe.
[226] Paragraph 5(4) of the Second Schedule of the Constitution of Zimbabwe. *See also Austin and Another* case, *supra* note 224, p. 29.

the right to legal representation was enshrined in the second schedule of the Constitution, and hence it could not be derogated by any law.[227] The Tribunal may make a written recommendation for the release of the detainees to the responsible authority.[228]

Even though, rights and freedoms can be limited during public emergency, the detaining authority should not take any action which exceeds what could reasonably have been thought to be required for the purpose of dealing with the situation prevailing otherwise the derogation of the rights of the detainees will be unlawful.[229] The rights of the detainees in question are then supposed to be restored.[230] Before independence and soon thereafter, it was prevalent that once detainees are released they would be re-arrested. Bearing that in mind, the Constitution clearly prohibits the re-detention of persons on the same grounds,[231] and there is a presumption that a person is detained on the same grounds if he or she is re-detained after the release.[232] Even where the matter is not yet brought before the tribunal, the detained person is allowed to challenge such detention in a court.[233] In *York v. The Minister of Home Affairs*, the applicants had been detained under emergency laws. Both the High Court[234] and Supreme Court[235] held that the provision under which they had been detained was invalid and ordered their release. Soon after their release, they were re-arrested with the Minister arguing that their detention was necessary for the security of the country. The Court rejected such submission and ruled the re-detention to be invalid.[236]

A person who is being detained pursuant to emergency laws has the right to be informed of the reasons thereof[237] and challenge such detention in a court of law.[238] In *Paweni v. Minister of State (Security),* it was submitted by that the respondent that the person was being detained for "acts of economic sabotage against the state and people of Zimbabwe" and that "it was considered that your activities pose a threat to the economic security of Zimbabwe". The Court accepted submissions on behalf of the petitioner that the reasons for detention were vague.[239] Another challenge that can be faced by detainees is that their detention may not be known since there is no law which provides for the publication of detention orders.[240] This therefore creates an environment where human rights can be violated without the knowledge of the public. Although the Constitution provides for *habeas corpus*, this may not be enough

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[227] *Ibid.*
[228] Paragraph 6 of the second schedule of the Constitution.
[229] Austin and Anor case, *supra* note 224.
[230] *Ibid.*
[231] Paragraph 7(1) of the Second Schedule of the Constitution of Zimbabwe.
[232] Paragraph 7(2) of the Second Schedule of the Constitution of Zimbabwe.
[233] Paragraph 8 of the Second Schedule of the Constitution. *See also* Currie and De Waal, *supra* note 54, p. 817.
[234] HC-H-218-82.
[235] 1982 (4) SA 496.
[236] *See Wood v. Minister of Home Affairs* H-247-82.
[237] *Minister of Home Affairs and Anor v. Austin and Anor* 1986 (1) ZLR 440 (SC).
[238] *Austin and Anor v. Chairman*, Detainees' Review Tribunal case, *supra* note 224, p. 29.
[239] *Ibid.*
[240] J. Hatchard, *supra* note 8, p. 45.

to curb the violations. In most cases the government will be denying knowledge of the whereabouts of such persons.[241] There are however certain rights that cannot be limited even during state of public emergency. These rights include the right to life; the right to human dignity, the right not to be tortured or subjected to cruel, inhuman or degrading treatment or punishment; the right not to be placed in slavery or servitude; the right to a fair trial and the right to obtain an order of *habeas corpus*.[242]

4.4 *Absolute Rights*

The Constitution provides that there are some rights that cannot be limited under any circumstances.[243] Section 87(4)(a) of the Constitution provides that a law providing for the declaration of a state of public emergency should not limit the rights listed in section 86(3). Rights listed in section 86(3) include the right to life;[244] right to human dignity; right not to be tortured or subjected to cruel, inhuman or degrading treatment or punishment;[245] the right not to be placed in slavery or servitude; the right to a fair trial; and the right to obtain an order of *habeas corpus*. Tripathi believes that the rationale behind non-derogable rights can be inferred from the natural law theory.[246] Another reason is that they are not created by men or societies but are rather discovered by them.[247] Once a right is recognised as non-derogable there is no law which can be said to be justifiable to limit that right.[248]

The right to dignity and right not to be tortured or subjected to cruel, inhuman or degrading treatment or punishment are some of the most litigated rights.[249] The

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[241] *See* the *Dzamara* case, *supra* note 78; *see also* the story of the three Movement for Democratic Change-Alliance where the three women were allegedly abducted. The spokesperson of the Zimbabwe Republic Police initially indicated that the Police had custody of the three women only to deny that later.
[242] Section 87(4)(b) of the Constitution.
[243] *See generally* R. Tripathi, 'Non Derogable Human Rights: A Comparative Study of Indian Constitution and International, Regional Instruments', 2 *Indian Journal of Law and Justice* (2011) pp. 66–78 where the author argues that the philosophical basis of non-derogable rights can be inferred from the natural law theory; O. Gross, 'Once More into the Breach: The Systematic Failure of Applying the European Convention on Human Rights to Entrenched Emergencies', 23 *Yale Journal of International Law* (2011) p. 437.
[244] The right to life can only be limited to the extent permitted in section 48. *See also* Article 2(1) of the European Convention.
[245] *See also* Article 7 of the ICCPR.
[246] Tripathi, *supra* note 243, pp. 66–78.
[247] M. Freeman, 'The Philosophical Foundation of Human Rights', 16 *Human Rights Quarterly* (1994) p. 499.
[248] *Ibid.*
[249] *S v. Chokuramba Justice For Children's Trust Intervening As Amicus Curiae Zimbabwe Lawyers For Human Rights Intervening As Amicus Curiae* CCZ 10-19. In this case the Constitutional Court was called upon to determine whether section 353 of the Criminal Procedure and Evidence Act [Chapter 9:07] which authorises the imposition of a sentence of moderate corporal punishment on a convict was constitutional. In the case of *S v. A Juvenile* 1989 (2) ZLR 61 (S) the Supreme Court, sitting as a Constitutional Court, held by a majority decision that moderate corporal punishment inflicted on a male juvenile in execution of a sentence for any offence of which he had been convicted was an inhuman and degrading punishment within the meaning of section 15(1) of the former Constitution of Zimbabwe. Ncube case, *supra* note 175. In that case, the Supreme Court held by a unanimous decision that corporal punishment inflicted in execution of a sentence imposed by a court on an adult male person

reasons for making the right to dignity a non-derogable right has been said to be that it is a special status which attaches to a person for the reason that he or she is a human being.[250] The legislature must not enact a law that authorises the infliction of inhuman and degrading treatment or punishment.[251] Corporal punishment in execution of a sentence has been held to be inhuman and degrading punishment.[252] In the *Mangwiro* case the Court ruled in favour of the applicant on the basis that the right to dignity and access to the courts are not subject to the test of proportionality. There is no need for a court to consider the degree of infringement of this right since its mere infringement is a violation of the constitutionally enshrined right. The Court in *Mangwiro* case also noted that the right to a fair trial cannot be limited under any circumstance.[253]

5 Conclusion

This research has managed to espouse the concept of rights focusing on the nature, scope and extent to which these rights can be exercised. It is not in doubt that rights are not absolute, at the very least the majority of rights are conditional and subject to limitations. However, this does not translate into implying that rights can be infringed upon willy-nilly. The law has recognised grounds and well-established parameters upon which these rights can be limited. These conditions reinforce and emphasise the impression that limitation of rights is a peculiar exercise that should be done in accordance with principles related to fairness, reasonableness, justice, rationality and equality to withstand legal scrutiny. To this end the law sets out recognised boundaries upon which rights can be limited. The limitation of rights is usually subject to the balancing of competing interests which are both protected by law. There is need to accord rights to everyone, but at the same time there is need to ensure that those rights are exercised in a responsible manner so that they do not interfere or intrude into other rights, be it for individuals, minority groups or for a collective group. There is no hard and fast rule when it comes to the justification of limitations of rights; however, the guidelines provided in various legal instruments, the constitution being the prime guide, offer a standard that should be observed in the limitation of rights. It is unquestionable that the legal framework providing guidelines on the limitations of rights are somewhat satisfactory. The question remains as to whether there is a clear political will to uphold the rule of law in

convicted of any offence was an inhuman and degrading punishment within the meaning of section 15(1) of the former Constitution; *Pfungwa and Another v. Headmistress Belvedere Junior Primary School and Others* HH 148-17.

[250] General Comment No. 13 0f 1999, the United Nations Committee on Economic, Social and Cultural Rights. *See also S v. Makwanyane* 1995 (3) SA 391 (CC), at para. 328.

[251] *Chokuramba* case, *supra* note 249. *See also* General Comment No.4 to Article 37(a) of the Convention on the Rights of the Child. It should be noted that Zimbabwe is yet to ratify the United Nations Convention Against Torture of 1984.

[252] Pfungwa case, *supra* note 249.

[253] This finding by the High Court is yet to be confirmed by the Constitutional Court. Section 167(3) of the Constitution provides that: "The Constitutional Court makes the final decision whether an Act of Parliament or conduct of the President or Parliament is constitutional, and must confirm any order of constitutional invalidity made by another court before that order has any force."

Zimbabwe. It remains to be seen how rights will be respected under the current and future dispensations.

Part III - The Rights of Vulnerable Groups

7 Gender Equality and Women's Rights under the 2013 Zimbabwean Constitution

Rosalie Katsande* and Tariro Tandi**

1 Introduction

The promulgation of the 2013 Constitution in Zimbabwe heralded the dawn of a new era with regards to gender equality. It was that flicker of hope for many who had been lobbying for reform in the area of gender equality. This Constitution clearly espouses values and principles of gender equality, a welcome gesture moving away from the Lancaster House Constitution which had retrogressive provisions that allowed discrimination in areas governed by personal law. One of the key values clearly stipulated in the current constitution is that the Constitution is the supreme law of the land and any law that is inconsistent with it is void to the extent of the inconsistency. This is referred to as constitutional supremacy, meaning that the Constitution takes precedence over all other laws. Supremacy of the Constitution is provided for in section 3(1)(a) as the first founding value or principle on which Zimbabwe is founded. In addition, section 2(1) specifically states that "[t]his Constitution is the supreme law of Zimbabwe and any law, practice, custom or conduct inconsistent with it is invalid to the extent of the inconsistency". Section 2(2) goes on to specify who is bound by the Constitution and it states: "The obligations imposed by this Constitution are binding on every person, natural or juristic, including the State and all executive, legislative and judicial institutions and agencies of government at every level, and must be fulfilled by them." The effect of this wording is that constitutional obligations are binding on every person and not just organs of state.

Section 3(g) clearly articulates that gender equality is one of the values of Zimbabwe, an indication that it holds a special place in the Constitution as well as the country. To further rubber stamp its commitment to gender equality, section 17 of the Constitution identifies gender balance as a national objective which must guide the state at every level in the formulation and implementation of laws and policies. Section 56(1) provides that all persons are equal before the law and have the right to equal protection and benefit of the law. Further, in its pursuit to promote gender equality, the Constitution in section 246 (a) provides for the establishment of an institutional mechanism whose function is to monitor issues concerning gender equality to ensure gender equality as provided in this constitution.

From 1980 the Zimbabwean legislative and policy framework has been greatly influenced by multi-layered processes at the international, regional and national

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levels. The attainment of independence in Zimbabwe saw the birth of a new Constitution[1] enshrined with a Declaration of Rights. There was an anti-discrimination clause enshrined in section 23 of the old Constitution which prohibited discrimination on the basis of sex, gender, creed, race, tribe, place of origin, political opinions and colour. This section was later amended to include gender and marital status.[2] The section was criticised for being in the nature of a 'claw back' clause which permitted discrimination in the matters of personal and customary law.[3] The net effect of this provision was that in relation to issues like divorce, inheritance and marriage, where customary law is deemed applicable, customary law was given precedence over general law.[4]

Indeed, Zimbabwe has taken positive steps towards the emancipation and empowerment of women.[5] The government has also shown some commitment in changing the plight of women.[6] Women have been recognised as an oppressed group and made a target of government policies. The government's achievements to transform women's status have been partially realised through landmark legal reforms and socio-cultural development. The country witnessed the passing of legislation such as the Legal Age of Majority Act in 1982 and many other positive statutes,[7] such as the Domestic Violence Act (Chapter 5.16). Zimbabwe was then one of six Southern African countries to have such specific legislation on domestic violence.[8] However, until the promulgation of the 2013 Constitution, the 'famous' claw back clause was a discomfort for most women in Zimbabwe as it allowed discrimination in matters pertaining to personal law and customary law. Given the way that patriarchy treats women like minors, this provision stripped women of any rights that they might have been perceived to have had.

This chapter explores how women's rights are secured in Zimbabwe and draws upon legislation at local, regional and international level. The chapter is located within equality and non-discrimination and the broader human rights discourse. The

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[1] This Constitution was published in 1979, as provided by the Statutory Instrument 1979/1600 of the United Kingdom; amended twice in 1981; in 1983; 1984; 1985; twice in 1987; twice in 1989; twice in 1990; twice in 1993; in 1996; 1998; 2000; 2005; 2007; 2009 and 2013.

[2] This was introduced in 1996 through Amendment No. 14.

[3] Section 23(3)(a)(b) of the 1979 Constitution.

[4] C. Damiso and J. E. Stewart.' Zimbabwe and CEDAW Compliance: Pursuing Women's Equality in Fits and Starts', in A. Hellum and H. S. Aasen (eds.), *Women's Rights CEDAW in International, Regional and National Law* (Cambridge University Press,Cambridge 2013) pp. 454–481.

[5] P. Mungwini, 'Forward to the Past: Dilemmas of Rural Women Empowerment in Zimbabwe', 11:2 *African Sociological Review* (2007) pp. 124–133, at p. 124.

[6] E. Batezat and M. Mwalo, *Women in Zimbabwe* (SAPES Trust, Harare, 1989) p. 4.

[7] Zimbabwe made significant strides in amending and enacting legislation and enacted 17 pieces of legislation to advance the gender equality and equity objective. These include: Matrimonial Causes Act (1985); Maintenance Act (1999); Administration of Estates Amendment Act (1997); Sexual Offences Act (2001); Education Act (2004); Labour Act (Chapter 28:01); Criminal Law Codification and Reform Act (2006); and Domestic Violence Act (2007). The 2004 Public Sector Gender Policy put in place Gender Focal Points in all ministries and parastatals, and in 2012 dialogue was initiated to set up a Gender Commission, and this Commission is provided for in the new Constitution in terms of section 245.

[8] M. Nyoni and T. Dzinoreva, 'The Media and Domestic Violence in Zimbabwe', 12:1 *Journal of Sustainable development in Africa* (2010) pp. 249–257, at p. 250.

chapter outlines the major areas that are of significance to women. The critical areas of the chapter include laying the foundations for gender equality and non-discrimination, understanding the nexus between gender equality, women's rights and feminism and a comparative analysis of gender equality provisions under the old and the new Constitution. In doing so, the chapter examines the right to equality and non-discrimination as important principles that should be observed in a society that strives for the promotion and protection of constitutional and human rights. It further examines how the country is fairing in advancing gender equality post the promulgation of the current constitution.

2 Understanding the Nexus between Gender Equality, Women's Rights and Feminism

The concept of women's rights is difficult to understand without first seeking to appreciate how it is informed by its correlative concepts of gender equality and feminism. A proper understanding of the relationship that exists amongst the three will adequately place the women's rights movement in both its historical and modern contexts, revealing the continuing evolution that the concept enjoys.

2.1 *Gender Equality*

Gender is understood to be socially constructed identities which attribute roles for men and women.[9] The meaning placed by society on the biological differences between men and women creates imbalanced power relations, meaning that men will reserve rights that empower them and disenfranchise women. Gender equality refers to the enjoyment of equal rights, opportunities and treatment by men and women and by boys and girls in all spheres of life. It asserts that people's rights, responsibilities, social status and access to resources should not depend on whether they are born male or female.[10] Rather, it entails that men and women are free to make life decisions without limitations placed on them by stereotypes and prejudice.

Various legal documents provide for equality between men and women with the oldest of these being the Universal Declaration of Human Rights (UDHR).[11] The current Sustainable Development Goals (SDGs) have SDG5 dedicated to achieving gender equality and empowering all women and girls. Most Governments are making concerted efforts to achieve gender equality including Zimbabwe. What is to be seen is whether commitments that are made are followed through with tangible actions towards attaining gender equality.

Gender equity represents a further step in the gender debate. It can be argued that it is a response to the inadequacies of the gender equality regime in that it seeks to

[9] OHCHR, *Women's Rights are Human Rights*, HR/PUB/14/2, p. 36, available at <http://www.ohchr.org/Documents/Events/WHRD/WomenRightsAreHR.pdf>.
[10] International Labour Office Geneva, *ABC of Women Workers' Rights and Gender Equality*, available at <http://www.ilo.org/wcmsp5/groups/public/---dgreports/--gender/documents/publication/wcms_087314.pdf>.
[11] In addition to the UDHR, *see* the ICCPR, ICESCR and Constitution of Zimbabwe.

redress past imbalances which have disadvantaged women and favoured men. Gender equity means fairness of treatment for women and men, according to their respective needs and realities. This may include equal treatment or treatment that is different but which is considered equivalent in terms of rights, benefits, obligations and opportunities.[12] Ultimately, 'gender equity' and 'gender equality' move away from a women in development attitude to encompass a gender and development approach and understanding. Gender and development recognises that gender inequity is not an issue that exclusively disadvantages women but is relevant to people of all gender identities and sexualities.[13]

2.2 *Women's Rights*

There is a popular saying amongst the women's rights discourse that says 'women's rights are human rights', which drives the equality agenda. This is inherent in the principle of equality between men and women in that they can be conferred on women no different than they can be conferred on men regardless of social, cultural or religious background. Women's rights are the economic, social and cultural freedoms to which all people are entitled.[14] Equality and non-discrimination between men and women is a fundamental tenet of human rights law. Both the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) prohibit discrimination on the basis of sex,[15] and ensure equal protection of the law.[16] Discrimination of women takes many forms: for example, *de jure* discrimination where laws directly distinguish between certain groups such as where women were prohibited from inheriting,[17] and *de facto* discrimination where a law or policy is seemingly gender-neutral but has detrimental effects on women.[18]

The overarching principle of women's rights is that women as well as men ought to be free to develop their "personal abilities, pursue their professional careers and make choices without the limitations set by stereotypes, rigid gender roles and prejudices".[19] This is possible because human rights which were first provided for in the UDHR are to be applied without distinction as to sex.[20] There was considerable discussion in the drafting of the UDHR as to the use of the term 'all men' rather than

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[12] ILO Geneva, *supra* note 10, p.48.
[13] Council for International Development, *Fact Sheet 6*, 2012, p. 1, available at <http://www.cid.org.nz/assets/CID-Resources/Fact-Sheets/FS6.-2014-format.-Gender.pdf>.
[14] Concern Worldwide, *Women's Rights, How Can We Ensure That All Women Have Equal Access to Their Rights?: Focus on Pakistan*, p. 1, available at <http://gcc.concernusa.org/content/uploads/2014/08/Womens-Rights.pdf>.
[15] Article 1 ICCPR, Article 2 ICESCR.
[16] Article 26 ICCPR.
[17] *See Magaya v. Magaya*, SC 210/98.
[18] OHCHR, *supra* note 9, p. 30. *See also* E. Grant, 'Dignity and Equality', 7 *Human Rights Law Review* (2007) p. 300.
[19] Committee on the Elimination of Discrimination against Women, General Recommendation No. 28 (2010) on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, para. 22.
[20] Article 2 UDHR.

a gender-neutral term.[21] Eventually the terms 'everyone' and 'all human beings' were used to show that the rights contained within the UDHR were to apply to all persons, men and women included. The universality of rights therefore dictates that women's rights are also human rights in that they are indivisible in nature. However, cultural and religious extremism has often been the reason states have sought to renege on their commitments in this regard.[22]

2.3 *Feminism*

It is difficult to arrive at a single definition of feminism because of its various nuances and varied understandings of it proffered in many quarters. This is because it is not a unitary concept but a diverse multifaceted group of ideas.[23] Rosalind Delmar does attempt to provide the following baseline definition: "Many would agree that at the very least a feminist is someone who holds that women suffer discrimination because of their sex, that they have specific needs which remain negated and unsatisfied, and that the satisfaction of these needs would require a radical change (some would say a revolution even) in the social, political and economic order."[24]

2.4 *The Nexus*

Looking at the three concepts combined it is apparent that they share common theoretical grounding in that they are all premised on the notion that women have been disadvantaged historically. Further, they acknowledge that there is a need to redress the social, economic and political advantages that men have previously enjoyed in a manner that disadvantaged women on the one hand and sustained the status quo which regards women as second class citizens on the other hand.

3 Gender Equality and Human Rights

The global push for gender equality is clearly set out in Sustainable Development Goals (SDGs) in Goal 5 which aims at promoting gender equality and empowering women.[25] SDGs take after the Millennium Development Goals (MDGs) which lapsed in 2015. The SDGs have been hailed for providing a better framework than the MDGs as they draw attention to all the key structural constraints that deprive women of their enjoyment of their rights. There is however still an outcry for the lack of robust accountability mechanisms that support the realisation of these SDGs. This has become a sore point as it appears as though most Governments ascribe to the SDGs but lack the political will to ensure it becomes a reality to women. Gender equality is an underpinning concept to the human rights discourse. It is important to note that

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[21] J. Morsink, 'Women's Rights in the Universal Declaration', 13:2 *Human Rights Quarterly* (May 1991).
[22] OHCHR, *supra* note 9, p. 27.
[23] J. Freedman, *Concepts in the Social Sciences: Feminism* (Open University Press, Buckingham, 2001)
[24] R. Delmar, 'What is feminism?', in J. Mitchell and A. Oakley (eds.), *What is Feminism?* (Basil Blackwell, Oxford, 1986) pp. 8–32, at p. 8.
[25] *See* <http://www.unwomen.org/en/news/in-focus/women-and-the-sdgs/sdg-5-gender-equality>.

this was not always the case; it took decades of dedicated and passionate advocacy for gendered diversities to be considered relevant in the human rights trajectory. This recognition gave birth to a number of legal and normative instruments at international and regional levels. These instruments include but are not limited to the Convention on the Elimination of Discrimination against Women (CEDAW) of 1979, the Beijing Platform for Action (BPFA) of 1995 and the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa of 1995. All these and others are explained in detail below, but it suffices to mention that they have all been an important advance in the protection and the promotion of women's rights.

4 Substantive Equality and the Birth of a Robust Approach to Equality

CEDAW was adopted in 1979 and entered into force on 3 September 1981.[26] It sought to transform the ideals contained in the UDHR into a legally binding instrument aimed at the achievement of women's equality with men[27]. CEDAW constitutes a bill of rights for women and girls by incorporating universality and indivisibility of rights.[28] Whilst gender equality and women's rights are key elements in the Universal Declaration of Human Rights, it was later recognised that certain rights are specific to women, or need to be emphasised in the case of women.[29]

The Convention's definition of discrimination is immediately indicative of an awareness of the fragility of women's standing in the law as regards previous conventions, the international bill of rights included. It is for this reason that CEDAW is so closely associated with the notion of substantive equality. The term 'substantive equality' was first produced in American jurisprudence in the case of *Griggs v. Duke Power*[30]where the employer had applied a uniform aptitude test to both white and African American job candidates. But because African-American applicants had long received inferior education in segregated schools, the test operated to disqualify such applicants at a substantially higher rate than whites. The Supreme Court held that equal treatment could be discriminatory if it led to unequal results. Thus, substantive equality should be viewed in the light of providing equity where simple formal equality would have led to an unfair result.

CEDAW places a positive duty on states to respect, protect and fulfil rights to equality and non-discrimination. This is a departure from the traditional view of protection of

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[26] UN, *Short History of the Commission on the Status of Women*, available at <http://www.un.org/womenwatch/daw/CSW60YRS/CSWbriefhistory.pdf>.
[27] A. Byrnes, 'Article 1', in M. Freeman, C. Chinkin and B. Rudolf (eds.), *The UN Convention on the Elimination of All Forms of Discrimination Against Women: A Commentary* (Oxford University Press, Oxford, 2012) pp. 51–99, at p. 53.
[28] *Report of the Online Discussion on "Women and Human Rights" Moderated by the Office of the High Commissioner for Human Rights 1–26 February 2010*, p. 3
[29] UNFPA and UNICEF, *Women's & Children's Rights: Making the Connection*, available at <https://www.unfpa.org/sites/default/files/pub-pdf/Women-Children_final.pdf p11>. *See also* S. Fredman, 'Substantive Equality Revisited', 14:3 *International journal of Constitutional Law* (July 2016) pp. 712–738.
[30] *Griggs v. Duke Power Co.*, 401 US 424, 91 S Ct 849 (1971) (US Supreme Court).

rights which focused on individual interaction.[31] In other words, relief could only be had where the perpetrator was named, and if, say, there were structural inequalities that could not be traced to an individual, then that lay outside the scope of enforcement of the right to non-discrimination.[32]Article 2(d) of CEDAW prohibits public authorities and institutions from engaging in any discriminatory conduct to the detriment of women. This provides protection for women *ex ante*, or before the fact, in that women are not necessarily saddled with an evidentiary burden in proving that public authorities violated their rights. Rather, all they need to do is show that they have a right in terms of the Convention as well as showing that the public authority has a positive duty to respect, protect or fulfil that right. In any event, the Human Rights Committee in its General Comment of 1989[33] noted that Article 26 of the ICCPR ensures that discrimination in any field regulated by a public authority is prohibited. This only emphasises the point that provisions of the ICCPR and the ICESCR can be read with CEDAW for the fuller protection of women's rights.

Article 4(1) of CEDAW provides that adoption by state parties of temporary special measures aimed at accelerating *de facto* equality between men and women shall not be considered discrimination. Special measures or affirmative action are controversial in that they appear to breach the equal treatment principle by requiring preferential treatment on the grounds of gender. However, once it is recognised that advantageous treatment might be necessary to counter previous disadvantage, it becomes clear that special measures are not a derogation from equality, but a means to achieve it. The wording of Article 4 of CEDAW demonstrates this tension. It appears to accept that gender-based provisions constitute a *prima facie* breach of the equal treatment principles, while at the same time recognising that measures specifically benefitting women might be necessary. Hence the need to call these measures 'special' and to insist that they are 'temporary'.[34] This then means that these temporary measures are not a means to an end but Governments are impressed upon to put in place measures that ultimately ensure 50/50 representation.

The CEDAW Committee in its General Recommendation No. 25[35] on temporary special measures stressed that the Convention was a dynamic instrument which went beyond the concept of discrimination used in many national and international legal standards and norms.[36] More to the point, the Committee had the following to say:

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[31] A. F. Bayefsky, 'The Principles of Equality or Non disrimination in International Law', 11:1–2 *Human Rights Law Journal* (1990) pp. 1–34, at p. 5.
[32] S. Fredman and B. Goldblatt, *Discussion Paper Gender Equality and Human Rights No. 4*, July 2015, p. 9.
[33] Human Rights Committee, General Comment No. 18: Non-discrimination (1989).
[34] S. Fredman, *Women and the Law* (Oxford University Press, Oxford, 1997) p. 97.
[35] UN Committee on the Elimination of Discrimination against Women, General Recommendation No. 25 (2004) on Article 4, paragraph 1 of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures.
[36] *Ibid.*, para. 5.

> In the Committee's view, a purely formal legal or programmatic approach is not sufficient to achieve women's de facto equality with men, which the Committee interprets as substantive equality. In addition, the Convention requires that women be given an equal start and that they be empowered by an enabling environment to achieve equality of results. It is not enough to guarantee women treatment that is identical to that of men. Rather, biological as well as socially and culturally constructed differences between women and men must be taken into account. Under certain circumstances, non-identical treatment of women and men will be required in order to address such differences. Pursuit of the goal of substantive equality also calls for an effective strategy aimed at overcoming underrepresentation of women and a redistribution of resources and power between men and women.

Article 4(1) of CEDAW has found application in the Constitution of Zimbabwe. Section 124(1)(b) provides that for the life of the first two Parliaments after the adoption of the Constitution, 60 women shall be a part of the National Assembly under a proportional representation or quota system. This is not without its flaws because issues of merit and competence have to be taken into account. However, flawed or not, the quota system represents a tremendous opportunity for women to participate in leadership and influence gender-related issues until the expiry of the temporary measure. It is hoped that more women will be able to aspire to political and other forms of leadership as a result. A closer look at this affirmative action provision leaves a lot to be desired in practice. The 60 seats provided for by the constitution in a bid to right the past inequalities have not provided the needed consolation. In reality, women conferred the 60 seats have no constituencies thus their opinion is not valued. They are seen as it were, but not heard. To further indicate how these seats are problematic, these seats are regularised on party lines and anyone who does not ascribe to a political party is already excluded from the process. This then takes us to another problematic aspect which is that there is no meritocracy when it comes to selection of the candidates for the affirmative seats such that the experience has been that most do not necessarily have the capacity to engage at policy formulation and reveal level as they lack the know-how. Many women's rights activists have rightly pointed out that the 60 seats provision is not synonymous with gender balance which goes beyond affirmative action but is about 50/50. The efficacy of the 60 seats now seem like sweets that are given to a crying child, just to silence women. As reported by Gender Links[37], in their report *Zimbabwe Gender and Elections*, currently, the Zimbabwean cabinet has a 29 per cent representation of women whilst the situation is dire at local government where the representation of women is at 14 per cent. The CEDAW shadow report by CSOs in Zimbabwe noted this anomaly which leads to gender imbalance as women are left out at the apex of government, at the grassroots level where participation is imperative and key especially in shifting the gender dynamics within society that contributes to the bigger picture of achieving equality.

Substantive equality is critical to the proper realisation and enjoyment of human rights by women, and this is because they have laboured under gender stereotypes

[37] <https://genderlinks.org.za/what-we-do/sadc-gender-protocol/advocacy-50-50/zimbabwe-gender-and-elections/ accessed on 24/12/2020- Zimbabwe Gender and Elections>.

for a long time. The Special Rapporteur on extreme poverty[38] highlighted that owing to gender stereotypes relating to family and work, depicting males as breadwinners and women as carers and nurturers, women tend to assume the bulk of the work at the expense of their human rights.[39] She goes on to say that:

The unequal distribution of unpaid care work is highly reflective and determinative of power relations between women and men. Discriminatory gender stereotypes, which construe women as second-class citizens whose place is in the home, cause and perpetuate this unequal distribution of work, rendering women's equal enjoyment of rights impossible. Addressing care responsibilities is thus an essential component of the obligations of States to ensure gender equality at home, work and in society more broadly.[40]

It is encouraging to note that our courts have acknowledged the contribution of women to the household even where they are not 'gainfully employed'. At the dissolution of marriage, the courts have found that a woman's role as a wife, mother, counsellor, housekeeper and day and night nurse for the family is in itself a contribution deserving of a share of the matrimonial estate.[41]In the spirit of righting some of the wrongs in the past especially with regards many who find themselves in unregistered customary law unions (UCLU), the government of Zimbabwe sought to repeal marriage laws.[42] The process to repeal marriage laws has not been a walk in the park and this has seen this initiative not yet concluded. The revised marriage bill has again failed to offer substantive equality to persons who are not legally married. It is unfortunate that the marriage bill is rubber stamping the attitudes of Zimbabwean society and has become a victim of the politics of the day. Adverse reports have been given with regards how the bill failed to recognise polygenous marriages, UCLU and same sex relationships which are an undeniable reality in the Zimbabwean community.[43]

Substantive equality operates on the premise that discrimination is an unnatural phenomenon in the field of human interaction. In other words, discrimination is socially constructed. It is for this reason that CEDAW promotes equality of opportunity, equality of access to opportunity and equality of result or outcome.[44] Some impediments to the realisation of substantive equality are the lack of economic wherewithal and imposition of economic sanctions on states. However, what this Convention requires is not to have a status of progress comparable to highly

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[38] *Report of the Special Rapporteur on extreme poverty and human rights, Magdalena Sepúlveda Carmona*, 23rd Session, A/HRC/23/36, 2013.
[39] *Ibid*., para. 8.
[40] *Ibid*., para 13.
[41] *See Tangirai v. Tangira*i, HH 65/13, p. 9.
[42] <http://www.veritaszim.net/node/3599>, accessed 30/12/2020
[43]<researchgate.net/publication/340051701_Opportunities_inconsistencies_and_gaps_in_the_Zimbabwe_Marriages_Bill_of_2019, Pretty Mubaiwa>, accessed 31 December 2020.
[44] Speech by Shanthi Dairiam, *Equality and Non-discrimination: The Two Essential Principles for the Promotion and Protection of the Human Rights of Women. Proceedings of a Conference organized by the Centre for Comparative and Public Law and the Women's Studies Research Centre*, *University of Hong Kong, 20 April 2002*, p. 3, available at <https://www.law.hku.hk/ccpl/Docs/ShantiDairiam.pdf>.

developed countries. Rather, it deals with the condition of women as against men. That is the context in which these issues must be considered.[45]

Ultimately, the problem of equality between the sexes is not one that can be solved by the law alone. Formal equality is achieved if policies are merely gender neutral, while substantive equality is concerned with the effects of equality policies and takes into account the need to correct prevailing inequality and this is outside the scope of the law and fully within the ambit of politics. As the CEDAW Committee points out in General Recommendation No. 25:

> [A] purely formal legal or programmatic approach is not sufficient to achieve women's *de facto* equality with men, which the Committee interprets as substantive equality. In addition the Committee requires that women be given an equal start and that they be empowered by an enabling environment to achieve equality of results … Pursuit of the goal of substantive equality also calls for an effective strategy aimed at overcoming underrepresentation of women and a redistribution of resources and power between men and women.[46]

The above comments place gender issues squarely in the context of democratic citizenship in that women's right to equality is a condition-precedent for democracy and not merely a result of democratic recognition. This is because women's rights are not an expression of the will of the majority. They are a tool to ensure protections for women whatever the will of the majority may be.[47]

The African Protocol to the African Charter on Human and People's Rights of Women in Africa, also known as the Maputo Protocol, is the main instrument in which the African Commission on Human and Peoples' Rights could be said to have formulated and laid down principles and rules aimed at solving legal problems relating to women's rights and freedoms, and upon which African governments may base their legislation that may in one way or another affect the rights of women.[48] Zimbabwe ratified this instrument in September 2008.[49] It provides for a number of rights such as the right to freedom from discrimination, the right to dignity, access to justice and equal protection of the law[50] and so on. However, regarding the right to integrity and security of the person, it appears that one of the functions of the Protocol is to encourage states to legislate laws for the further protection of women where they have not already done so. To this end, Banda remarks as follows: "[T]he state is made responsible for violence including forced sex in the private sphere raising the

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[45] *Ibid.*
[46] Para. 8.
[47] F. Raday, 'Gender and Democratic Citizenship: The Impact of CEDAW', 10:2 *International Journal of Constitutional Law* (2012) pp. 512–530, at p. 515.
[48] J. D. Mujuzi, *The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa: South Africa's Reservations and Interpretative Declarations*, p. 43, available at <http://www.saflii.org/za/journals/LDD/2008/12.pdf>.
[49] B. Kombo, S. Rainatou and F. J. Mohamed, J*ourney to Equality: 10 years of the Protocol on the Rights of Women in Africa*, p. 99, available at <https://www.equalitynow.org/sites/default/files/MaputoProtocol_JourneytoEquality.pdf>.
[50]Article 2, 3 and 8 of the Protocol, respectively.

possibility that those African states which have not already done so, may have to legislate to make rape within marriage illegal."[51]

Further to this, inclusion of rights such as the right not to be subjected to harmful practices details how comprehensive the protection of women's rights is under the Protocol. The rights of rural women are also protected in Articles 18 and 19, which is important considering that approximately 60 per cent of women live in the rural areas.[52] Section 72 of the Constitution buttressed by Statutory Instrument 53 of 2014[53] have given relief to a lot of women when it comes to ownership of agricultural land. With regard to A1 and A2 farming lands, spouses of the deceased automatically inherit the title of the land. However, with regards to communal land, women are still disenfranchised because when their husbands die women can be chased away from the clan communal land as they do not have rights to ownership but just rights to access through their husbands. Land is still typically allocated within patrilineal lines in practice which leaves a lot of women greatly disadvantaged.

The Protocol heavily emphasises that states should carry out educational campaigns in order to sensitise men and women to break down stereotyping and culturally engrained patterns of superiority and inferiority.[54] It also seeks to eliminate harmful practices through educational programmes and outreach initiatives[55] and enjoins states to eliminate stereotypes in textbooks, syllabuses and the media.[56] In the same spirit, Zimbabwe through the Education Amendment Act[57] made it illegal for pregnant girls to be expelled from school.[58] While this is welcome, there is still a lot of work that needs to be done in shifting the attitudes of society that impede pregnant girls from accessing education. It is one thing to have a right to remain in school while pregnant, and another to have an environment that supports and upholds such a right. Change of attitude cannot be legislated.[59] This stance is in line with the above expressed notion that discrimination is not the natural state of humanity and that the effects of gender inequality can be gradually reversed though education and change of attitude and behaviour. The Protocol goes further by providing in Article 10(3) that states must prioritise their spending in favour of social development in general and the promotion of women in particular. Viljoen argues that this provision sets a basis for the review of states' budgetary allocations by the African Commission or the

[51] F. Banda, 'Blazing a Trail: The African Protocol on Women's Rights Comes into Force', 50 *Journal of African Law* (2006) at p. 79
[52] Right to a healthy and sustainable environment and right to sustainable development, respectively.
[53] <http://extwprlegs1.fao.org/docs/pdf/zim158139.pdf accessed 30/12/2020>.
[54] Article 2(2).
[55] Article 5(a).
[56] Article 12(1).
[57] <https://zimlii.org/zw/legislation/num-act/1987/5/Education%20Act%20%5BChapter%2025-04%5D.pdf accessed 30/12/2020>.
[58] <https://www.aljazeera.com/news/2020/8/25/its-now-illegal-for-zimbabwe-schools-to-expel-pregnant-girls accessed 30/12/2020>.
[59] <https://theconversation.com/zimbabwes-education-law-now-does-more-for-children-but-there-are-still-gaps-145265 accessed 30/12/2020>.

African Human Rights Court in order to assess states' dedication to gender equality.[60]

In comparison with CEDAW, the Protocol locates the protection of women's rights in more specific contexts than does the former. For example, the special temporary measures provided for in CEDAW[61] are aimed at accelerating equality between the sexes but appear to apply in the most general of contexts. This allows for a broad interpretation of rights which in its own right is not a negative thing. The Protocol on the other hand provides explicitly that in certain circumstances women are to be favoured over men, for example in electoral quotas.[62] Positive action on the part of states is also required in the areas of discrimination in law,[63] illiteracy and education.[64]

5 Comparative Analysis of Gender Equality Provisions under the Old and the New Constitution

The 2013 Constitution is widely acknowledged for its firm commitment to gender equality. The affirmative action provisions further assert the Constitution's resolve to redress gender inequality. The Constitution reaffirms earlier commitments shown by the 2005 Constitutional Amendment No. 17 to the 1979 Constitution. Chapter 2 on national objectives in the 2013 Constitution spells out gender balance as being one of the objectives to guide the state, all institutions and agencies of government. Throughout the statement of the 26 national objectives equality is emphasised and, where appropriate, women and girls are specifically mentioned.

The Constitution also has special enforcement provisions in section 85, in that any of the following persons – namely any person acting in their own interests, acting on behalf of another person who cannot act for themselves, acting as a member, or in the interests of a group or class of persons, acting in the public interest, or any association acting in the interests of its members – is entitled to approach a court, alleging that a fundamental right or freedom enshrined in the Constitution has been, is being or is likely to be infringed, and the court may grant appropriate relief, including a declaration of rights and an award of compensation.

The founding values and principles in Chapter 3 of the 2013 Constitution further provide that Zimbabwe is founded on the respect and recognition of the equality of all human beings, gender equality, recognition of the rights of women, the elderly, youths and children and the equitable sharing of national resources, including land. These founding values and principles demonstrate the Constitution's spirit and intent with regard to the principle of equality. The values and principles of recognition of the inherent dignity and worth of each human being, the recognition of the equality

[60] F. Viljoen, 'An Introduction to the Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa', 16:1 *Washington and Lee Journal of Civil Rights and Social Justice* (2009) at p. 31.
[61] Article 4(1).
[62] Article 9(1).
[63] Article 2(1)(d).
[64] Article 12(2).

of all human beings and gender equality are all stated separately to emphasise the importance of these values and bringing out the Constitution's commitment to equality of persons before the law and in the society.

5.1 *The Right to Equal Opportunities in Political, Economic and Social Activities*

The Declaration of Rights in Chapter 4 of the 2013 Constitution recognises that men and women have a right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres. The national objectives in Chapter 2 are a new concept in the constitutional history of Zimbabwe. The objectives are a summary of the framework which the government and all state institutions are to use in the formulation and implementation of policy. The gender balance objective in section 17(1)(c) provides that the state *must* promote full gender balance in Zimbabwean society, and, in particular, the state and all institutions and agencies of government at every level must take practical measures to ensure that women have access to resources, including land, on the basis of equality with men. Section 17(2) further provides that the state must take positive measures to rectify gender discrimination and imbalances resulting from past practices and policies.

Section 17 of the 2013 Constitution categorically defines 'gender balance' to mean the promotion of the full participation of women in all spheres of Zimbabwean society on the basis of equality with men. In addition, the objective proceeds to state that the state must take measures, including legislation, to ensure that there is equal representation of men and women in all state institutions and agencies and at all levels.

Section 23 of the old Zimbabwean Constitution provided that in implementing any programme of land reform the government shall treat men and women on an equal basis with respect to the allocation or distribution of land or any right or interest therein under that programme. This provision which was added in 2005 by Amendment No. 17 to the Constitution was exempted from the application of the claw back clauses in section 23(3)(a) and (b) of that Constitution. This definite positive move is also provided for in the 2013 Constitution. The 2013 Constitution has a clear provision for women to access resources, including land, on an equal basis with men. For a country whose economy is agro-based and depends heavily on the land, this provision indicates acknowledgement that the economy should be driven by both men and women. This, however, can only be achieved if women's work is fully recognised and not seen as an appendage to that of men.[65]

Section 13(1) of the 2013 Constitution requires state parties and agencies of the government to facilitate rapid and equitable development. The government is mandated to take measures to support private initiative and self-reliance, to foster the development of industrial and commercial enterprises in order to empower Zimbabweans and to bring about balanced development. Subsection (3) requires

[65] *See also* J. Klugman and S. Twigg, G*ender at Work in Africa: Legal Constraints and Opportunities for Reform*, Working Paper No. 3, January 2015.

that these measures must protect and enhance the right of the people, particularly women, to equal opportunities in development.

By themselves the principles of equality and non-discrimination are not sufficient to guarantee true equality. Temporary special measures may sometimes be needed in order to bring disadvantaged or marginalised persons or groups of persons to the same substantive level as others. Temporary special measures aim at realising not only *de jure* (or formal) equality but also *de facto* (or substantive) equality for men and women. Equality guarantees that women and men enjoy all human rights on an even, like or same basis.

The affirmative action clause in section 23(3)(g) of the old Constitution did not satisfactorily address women as an oppressed group, and this resulted in the sub-optimal improvement of women's social status. Affirmative action is the nearest and most effective tool to realise and bring out women's worth in every sector of the society. Affirmative action, apart from improving gender equality in every sector of Zimbabwe, can ultimately improve economic development if there is full commitment to its goals and measures by government and the private sector.

Section 14(1) of the 2013 Constitution provides that the state and all institutions and agencies of government at every level must endeavour to facilitate and take measures to empower, through appropriate, transparent, fair and just affirmative action, all marginalised persons, groups and communities in Zimbabwe. Subsection (2) calls for the state and all institutions and agencies of government at every level to ensure that appropriate and adequate measures are undertaken to create employment for all Zimbabweans, especially women and youth. Section 246(f) enables the Gender Commission to recommend affirmative action programmes to achieve gender equality. These provisions on gender equality and equity are a landmark development in our law. It is something that the old Constitution lacked. The manner in which these sections are worded shows a positive move towards achieving equality between men and women. It is important though to note that whilst the 2013 constitution's spirit is geared towards achieving equity, the practice thus far has not reflected this commitment in many spheres.

Section 24 of the 2013 Constitution provides that the state and all institutions and agencies of government must adopt reasonable policies and measures to provide everyone with an opportunity to work in a freely chosen activity, in order to secure a decent living for themselves and their families. At every level, the state must endeavour to secure full employment and the removal of restrictions that unnecessarily inhibit or prevent people from working and otherwise engaging in gainful economic activities. They must also secure vocational guidance and the development of vocational and training programmes, including those for persons with disabilities, and the implementation of measures, such as family care, that enable women to enjoy a real opportunity to work.

5.2 *Women's Rights in the Context of Customs, Traditions, Religious and Cultural Practices*

Discrimination is further outlawed by the Prevention of Discrimination Act (Act No. 19 Of 1998) (Chapter 8:16). The purpose of this Act is stated in its preamble as "to prohibit discrimination on the ground of race, tribe, place of origin, national or ethnic origin, political opinions, colour, creed or gender and to provide a remedy for persons injured by such discrimination; to prohibit the promotion of such discrimination …" This Act prohibits discrimination by one person against another in regard to: (a) the admission and supplying of commodities or services in public premises and facilities;[66] (b) the disposal of immovable property;[67] (c) the granting of finance;[68] and (d) the making or communication of statements based on racial superiority or hatred.[69] It is a criminal offence to discriminate against any person in any of the above instances.

Despite the operation of this provision, women's plight under the old constitutional provisions was far from being lessened. This was so because discrimination could be effected against them on the pretext of complying with customary law, which, based on the old constitutional provisions, was permissible.[70] This will no longer be the case under the 2013 Constitution as section 56 provides for unequivocal, unfettered equality between women and men, which is unlike the situation under the old Constitution where equality and non-discrimination were not clearly stated as being between men and women.

Section 80(1) of the 2013 Constitution provides that every woman has full and equal dignity of the person with men and this includes equal opportunities in political, economic and social activities.

Section 80(3) of the 2013 Constitution further provides that all laws, customs, traditions and cultural practices that infringe the rights of women conferred by the Constitution are void to the extent of the infringement. This is also provided for in section 2 of this Constitution which says that the Constitution is the supreme law of the country and "all laws and any law, practice, custom or conduct inconsistent with it is invalid to the extent of that inconsistency …". In terms of the realisation of women's rights, this provision requires that laws and policies are subject to being interpreted as being in violation of the fundamental rights set out in the Constitution. The provision that any law inconsistent with the Constitution is invalid lays a good foundation for women to exercise and enjoy the rights provided for under the 2013 Constitution.[71] In subjecting all laws, including customary laws, to the equality clause, the 2013 Constitution addresses discrimination and equality clearly and

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[66] Section 3.
[67] Section 4.
[68] Section 5.
[69] Section 6.
[70] *See generally* J. Stewart *et al*., *Shadow of the Law: Women and Justice Delivery in Zimbabwe* (Women and Law in Southern Africa Research Trust, Harare, 2000).
[71] *See Mudzuru and another v. the Minister of Justice, Legal and Parliamentary Affairs and others*, CCZ 12-15.

unambiguously and presents a real opportunity to re-view and re-envisage women's rights and entitlements in Zimbabwe. In theory this is such a great stride but in reality the traditional institutions and customs are still to come to speed with this concept of equality. Presently women have not been able to navigate the cultural spaces. Out of over 200 chiefs in Zimbabwe, only 6 are women. Chiefs shape the customs and traditions that govern about 60 percent of the population that stays in the remote areas and not having women at such decision making tables has a negative impact on shaping the norms, traditions and values.

5.3 *Intersectionality of Disadvantage and Substantive Equality*

Section 56(1) of the 2013 Constitution provides that all persons are equal before the law and have the right to equal protection and benefit of the law. Unlike in the old Constitution in which equality and non-discrimination were not clearly stated as being, among other things, between men and women, section 56(2) of the 2013 Constitution categorically states that women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.

This section takes a substantive approach which recognises that in order to redistribute benefits equally between women and men, there must be measures to promote women's rights that must transform the unequal power relations between women and men in the process. There should not only be equal opportunities for women but also equal access to those opportunities.[72]

Subsection (3) further provides that "every person has the right not to be treated in an unfairly discriminatory manner on such grounds as their nationality, race, colour, tribe, place of birth, ethnic and social origin, language, class, religious belief, political affiliation, opinion, custom, culture, sex, gender, marital status, age, pregnancy, disability or economic or social status or whether they are born in or out of wedlock".

The substantive equality approach taken in this section recognises that women and men cannot be treated the same, and for equality of results to occur, women and men may need to be treated differently. The challenge is to know when to take note of difference, and to decide on appropriate measures for different treatment that will facilitate equal access, control and equal results.[73] Such measures will have to be assessed to ensure that they promote autonomy rather than protection or dependency. This has to be done without compromising the claim for equal rights and equality as a legal standard.

Substantive equality for men and women will however not be achieved simply through the enactment of laws or the adoption of policies. In implementing the Constitution, the state should take into account that such laws, policies and practice can fail to address or even perpetuate inequality between men and women because

[72] Byrnes, *supra* note 27, p. 55.
[73] *Ibid.*

they do not take account of existing economic, social and cultural inequalities**,** particularly those experienced by women.[74]

In addition to the above, the CEDAW Committee in its General Recommendation No. 25 on Article 4(1) of CEDAW on temporary special measures further elaborated the principle of non-discrimination as well as achievement of equality between men and women. In paragraph 8, the Committee noted that, in its view, a purely formal legal or programmatic approach is not sufficient to achieve women's *de facto* equality with men, which the Committee interprets as substantive equality. In addition, the Convention requires that women be given an equal start and that they be empowered by an enabling environment to achieve equality of results. It is not enough to guarantee women treatment that is identical to that of men. Rather, biological as well as socially and culturally constructed differences between women and men must be taken into account. Under certain circumstances, non-identical treatment of women and men will be required in order to address such differences. Pursuit of the goal of substantive equality also calls for an effective strategy aimed at overcoming under-representation of women and a redistribution of resources and power between men and women.

Despite the ordering of the modern society and the progressive provisions of the law, gender inequality still rears its ugly head. To understand the underpinning factors leading to the chronic inequality it is necessary to understand the relationship between gender equality, women's rights and feminism on a broader praxis.

6 Gendered Impact of COVID-19 and Its Implications on Women's Rights

On the 11th of February 2020, the World Health Organization (WHO) officially declared COVID-19 a global pandemic. The WHO declared the disease to be a public health emergency of international concern. The government of Zimbabwe, as it is enjoined to do, responded by putting in place a series of extraordinary measures to combat the global pandemic. Through promulgation of statutory instruments, rights such as freedom of movement and assembly, religion and culture were limited.[75] The Constitution as has already been noted protects fundamental rights and freedoms in the Declaration of Rights. The rights most relevant to the COVID-19 response are: the right to life, personal liberty, human dignity, personal security, privacy, education, healthcare, food and water. These rights may be limited only

[74]Article 3(8) ICESCR.

[75] Measures that were put in place include but not limited to: The Civil Protection (Declaration of State of Disaster: Rural and Urban Areas of Zimbabwe) (COVID-19) Notice, 2020 (Statutory Instrument 76 of 2020) which declared the Coronavirus an infectious disease and a state of disaster; The Public Health (COVID-19 Prevention, Containment and Treatment) Regulations, 2020 published as Statutory Instrument 77 of 2020 which declared the disease a formidable epidemic disease; and the COVID-19 Prevention, Containment and Treatment (National Lockdown) Order, 2020 contained in Statutory Instrument 83 of 2020 which declared a period of 21 days of lockdown of all sectors except for essential services and few cases exempted. In terms of Statutory Instrument 83 of 2020, authorities in Zimbabwe have been empowered to arrest anyone who breaks mandatory quarantine, isolation or partake in gatherings during the period of lockdown

where a law of general application permits it and subject to it being necessary and reasonable in a democratic society.[76]

However, during emergencies, these rights may be limited through a written law to the extent to which the emergency strictly requires it. Whilst progress has been made in the Constitution in broadening equal opportunities for women and affirming their rights, impacts of the COVID-19 pandemic deepens pre-existing inequalities and persistent violations of the rights of women and girls as compared to men and boys. Disease outbreaks affect women and men, girls and boys differently based on the perceived cultural and societal roles and responsibilities. According to Kameri-Mbote, past disease outbreaks such as Ebola virus in 2014 and Zika virus in 2015-2016 have had gendered impacts.[77] The same can be said regarding COVID-19.

The Zimbabwean Constitution provides a solid legal stand-point for the promotion and protection of equality and non- discrimination in Zimbabwe.[78] However, the unprecedented impact of COVID-19 disproportionately affects women, and this has the likelihood of increasing their vulnerabilities. According to the Organisation for Economic Co-operation and Development (OECD), 70 per cent of health workers are women and such are most exposed to the COVID-19 pandemic.[79] In a depressed economy such as that of Zimbabwe, there is need for a closer look on the impacts of lockdowns and the impact that the pandemic has on vulnerable groups such as women and girls.

On 23 April 2020, the United Nations Secretary General António Guterres released a policy brief titled: *COVID-19 and Human Rights: We are all in this together.* In this policy brief, the Secretary General asks the question why human rights are so important to the COVID-19 response. In answering this question, the Secretary General offers six key messages[80] which must underline responses to COVID-19.[81]According to one of the key messages, the virus does not discriminate, but its impacts do and therefore everyone should be involved in the responses. The gender dimensions of the pandemic are numerous and can be severe. The invisible coronavirus made systemic gender inequalities and injustices visible.[82] There are

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[76] Section 86 (2).

[77] P. Kameri-Mbote and D. A. Kipkoech, *Human Rights Implications of the Covid-19 Pandemic in Kenya* (School of Law, University of Nairobi, 2020) p. 17, citing *The COVID-19 Outbreak And Gender: Key Advocacy Points from Asia and the Pacific* (UN Women | Asia and the Pacific, 2020) accessed 5 April 2020.

[78] Section 56.

[79] *See* <http://www.oecd.org/coronavirus/policy-responses/women-at-the-core-of-the-fight-against-covid-19-crisis-553a8269/>.

[80] Protecting people's lives is the priority; protecting livelihoods helps us do it. The virus does not discriminate; but its impacts do. Involve everyone in your response. The threat is the virus, not the people. No country can beat this alone. When we recover, we must be better than we were before.

[81] Zimbabwe Human Rights Association, *A Human Rights Approach to Fighting COVID-19 in Zimbabwe in the Light of The United Nations Policy Brief on COVID 19 and Human Rights* (Accessed 29 April 2020) p. 1.

[82] L. Schalatek, *The Invisible Coronavirus Makes Systemic Gender Inequalities and Injustices Visible* (7 May 2020), <https://za.boell.org/en/2020/05/07/invisible-coronavirus-makes-systemic-gender-inequalities-and-injustices-visible>.

many socio-economic effects of the pandemic to women due to the nature of the role that they play in the community.[83]

Globally, women do most of the domestic work and unpaid care. Due to closure of schools and the limitation on movement for members of the family it is highly likely that women will be required to perform more caregiving responsibilities. Further, the shift of work spaces from public offices to homes has the effect of increasing women's workload as well as constraining their workspace given the gender division of labour.[84] *A Gender Assessment of COVID-19 and the Countrywide Lockdown Process*, carried out by UN Women Zimbabwe, revealed that women reported an increased burden in taking care of children, performing household chores among other routine duties they have at household and community level.[85] The pandemic jeopardises some of the achievements observed since 2013 in several aspects of gender equality and women's empowerment. The crisis' economic and social consequences will exacerbate existing inequalities and discrimination against women and girls, especially against the most marginalised and those in extreme poverty.[86]

The pandemic manifested itself at a time the international community was focusing on taking stock of achievements made in implementing the Beijing Platform of Action with its global commitments towards comprehensive gender equality and the fulfilment of women's universal human rights over the past 25 years.[87] The COVID‑19 pandemic further poses a severe threat to the achievement of gender-related SDGs.[88] The development of the outbreak might also put a hold to some gender-transformative policies and reforms by diverting resources away from past and current needs of women, whereas the crisis will actually increase and expand them.[89]According to the UN, COVID-19 could reverse the limited but important progress that has been made on gender equality and women rights. Women's leadership and contributions must be at the centre of coronavirus resilience and recovery efforts.[90]

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[83] *ZWRCN Coronavirus Lockdown and Women: TheEffects of the Pandemic on the Existing Strides Made on Gender Equality and Women's EqualPparticipation* (2020), <https://www.zwrcn.org.zw/index.php/news/400-coronavirus-lockdown-and-women-the-effects-of-the-pandemic-on-the-existing-strides-made-on-gender-equality-and-women-s-equal-participation>.
[84] Kameri-Mbote and Kipkoech, *supra* note 77, p. 17.
[85] *"Building Back" Resilience of Rural Women after COVID-19*, <https://zimbabwe.un.org/en/95733-building-back-resilience-rural-women-after-covid-19>.
[86] *OECD Policy Responses to Coronavirus. Women on the Core of the Fight Against Covid 19 Crisis* (2020), <https://www.oecd.org/coronavirus/policy-responses/women-at-the-core-of-the-fight-against-covid-19-crisis-553a8269/>.
[87] *"Building Back" Resilience of Rural Women after COVID-19*, *supra* note 85.
[88] *OECD Policy Responses to Coronavirus. Women on the Core of the Fight Against Covid 19 Crisis*, *supra* note 86.
[89] *Ibid.*
[90] *See* <https://www.un.org/en/un-coronavirus-communications-team/put-women-and-girls-centre-efforts-recover-covid-19>.

7 Conclusion – Substantive Equality, Transformative Constitutionalism and the Future of Women's Rights in Zimbabwe. Is It a Case of Elusive Equality?

This chapter explored how women's rights are secured in Zimbabwe and draws upon legislation at local, regional and international levels. The chapter is located within equality and non-discrimination and the broader human rights discourse. The rights discourse is a powerful tool for making governments accountable for the treatment of their citizens. As such, liberal feminists have adopted this discourse to help secure women's rights. Securing women's rights means ensuring that women are included in the group to whom the entitlement is extended. General Comment No. 28 of the CEDAW Committee and section 56 of the 2013 Constitution emphasise the obligation of the state to take all necessary steps in order to prohibit and prevent violations of the rights of women. Both emphasise that religious or traditional attitudes are not a legitimate defence of such violations. In terms of General Comment No. 28, states parties are required to report on the measures they have taken to eliminate and prohibit discrimination against women.

The concept of equality is traditionally understood to mean 'the right to be equal to men'. This becomes problematic when it is extended to the understanding that women must be treated exactly like men if they are to gain equality with men.[91] It implies that women must be treated according to male standards, obscuring the ways in which women are different from men and how they will be disadvantaged because of these differences. It is thus imperative that the implementation of the 2013 Constitution focuses on the need to attain substantive equality that encompasses equality of opportunity.[92] Substantive equality recognises that women do not necessarily have the same experiences as men and, therefore, should not be treated identically to men in all circumstances. Focus should be on equality of results, which focuses on equality of outcomes and requires the transformation of the underlying structures that are the cause of inequality. Therefore the concept of equity should take precedent as this focuses on creating a level playing field and meeting people where they are in order to attain substantive equality. Without that the 2013 Constitution will be another case of elusive equality.

What is evident though is that in as much as the law sometimes creates the framework that facilitates change, it sometimes is complicit in providing a framework that justifies exclusion. It is also important to note that change itself needs to come through social, cultural, religious, economic and political dispensations. Law is indeed the enforcement mechanism but it is not the panacea-the end all. There has to be political will to achieve substantive justice from the highest office through the whole policy making machinery.

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[91] S. Fredman, 'Beyond Dichotomy of Formal and Substantive Equality: Towards a New Definition of Equal Rights', in I. Boerefijn (ed.), *Temporary Special Measures* (Intersentia, 2003) pp. 111–124, at p. 111. *See also* R. J. Cook and S. Cusack, *Gender Stereotyping: Transnational Legal Perspectives* (University of Pennsylvania Press, 2010) p. 229.

[92] L. Chiduza and P. N. Makiwane**, '**Strengthening Locus Standi in Human Rights Litigation in Zimbabwe: An Analysis of the Provisions in the New Zimbabwean Constitution', 19 *Potchefstroom Electronic Law Journal* (2016).

8 The Rights of Persons with Disabilities in Zimbabwe

Christine Peta* and Admark Moyo**

1 Introduction

The *World Report on Disability*[1] estimates a disability prevalence of 15 per cent of the world population or more than one billion people. These figures indicate an upward increase from previous WHO/UN statistics of 10 per cent of the world population or 650 million people which had been submitted since the 1970s. Estimates point to the fact that more than 80 per cent of persons with disabilities (PWDs) live in developing countries and more than half of them are women.[2] Current precise and reliable data on disability in Zimbabwe is not available. Approximate statistics can however be deduced from the WHO, World Bank and UN standards. It can therefore be estimated that approximately 15 per cent of Zimbabwe's population of 13 million people is disabled (about 2,250,000 people) and more than half of that proportion are women.[3] In a study carried out in Zimbabwe by Eide, Nhiwatiwa and Muderedzi,[4] impairments were found to be uniformly spread among all age groups, amid counts of 45 per cent mobility problems, 34 per cent sensory impairments and 11 per cent emotional, intellectual and learning disorders.

The conceptualisation and definition of disability has been a complex, controversial, multidimensional and evolving issue dating back to the 17th century.[5] There is no standard definition of disability that is accepted worldwide. Some Asian countries believe in rebirth and define disability as a temporary phase of the recreation process.[6] In some African countries, the birth of children with disabilities (CWDs) represents mothers who would have had sex with a white man or a ghost. Some communities in Zimbabwe do not regard people with mental impairment as persons with disabilities but as '*vanhu vanorwara nepfungwa*' (people with brain sickness) or '*vanhu vane mamhepo*' (people who are possessed by the spirit of the winds). However, the meaning of disability in this chapter draws upon the United Nations Convention on the Rights of Persons with Disabilities (CRPD).[7] Article 1 thereof

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[1] World Health Organisation, *World Report on Disability*, World Health Organisation, Malta, 201, available at <http://www.who.int/disabilities/world_report/2011/accessible_en.pdf,site>.

[2] L. Hershey, 'Women with Disabilities, Health, Reproduction and Sexuality', *International Encyclopaedia of Women: Global Women's Issues and Knowledge* (200), available <http://cripcommentary.com/women.html>.

[3] *See* World Health Organisation, *supra* note 1.

[4] A. H. Eide *et al.*, *Living Conditions Among People with Activity Limitations in Zimbabwe*. *A Representative Regional Survey,* Forskningsveien, SintefUnimed Norway, 2003.

[5] G. L. Albrecht, K. D. Seelman and M. Bury, *Handbook of Disability Studies* (Sage Publications Limited, California, 2001).

[6] C. Haihambo and E. Lightfoot, 'Cultural Beliefs Regarding People with Disabilities in Namibia: Implications for the Inclusion of People with Disabilities', 25:3 *International Journal of Special Education* (2010) pp. 76-87.

[7] United Nations, *Convention on the Rights of Persons with Disabilities (CRPD)*, 2008.

states that “[p]ersons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others”.

To begin with, this chapter in section 2 explores the broad social and historical context within which the disability discourse should take place. This includes an analysis of the historical development of the rights of PWDs both at the international plane and in Zimbabwe. The chapter is located within a conceptual framework of the intersectional model, as well as the key models of disability (charity, medical, social and human rights models). Intersectionality is important because it helps us to understand that disability does not function in isolation but is always intimately interconnected with other identity markers such as culture, age, sexuality and gender to frame the experiences of PWDs. In addition, intersectionality addresses the issue of difference, and argues that the experiences of disability of PWDs in the Global North are different from those of PWDs in the Global South; hence in domesticating international human rights conventions there is need to pay close attention to all relevant facets of the local context. In this discourse, models of disability are important because they represent structures that assist us to explain the ways in which public thinking and responses to disability are framed as well as to assess the pertinence of such responses.

In section 3 we introduce the charity, medical, social and human rights models of disability, and thereafter in section 4 we discuss the subject of intersectionality. In section 5, we discuss measures that need to be taken by the state to promote the rights of PWDs in relation to the provisions of section 83 of the Constitution, albeit referencing the CRPD at a broader level. Section 83 of the Constitution articulates the commitment of the state to addressing some of the major barriers that result in PWDs not being able to be self-reliant, to live with their families, to be protected from exploitation and abuse, to have access to medical treatment and to education. In section 6 the chapter discusses the possible shortcomings relating to the way in which the constitutional text protecting the rights of PWDs is structured. These shortcomings include, among others, the failure by the legislature to craft the applicable provisions in the language of rights and the fact that the measures to be adopted by the state are subject to available resources. Section 7 explores the way in which the COVID-19 pandemic has exacerbated the challenges confronted by PWDs and emphasises the need for the state to adopt affirmative action measures to support their livelihoods and promote their rights.

2 Historical Background and Context

In every region of the world, persons with disabilities often live on the margins of society, deprived of the most basic human rights and fundamental freedoms. Due to increased vulnerability, patriarchy, cultural beliefs, social stereotypes and stigmatisation, women and children with disabilities endure even more gross human

rights violations as they have other vulnerabilities.[8] Women with disabilities suffer double discrimination, firstly as women and secondly as persons with disabilities.[9] Mandipa underlines that "cultural beliefs and practices weigh too heavily against the realisation of the rights of women with disabilities. Poverty, misery, illiteracy, joblessness and social exclusion are some of the common plights that women with disabilities face in Zimbabwe. Similarly, children with disabilities are normally not sent to school, compared to their nondisabled counterparts. Without the requisite knowledge and skills, it is very difficult if not impossible for the children to secure any form of employment when they grow up. In the end, a vicious cycle of poverty and disability is created."[10] Unfortunately, discrimination against PWDs occurs, among others, even in the context of one of the most important empowerment rights, that is, access to education, and poses a serious threat to generations of people born in disadvantaged families.[11]

To address the plight and protect the rights of PWDs, the international community drafted the Convention on the Rights of Persons with Disabilities. Zimbabwe is a state party to the CRPD, having deposited instruments of ratification thereof in 2013, the same year the country adopted a new Constitution. The CRPD is a contemporary human rights treaty which consists of novel components which have thus far had great impact on both disability law and disability studies.[12] The purpose of the CRPD as articulated in Article 1 "is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all PWDs, and to promote respect for their inherent dignity". On 23 September 2013, Zimbabwe made great strides towards recognising the rights of PWDs by becoming the 135th state party to duly ratify the CRPD and its Optional Protocol.[13] In addition, the crafting and enacting of the new Constitution, which came into force in various stages in 2013, meant significant advancement towards expanding disability rights in the country, albeit at policy level and not on the ground. Nevertheless, the move brought a

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[8] *See generally* A. Moyo and G. Manyatera, 'International and Domestic Perspectives on Disability and Education: Children with Disabilities and the Right to Education in Rural Zimbabwe', 1 *Midlands State University Law Review* (2014) pp. 103–135

[9] I. Grobbelaar-du Plessis, 'The African Women with Disabilities: The Victims of Multilayered Discrimination', 22 *South Africa Public Law* (2007) p. 405.

[10] E. Mandipa, 'A Critical Analysis of the Legal and Institutional Frameworks for the Realisation of the Rights of Persons with Disabilities in Zimbabwe', 1 *African Disability Rights Yearbook* (2013) p. 73, at p. 75. *See* L. Dube, 'The Plight of Deaf and Dumb Children in Education', *Manica Post Newspaper*, 20 December 2011, where it is reported that 75 per cent of children with disabilities never complete primary school in Zimbabwe.

[11] According to the United Nations:
Persons with disabilities make up the world's largest and most disadvantaged minority. The numbers are damning: an estimated 20 per cent of the world's poorest persons are those with disabilities; 98 per cent of children with disabilities in developing countries do not attend school; an estimated 30 per cent of the world's street children live with disabilities; and the literacy rate for adults with disabilities is as low as 3 per cent—and, in some countries, down to 1 per cent for women with disabilities. *See* United Nations, *From Exclusion to Equality: Realising the Rights of Persons with Disabilities: A Handbook for Parliamentarians on the Convention of the Rights of Persons with Disabilities and its Optional Protocol* (2007) p. 1.

[12] T. Degener, 'Disability in a Human Rights Context', 5:35 *Laws* (2016) pp. 1–24.

[13] E. Mandipa and G. Manyatera, 'Zimbabwe', *African Disability Rights Yearbook* (Pretoria University Law Press, Pretoria, 2014).

marked improvement considering that contents of the 1979 Constitution,[14] together with all its 19 amendments, scantly mentioned disability under Section 23(2) as follows:

> a person shall be regarded as making a provision that is discriminatory and a person shall be regarded as having been treated in a discriminatory manner, if, as a result of that law or treatment, persons of a particular description by … physical disability are prejudiced.

From the above clause, it is evident that whilst the 1979 Constitution condemned discrimination against PWDs, it only recognised physical disability to the express exclusion of all other forms of disability. Although the provisions of the new Constitution are an improvement, in part, the new Constitution follows in the footsteps of the old Constitution by deploring the discrimination of persons with physical and mental disability whilst being unmindful of persons with intellectual and sensory disabilities. However, by enacting the new Constitution, the government of Zimbabwe has in part implemented the provisions of the CRPD. That is so because under Article 4(a) the CRPD requires the adoption of appropriate legislative measures for the implementation of the rights recognised in the CRPD, and in Article 4(b) directs state parties to take all appropriate measures to modify or abolish existing laws that perpetuate discrimination against persons with disabilities.

Generally, the rights of PWDs are protected at multiple levels. First, PWDs are entitled to all the rights to which all human beings are entitled. At this level, the protection and empowerment extended to PWDs are similar to those extended to other members of society in line with the equal protection and benefit of the law clause. Second, the rights of PWDs are enunciated as national objectives in section 22 of the Constitution. At this level, these rights are, strictly speaking, not binding on the state but act as guidelines on the implementation of the justiciable rights of PWDs that are stipulated in other constitutional provisions. Third, as a class of persons that belongs to vulnerable groups, PWDs are also entitled to specific guarantees that apply only to PWDs, as stipulated in section 83 of the Constitution. In addition, the Declaration of Rights (DoRs) expounds 'justiciable' rights of PWDs in section 83, thereby giving PWDs the power to seek redress when their rights have been violated as stipulated in section 85 of the Constitution.

Fourth, where they belong to one of the stipulated vulnerable groups such as women and children, PWDs are entitled to further protection and empowerment that should be constitutionally extended to marginalised groups confronted by disadvantage at multiple levels. To this end, section 56(6) of the Constitution provides that "the state must take reasonable legislative and other measures to promote the achievement of equality and to protect or advance people or classes of people who have been disadvantaged by unfair discrimination". This provision was designed to shield affirmative action programmes that benefit women, children and PWDs against charges of unfair discrimination. Fifth, the rights of PWDs are protected in specific

[14] Constitution of Zimbabwe (1979) published as a Schedule to the Zimbabwe Constitution Order 1979 (S.I. 1979/1600 of the United Kingdom).

contexts relating to inclusion in the politics and governance of the country. Of significance to the disability discourse in Zimbabwe is also the provision for the appointment of two elected senators under section 120(1)(d) of the Constitution nominated by PWDs themselves to champion their cause.

While there is room to ask for more disability friendly legal provisions protecting and empowering PWDs, the constitutional recognition of the rights of PWDs at different levels should be considered as a significant milestone for a country that historically did not formally protect the rights of PWDs. However, before delving into the main discussion of the constitutional commitments of Zimbabwe towards addressing some of the major barriers faced by PWDs, this chapter partly reflects on prevailing international and local disability statistics as a measure of the impact of disability at a population level.

3 Models of Disability

By paying attention to some of the models of disability, our aim is to enhance the understanding of disability and to map the social but not the chronological journey taken by the concept over time. Whilst some scholars in disability studies may argue that the contrast between disability models such as the medical and social models is an outdated ideology, the reality is that the dichotomy between such models has garnered fresh attention in the human rights discourse.[15] In any case the medical and social models of disability played a key role during deliberations that led to the promulgation of the CRPD. Below we discuss the various models of disability.

3.1 *The Charity Model*

The charity model of disability regards PWDs as unfortunate and suffering victims of impairment who require sympathy and donations.[16] Persons with disabilities are considered as people who are unable to take charge of the affairs of their own lives, and hence they need assistance. Such an understanding of disability is commonly perpetuated by religious beliefs of any given society. Post-colonial Zimbabwe has been rated a Christian nation with approximately 85 per cent of the population following the Christian religion and most persons or families holding some form of church membership,[17] albeit believing in ancestors and consulting traditional healers. The Bible as the cornerstone of Christian religion and through scriptures such as *Luke* (14 vs 12-14) directs charity towards PWDs by declaring that "when you give a banquet, invite the poor, the crippled, the lame, the blind, and you will be blessed".[18] Left unmoderated such scriptures run the risk of encouraging PWDs to passively sit around as they await to be remembered by compassionate persons so as to benefit from charitable deeds.

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[15] Degener, *supra* note 12.

[16] A. Harris and S. Enfield, *Disability, Equality and Human Rights, A Training Manual for Development and Humanitarian Organisations* (Oxfam Publications in association with Action on Disability and Development, London, 2003).

[17] *See* <http://relzim.org/major-religions-zimbabwe/>.

[18] Biblica, Inc., *Holy Bible, New International Version (NIV)* (Inc Zondervan, Michigan, 2011).

The irony of the matter is that when PWDs begin to expect what may be perceived as different or increased levels of benevolence, they run the risk of being judged as ungrateful or too demanding. It is therefore not surprising that support and services are commonly designed and imposed on PWDs, with very little if any consultation with them. Furthermore, the model's focus on charity justifies the establishment of separate facilities for PWDs such as special residential institutions and schools. Such institutions perpetuate the isolation and marginalisation of PWDs in a context where services offered are usually embedded with conditions which in some instances violate the rights of PWDs. For example, without being given a choice, women with disabilities who reside in some rehabilitation institutions in Zimbabwe are required to first of all undergo tubal ligation alongside a belief that they are being protected from the 'burden' of reproduction.[19] Yet, the findings of the same research have indicated that women with various kinds of disabilities desire to have and to raise their own biological children. However, in the 18th century focus began to shift from the charity model to the medical model, albeit the fact that some communities today still perpetuate the charity model of disability.[20]

3.2 *The Medical Model*

The focus of the medical model of disability is on the biological or physical condition of a person with disability. The model therefore regards the impairment of a person as some kind of illness which should be treated in order to bring the person as close as possible to normalcy.[21] As a result, the medical model calls upon PWDs to behave in the same way that sick persons do, thereby assuming a 'sick role' of passivity. Under this model health care providers often make most of the decisions about the lives of PWDs including on issues that may not even be related to impairment such as whether a PWD should engage in an intimate partner relationship or not or whether he or she should marry.[22] The medical model has come under criticism due to its focus on 'fixing' the person, whilst the person puts his or her life on hold as health care professionals make several attempts to ensure that the person becomes 'normal'.[23] Instead of accepting impairment and encouraging people to live their full lives whilst using assistive devices such as hearing aids and wheelchairs, health care staff may in some instances undertake unnecessary corrective surgery so as to, for example, straighten or lengthen people's legs.

In Zimbabwe, it is not uncommon for PWDs and their families to seek a 'cure' for impairment by relentlessly and simultaneously consulting traditional healers,

[19] C. Peta, 'Disability Is Not Asexuality: The Sexual and Reproductive Health Experiences and Aspirations of Disabled Women in Zimbabwe', 15 *Reproductive Health Matters* (2017) pp. 10–15.
[20] Albrecht, Seelman and Bury, *supra* note 5.
[21] J. A. Winter, 'The Development of the Disability Rights Movement as a Social Problem Solver', 23:1 *Disability Studies Quarterly* (2003) pp. 33–61.
[22] A. Wilkerson, 'Disability, Sex Radicalism and Political Agency', in K. Hall (ed.), *Feminist Disability Studies* (Indiana University Press, Bloomington, 2011) pp. 194–217.
[23] Harris and Enfield, *supra* note 16.

religious prophets and contemporary health care professionals.[24] That is not to say that a person with disability does not require health care, but it is to say that framing the person's entire identity around a 'sickness' which people perpetually make efforts to get rid of may result in the person giving up hope of living a full and satisfying life which consists of a wider range of needs that go beyond health care. Even in instances where health care professionals may be aware that a person cannot be cured of impairment, they may not articulate the real diagnosis, alongside a belief that such truth would shatter the hopes of the person and his or her family members, who are presumably better off believing that one day the person will be 'normal'. In instances where it is openly accepted that the person's impairment cannot be medically corrected, the individual may be regarded by both health care staff and his or her family and community members as a 'useless' person whose life is not worth living. Contrary to such beliefs, an example is given of a woman in Kosovo who acknowledged that after undergoing several surgeries in order to lengthen her leg by three centimetres so that it would attain the same length as the other one, she felt liberated when she gave up on such treatment and accepted her legs as they were. She pursued a career in the hairdressing/beauty industry and became a leading expert in the field, who attracted customers from afar, thereby supporting her family with her own income.

The above example provides evidence of the shortcomings of the medical model of disability, and proves that the 'sick role' can only serve to deprive PWDs of the right and freedom to take charge of the affairs of their own lives. Considering that autonomy (self-governance) is a defining mark of being human, the disability rights movement condemned the medical model for perpetuating injustice against PWDs.[25] Beginning in the 1970s the movement sought to weaken the supremacy of the medical model and to replace it with the social model which the movement considered to be an appropriate model for understanding the concept of disability. The argument was that if blindness, for example, cannot be cured, then a blind person under the medical model would be a lifetime patient who hands over the control of their own life to health care professionals who will perpetually try to cure the impairment. The disability rights movement argued that the social model of disability was more liberating than oppressive and a foundation of inclusion of PWDs and not discrimination as further discussed below.

3.3 *The Social Model*

The social model has thus far made great impact in the field of disability law and studies, to the extent where it has been described as standard learning in the field.[26] The social model was formulated in the 1970s by a small group of activists from the

[24] E. Mpofu and D. A. Harley, 'Disability and Rehabilitation in Zimbabwe: Lessons and Implications for Rehabilitation Practice in the US', 68:4 *Journal of Rehabilitation* (2002) pp. 26–33.
[25] Winter, *supra* note 21.
[26] A. M. Samaha, 'What Good Is the Social Model of Disability?', *University of Chicago Law Review* (2007) p. 74.

British Union of the Physically Impaired against Segregation (UPIAS).[27] Disability activists were challenging the dominance of the medical model of disability whose focus was on the biological nature of impairments. The main proclamation of the social model was that the answer to the disability problem did not lie in the narrow medical curing of impairment but from attaining change at family, community and societal levels, given the fact that PWDs live within those social organisations.[28] Activists argued that in organising itself society pays very little attention to the needs of PWDs, thereby marginalising them and excluding them from most facets of life, as well as violating their fundamental human rights. For example if a PWD is unable to go up to the first floor of a building because of a staircase, the medical model blames the impairment and the wheelchair, whereas the social model views society as having disabled and excluded the person by creating such a barrier. Such exclusion was deemed as preventable and not as an unavoidable outcome of impairment as advanced by the medical model. The development of the social model resulted in the moving of disability from the traditional medical landscape to a new socially oriented territory, albeit in a Global Northern context.

There is need to note that the social model is an urban model of disability which was crafted and upheld by disability theorists who lived in urban settings of the Global North.[29] Whilst we embrace the emancipatory and participatory tenets of the model, we question its applicability in the Global South, and particularly in an African rural context including in Zimbabwe. The real experiences of disability in the rural Global South are characterised by among other things unpaved roads, mountains, sand, hills, rough ground and mud. The majority of PWDs live in the Global South, and they belong to an underprivileged status, which results in them having limited choices in relation to where and how they can live.[30] Thomas points at underprivileged PWDs in poor nations and argues that they are contextually disadvantaged at both economic and social levels to the extent that perhaps all they ever know about is material lack.[31] Oblivious of such perspectives, the 1976 UPIAS policy statement cited among other things staircases, outdated disability aids and kits and inflexible factory and office working patterns as some of the key challenges faced by PWDs. The barriers presented by such challenges in the Global North may be different from those that are confronted by PWDs in the Global South, particularly in African contexts; hence a critical application of the model to suit the local context is required.

However, in spite of its flaws, the social model has been progressive in directing attention from the personal to the political, in giving rise to the disability movement, discouraging a negative disability identity as well as in directing civil rights legislation

[27] K. W. Hammell, *Perspectives on Disability and Rehabilitation: Contesting Assumptions; Challenging Practice* (Elsevier Health Sciences, Edinburgh, 2006).
[28] Harris, and Enfield, *supra* note 16.
[29] Hammell, *supra* note 27.
[30] H. Avery, 'Feminist Issues in Built Environment Education', 13:1 *Journal of Art & Design Education* (1994) pp. 65–71.
[31] C. Thomas, 'Disability and Gender: Reflections on Theory and Research', 8:2–3 *Scandinavian Journal of Disability Research* (2006) pp. 177–185.

and illuminating and promoting the removal of barriers.[32] In particular, the gains of the social model worldwide have been noted in the passing of legislation which prohibits discrimination on the grounds of disability, particularly in the work place and the transport sector and in some instances in housing and education. However, such laws need both appropriate interpretation and enforcement if at all they are to be meaningful. Thomas asserts that the acknowledgement of the worldwide progress that has been made by the social model does not conceal the huge amount of work that still needs to be done if the full equality and inclusion of PWDs is to be achieved, particularly in the Global South. A model which claims to shape the experiences of PWDs and to make them masters of their own destinies should sufficiently attend to the main concerns of all PWDs,[33] including those in the Global South. However, by advocating for and supporting anti-discrimination legislation and civil rights, the social model has served as a fundamental stepping-stone to the human rights model.[34]

3.4 *The Human Rights Model*

The human rights model is not a complete departure from the social model of disability but it builds on the social model and develops it further. However, whilst the social model explains disability as a social construct along the lines of barriers, marginalisation and discrimination, the human rights model consists of the values of disability policy that acknowledge the human dignity of PWDs. The attention that is paid to rights by the human rights model is meant to ensure that PWDs gain access to the same privileges that they would otherwise have access to had they not been disabled. Some disability rights scholars state that:

> Human dignity is the anchor norm of human rights. Each individual is deemed to be of inestimable value and nobody is insignificant … The human rights model focuses on the inherent dignity of the human being and subsequently, but only if necessary, on the person's medical characteristics …[35]

The human rights model does not disregard the social model's support of anti-discrimination policy and civil rights reforms, but moving beyond the social model, the CRPD which is based on the human rights model calls for a 'paradigm shift in disability policy' which understands PWDs as people who have human rights. The CRPD is the first human rights instrument which realises that impairment should not be used as a tool for restricting or denying people their rights; persons with all kinds of disabilities are human rights holders in equality with every other citizen. However, in Zimbabwe, the fact that an international treaty has been ratified by the country

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[32] M. Oliver, 'Defining Impairment and Disability: Issues at Stake', in C. Barnes and G. Mercer (ed.), *Exploring the Divide: Illness and Disability* (The Disability Press, Leeds, 1996) pp. 29–54.
[33] M. Lloyd, 'The Politics of Disability and Feminism: Discord or Synthesis?', 35:3 *Sociology* (2011) pp. 715–728.
[34] Degener, *supra* note 12.
[35] G. Quinn and T. Degener, *Human Rights and Disability* (United Nations, New York and Geneva, 2002) p. 14.

does not automatically make it operational.[36] Any such treaty has to first of all be domesticated through the approval of Parliament, thereby integrating it into domestic law via a parliamentary act before it becomes obligatory. However, Zimbabwe thus far has not domesticated the CRPD, in spite of the fact that section 34 of the Constitution states that "the State must ensure that all international conventions, treaties and agreements to which Zimbabwe is a party are incorporated into domestic law". There is therefore an urgent need for policy makers to realign the outdated Disabled Persons Act[37] with the new Constitution, whilst at the same time taking into consideration important aspects such as the multi-dimensional and intersectional nature of the experiences of PWDs, thereby drawing on the model of intersectionality to enhance understanding

4 Intersectionality: The Need for a Multi-Layered Approach to the Rights of PWDs

The term 'intersectionality' was introduced by American law professor Kimberlé Crenshaw[38] in 1989 in an effort to evade the challenges that are embedded in identity politics. Using legal cases such as that of *Degraffenreid v. General Motors,* in which five black women sued General Motors on the grounds of gender and race discrimination, Crenshaw coined the term intersectionality to illuminate and address the problem of discrimination laws which regarded gender and race as separate social life attributes. She argued that when African American women or other women of colour experienced multifaceted or intersecting discrimination, there were no laws that were available to come to their defence. Justifying why she coined the concept of intersectionality, Crenshaw, in a personal interview with Adewunmi said:

> The particular challenge in the law was one that was grounded in the fact that anti-discrimination law looks at race and gender separately … The consequence of that is when African American women or any other women of colour experience either compound or overlapping discrimination, the law initially just was not there to come to their defence.[39]

The thinking of the courts was that it was impossible for black women to prove discrimination on the grounds of gender because not all women were discriminated against, and black women could also not prove racial discrimination because not all black people were discriminated against. A multi-layered discrimination suit would in the eyes of the courts result in preferential treatment for historically marginalised individuals or groups of persons. Crenshaw brought forth the intersectional model as a tool for addressing that which the Courts were not seeing.

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[36] Mandipa and Manyatera, *supra* note 13.
[37] Government of Zimbabwe, Disabled Persons Act, Chapter 17:01 (Government Printers, Harare, 1996).
[38] K. Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics', *The University of Chicago Legal Forum* (1989) pp. 138–167.
[39] B. Adewunmi, 'Kimberlé Crenshaw on intersectionality: "I wanted to come up with an everyday metaphor that anyone could use"', *NewStatesman*, 2 April 2014, available at: <https://www.newstatesman.com/lifestyle/2014/04/kimberl-crenshaw-intersectionality-i-wanted-come-everyday-metaphor-anyone-could>.

Intersectionality considers the identities and experiences of people without assigning them to permanent categories.[40] Such classifications are metaphorically described by Sims[41] as the placing of people in specific 'boxes', when in fact most people are reluctant to be put in 'boxes' or to check 'boxes' to denote their identity. Before the introduction of the concept of intersectionality, scholars had been trying to ascertain which among the various social attributes such as class, sex or gender was more significant than the other.[42] As a result, it was not uncommon to find that the fight against one manifestation of a social life attribute would worsen the disunions in the others. It therefore means that if we focus our attention on fighting injustices of disability on their own, other problems may be arising in other attributes such as gender among the same PWDs. The idea is to acknowledge the intersectional nature of various identity markers in framing the oppression of PWDs and dealing with them at once. As stated by Kimberley Crenshaw, "if you are standing in the path of multiple forms of exclusion, you are likely to get hit by both".[43]

Section 56(3) of the Constitution stipulates that every person has the right not to be treated in an unfairly discriminatory manner on such grounds as "language, … sex, gender, marital status, age, pregnancy, disability …". The clause acknowledges different identity markers, but it does not point or at least give a hint to the intersectional nature of such attributes. In aligning the DPA with the Constitution, different layers of identity should not be treated as stand-alone attributes, but the significance of the intersectional nature of various identity markers in framing the life worlds of PWDs needs to be acknowledged if disability policy is to effectively promote the realisation of their human rights. The reality is that disability does not operate in isolation nor does gender; hence an understanding of the intersectional, multi-layered and multidimensional nature of various identity markers in creating the oppression of PWDs is likely to result in disability policies that contribute to making a meaningful difference in the lives of PWDs. Another example is section 63(i) of the Constitution which states that every person has the right to participate in the cultural life of their choice. Whilst this is a noble right that can be drawn to a disability and human rights context, there is need for policy makers to acknowledge that culture does not function in isolation either, but it intersects with other identity markers such as disability, age, gender and class to frame the life worlds of PWDs.

The CRPD acknowledges different layers of identity such as disabled women (Article 6) and disabled children (Article 7). However, it is striking to note that primary sections that pertain to disability in the Zimbabwean Constitution take a human rights approach which foregrounds disability and treats it as a standalone social life attribute, thereby turning a blind eye to the intersection of disability with other identity

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[40] J. Simpson, *Everyone Belongs: A Toolkit for Applying Intersectionality. Embracing the Complexities of Women's Lives Project*, Canadian Research Institute for the Advancement of Women (CRIAW), Ontario, 2009.

[41] C. L. Sims, *Faceted Identities: Extending Intersectionality*, 2009, available at: <https://www.academia.edu/195897/ Faceted_Identities_Extending_Intersectionality>.

[42] J. Beard, 'Perspectives on Intersectionality: Race, Gender and Class in Interaction', 3:2 *Southern African Feminist Review* (1999) p. 19.

[43] Adewunmi, *supra* note 39.

markers. For example, section 22 of the Constitution is gender blind, yet men and women do not experience disability in similar ways; such a thrust resonates with the current ineffective DPA which does not pay attention to gender. By eliminating the practice of assigning experiences to exclusively individual identity categories, intersectionality seeks to broaden and enrich social justice policies and interventions.[44] The objective is to promote possible collective action in an effort to bring those who are at the margins to the centre in a scenario where: "When they enter, we all enter …".[45]

The other function of intersectionality is that it deals with the notion of difference.[46] Global North writings perceive PWDs in the Global South as a homogenous group and make extensive generalisations about such persons.[47] An inability to examine difference in relation to the complex intersections of various social life attributes in different contexts runs the risk of rendering disability laws and disability studies irrelevant to oppressed and marginalised groups in other contexts. Different social life attributes intersect in diverse ways in divergent contexts to influence the experiences of disability of affected persons and the realisation and non-realisation of their human rights. The reality is that the lives of Global South PWDs, including those in African countries, have been intensely affected by colonisation, and a presence of the colonial legacy in the lives of such persons has continued to prevail.[48] An analysis of the contextual intersection of different social life attributes is therefore necessary because various identity markers do not create similar kinds of marginalisation, discrimination and oppression for all PWDs in all places in the world.

Human rights are framed around Western ideologies of individualism; hence their uncritical application in African contexts runs the risk of presenting an incomplete picture to the world. As such, paying attention to the political, economic and social contexts within which the intersectional experiences of disability take place is beneficial. For example, the colonial processes of powerful nations such as the USA, England, Portugal and Spain left a trail of dependency, poverty and disability in Global South countries. Whilst for example disabling diseases such as polio have been eliminated in nations of the Global North, such diseases have remained prevalent in some Global South countries, where the impairing outcome of sub-standard drugs that are received from powerful nations and distributed among locals have also been reported. Furthermore, the majority of people in colonised African countries and in other developing nations are unable to afford HIV drugs and assistive devices, in spite of the fact that PWDs who live in the Global South are expected to buy services and goods that come from powerful nations of the Global North. Disability is therefore a part of social, economic and historical settings, and in some instances it is acquired under "oppressive conditions of poverty, economic

[44] K. W. Crenshaw and L. C. Harris, 'A Primer on Intersectionality Booklet', in *African American Policy Forum*, Vassar College, Columbia Law School, Poughkeepsie, NY, 2009.
[45] Crenshaw, *supra* note 38.
[46] S. A. Shields, 'Gender: An intersectionality perspective. 59 *Sex Roles* (2008) pp. 301–311.
[47] H. Meekosha, 'Decolonising Disability: Thinking and Acting Globally', 26:6 *Disability and Society* (2011) pp. 667–682.
[48] M. Holmes, *What Is Gender? Sociological Approaches* (Sage Publications Ltd., London, 2007), and M. Walters, *Feminism: A Very Short Introduction* (Oxford University Press, Oxford, 2005)

exploitation, police brutality, neo-colonial violence, and lack of access to adequate health care and education".[49] Ratifying international human rights treaties is important, but paying attention to conditions in the local context is equally significant.

In the context of the Global South, where national economies are characterised with economic poverty, the identity markers of disability and poverty are closely interrelated in framing the experiences of disability of the affected persons. As poverty intersects with other identity markers, it becomes difficult for African citizens to realise their right to basic provisions such as water, foodstuff, health facilities and schooling.[50] There is widespread agreement that one must always take into consideration the multiple dimensions of oppression, least one risks assuming that all disabled persons are white or people of colour are male or that every other person is heterosexual.[51] As such, different settings breed different challenges and responses even within the same broad band of issues.[52] We therefore in this chapter argue that the facilitation of the voice of PWDs in Zimbabwe in research studies which form part of efforts to align the new Constitution with the provisions of the CRPD and the DPA is likely to result in the formulation of realistic policies that facilitate the realisation of the human rights of PWDs based on the contextual findings of such studies.

Just like any other theoretical concept, intersectionality has been criticised for its imprecision and open-endedness, which allows every other identity marker to be included, depending on relevance in each setting.[53] Some scholars have argued that the model ought to have a clear set of defined boundaries in relation to what social life attributes it should encompass and that which it should not to avoid the 'confusion' that it may create. However, we concur with Davis that the ambiguity and integral open-endedness of intersectionality instigates an endless discovery process which yields novel, broader and significant insights. In any case intersectionality does not yield a normative straitjacket for monitoring human rights in search of the 'correct line', but it encourages a discovery process of relevant identity markers in any given framework. The human rights model considers different layers of identity; hence in the context of disability and human rights, there is need to acknowledge that PWDs are not a homogenous group, but they are for example men and women or children and adults.[54] Whilst there are many more identity markers to be considered, the reality is that the issue of intersectionality of discrimination law in international human rights has not yet been fully addressed.[55] Perhaps, the initial

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[49] N. Erevelles, 'The Color of Violence: Reflecting on Gender, Race, and Disability', in Hall, *supra* note 22, pp. 118–135.
[50] H. Jauch, *How the IMF-World Bank and Structural Adjustment Program (SAP) Destroyed Africa*, 2012, available at: <http://www.proshareng.com/articles/2428>.
[51] B. J. Risman, 'Gender as a Social Structure: Theory Wrestling with Activism', 18:4 *Gender and Society* (2004) pp. 429–450.
[52] S. V. Gunjate and M. U. Shivaj, *Post-Colonial Feminist Theory*, Proceedings of national seminar on postmodern literary theory and literature, Nanded, 2012.
[53] K. Davis, Intersectionality as Buzzword: A Sociology of Science Perspective on What Makes a Feminist Theory Successful', 9:1 *Feminist Theory* (2008) pp. 67–85.
[54] Degener, *supra* note 12.
[55] *Ibid*.

use of the intersectional model to address racial and gender inequalities in work place environments resulted in its neglect of issues such as disability. However, the notation of intersectionality permits a multifaceted analysis of disabled persons' oppressions and ultimately the promotion of their human rights.

We reiterate the fact that intersectionality is not an additive, one-plus-one approach which adds one social life attribute to the other.[56] In this chapter, we acknowledge the simultaneous interaction of the various social life attributes in shaping the oppression of PWDs. However, the additional but intersecting social life attributes are made possible by what critiques call the ambiguity and open-endedness of intersectionality, and yet it is such vagueness and infiniteness that permits the exploration of an endless collection of intersecting modes of difference. Through a discovery process, intersectionality brings an awareness of the reality that the experiences of PWDs are more complex and contradictory. Defining a person solely on the grounds of disability means that the various social life attributes that intersect to frame the life worlds of PWDs are marginalised, to the detriment of the realisation of their human rights. However, that is not to say that all social attributes can be included in every analysis, but additional social life attributes should continue to be explored as they arise. In this chapter we use the intersectional model to illustrate the need for a multi-layered approach to the rights of PWDs.

5 State Measures to Be Taken to Promote the Rights of PWDs

Synonymous with the CRPD, the principles of equality and respect for human rights for all people forms the foundation of the Constitution of Zimbabwe. Section 83 of the Constitution articulates the commitment of the state to addressing some of the major barriers that result in PWDs not being able to be self-reliant, to live with their families, to be protected from exploitation and abuse, to have access to medical treatment and to education. Such provisions represent the state's commitment to implementing some of the provisions of the CRPD such as: Article 16 on freedom from exploitation, violence and abuse, Article 23 on respect for home and the family, Article 24 on education and Article 25 on health. In this section we discuss measures that need to be taken by the state to promote the rights of PWDs in relation to the provisions of section 83 of the Constitution, albeit referencing the CRPD at a broader level.

5.1 *Measures to Enable PWDs to Become Self-Reliant*

The term self-reliance was coined by American philosopher Ralph Waldo Emerson in 1841, in one of his essays in which he encouraged people to think for themselves and to be independent, instead of passively accepting the ideas of other people and

[56] Shields, *supra* note 46.

being dependent.[57] In 2001, the United Nations High Commission for Refugees[58] delineates self-reliance as "the social and economic ability of an individual, a household or a community to meet essential needs in a sustainable manner and with dignity … developing and strengthening livelihoods of persons of concern, and reducing their vulnerability and long-term reliance on humanitarian/external assistance". This definition places focus on three important indicators of 'self-reliance', namely the individual's social and economic stability, the sustainability of the activities from which this stability is derived and the need to reduce or even eliminate reliance on external support. Such an understanding of self-reliance discourages dependency on outside help, thereby bringing consciousness to the ideology and practice of drawing local natural resources to advance the cause of self-reliance in both a social and economic sense.

At the regional level, self-reliance for PWDs is referred to in the African Charter on the Rights and Welfare of the Child. Article 13(1) thereof provides for every 'disabled' child's "right to special measures of protection … under conditions which ensure his dignity, promote his self-reliance and active participation in the community". The state's duty to promote the self-reliance of PWDs should be read together with the founding values and principles of the nation state as well as the national objectives protected in Chapter 2 of the Constitution. For instance, self-reliance can be viewed as both a goal and a result of such founding values and principles as the "recognition of the inherent dignity and worth of each human being", the "recognition of the equality of all human beings" and "good governance".[59] Governance measures that are designed to promote self-reliance also inherently promote human dignity, equality and freedom – the key values of the new constitutional dispensation. These principles lie at the heart of the new constitutional order and, together with measures that promote self-reliance, create the necessary preconditions for the achievement of the full potential of PWDs. In addition, the principles of good governance include, among other things, "the equitable sharing of natural resources, including land" as well as "due respect for vested rights".[60] To be 'equitable', the (re)distribution of natural resources should address the specific needs and challenges that confront PWDs when it comes to both ownership and use of natural resources. This implies that the state bears the obligation to enhance the capacity of PWDs to ensure that they make optimal use of the resources that are allocated to them.

As can be gleaned from section 22 of the Constitution, the state's duty to ensure self-reliance is closely related to the national objectives protected in Chapter 2 of the Constitution. For instance, state institutions and agencies of government have the obligation to recognise the rights of PWDs, in particular their right to be treated with

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[57] M. Dora and H. Amzad, *Principles for Self-Reliance and Sustainability: Case Study of Bangladesh*, Proceedings of the Anti-Poverty Academic Conference with International Participation, Institute for Sustainability and Technology Policy, Murdoch University, Perth, 2006.
65 UNHCR policy document on the community development approach: "Reinforcing a Community Development Approach" was endorsed by the Executive Committee to the High Commissioner's Programme in February 2001, EC/51/SC/CRP.
[59] *See* section 3(1)(e), (f) and (g) of the Constitution.
[60] *See* section 3(2)(j) of the Constitution.

respect and dignity.[61] For PWDs to have a sense of self-esteem and an appreciation of the value that society accords to them, PWDs must be empowered to lead independent and fulfilling lives. This claim is grounded on the constitutional command that the state and all agencies of government are legally required, within the limits of the resources available to them, to 'assist' PWDs "to achieve their full potential and to minimise the disadvantages suffered by them".[62] These provisions speak to the need to develop disability-friendly laws and policies that are designed to offer preferential treatment to PWDs to ensure that they lead healthy, prosperous and fulfilling lives. To this end, the Disabled Persons Act (DPA) stipulates that one of the functions of the National Disability Board is "to formulate and develop measures and policies designed to enable disabled persons, so far as possible, to lead independent lives".[63] Accordingly, there are synergies and overlaps between the DPA and the Constitution, especially in the context of the need to create legal and policy frameworks that empower PWDs to contribute towards personal, social and economic development.

In terms of the Mental Health Act,[64] there is also slight mention of treatment and training of patients with intellectual disabilities, but the context does not seem to refer to training for purposes of self-reliance. For instance, section 61(1) of the Act permits mental health institutions designated hospitals and nursing-homes to "receive, accommodate and treat or train a person who is intellectually handicapped with behavioural problems and is likely to benefit from such treatment or training but, on account of his intellectual handicap, is unfit to be received and treated as an informal patient". A further reading of the relevant provisions dispel the idea that the training referred to is meant to enable mental health patients to lead self-reliant lives. It is noteworthy that this is a gap that must be addressed by the adoption of laws and policies that directly speak to the need for PWDs to be rehabilitated in a manner that gives them a fair chance to lead, at the very least, a minimally descent life.

PWDs should be consciously included in self-reliance projects that revolve around natural resources, for example the use of bamboos in the Binga district to weave baskets for both the local and export markets. Some people hold the mythical belief that self-reliance can only be attained by rich people, but the reality is that in spite of limited resources self-reliant individuals and families can use whatever resources they have effectively and efficiently to uplift their own standards of living and those of other human beings. There is no need for the state to be concerned about creating new structures to promote the self-reliance of PWDs; the state should use existing government structures which transcend to district and ward levels to steer a spirit of independence.

The idea behind self-reliance is to encourage citizens to foster the essence of solidarity in which non-disabled people and PWDs work together and learn to use their own initiative and local resources to improve their well-being instead of

[61] Section 22(1) of the Constitution.
[62] Section 22(2) of the Constitution.
[63] Section 5(1)(b)(ii) of the Disabled Persons Act.
[64] Chapter 15:12 of the Mental Health Act.

passively waiting for the government or donor to deliver the goods. In any case self-help and peer support are acknowledged as primary areas of promoting self-reliance.[65] That is not to say external assistance should be rejected, but it is to say that a collective self-reliance approach, which is embedded in the mainstream community development agenda, encourages PWDs and their families to look inwards, to be creative and to assist donors to view the world through their own indigenous lens. Such a scenario is not possible if PWDs are inactive and voiceless; too much and prolonged charity perpetuates laziness and weakens the ability of PWDs to develop themselves for self-reliance. Yet, apart from cases of severe disability, there is no type of disability which deters a person from being involved in activities that improve their own standard of living.[66] Whilst some people may prefer to continue giving charity so as to further their own pride, the reality is that perpetual charitable deeds serve to tell PWDs that they are not capable beings. Teaching or training PWDs in both urban and rural areas to adopt self-reliance as a new way of life is likely to go a long way in contributing towards the attainment of their right to self-reliance.

Section 83(a) of the Constitution of Zimbabwe directs that PWDs should be empowered so that they become self-reliant; the question then is: What is the starting point? It is prudent for the state to first of all know what it is dealing with. Instead of introducing policy without consulting stakeholders, the first port of call should be the commissioning of a survey which facilitates the voice of PWDs and those they interact with, in both rural and urban areas, so as to determine the existing state of their experiences, concerns and aspirations regarding self-reliance. The practice of facilitating voice empowers people who might otherwise have remained silent to be heard. Voice is the right to have one's experiences and perspectives available to others, to participate in the construction of the self and to decide how to represent that self to others.[67] Such an approach should be incorporated in disability policy so that periodic surveys are conducted (maybe every four years) in order for the state to keep abreast with among other things the self-reliance status of PWDs. Determining what works and what does not work and responding accordingly is essential, if at all Zimbabwe is to get anywhere close to attaining equal rights for all citizens including PWDs.

A study carried out by Stewart and Bhagwanjee[68] to determine the policy requirements for disability in post-apartheid South Africa revealed that a properly designed participatory research approach can unlock the potential of PWDs for self-reliance and offer deep insights into the ways that opportunities for self-reliance and empowerment of PWDs can be created. In any case, Article 21 of the CRPD in part directs freedom of expression and opinion, including the freedom of PWDs to impart

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[65] *See Ibid*.
[66] K. Ghebrehiwet, S*elf-Motive of the Disabled: Key to Self-Reliance Part I* (2013).
[67] C. E. Ashby, 'Whose "Voice" Is It Anyway?: Giving Voice and Qualitative Research Involving Individuals That Type to Communicate', 31:4 *Disability Studies Quarterly* (2011).
[68] R. Stewart and A. Bhagwanjee, 'Promoting Group Empowerment and Self-Reliance Through Participatory Research: A Case Study of People with Physical Disability', 21:7 *Disability and Rehabilitation* (199) pp. 338–345.

information and ideas on an equal basis with others. However, most interventions that concern PWDs are planned and implemented with little or nil consultation of the relevant persons, alongside varied assumptions which include the belief that PWDs have no voice and they are unable to represent themselves in national dialogue, to assert their rights or to contribute to policy formulation. Such misconceptions are reinforced if the two senators who are elected under section 120(1)(d) of the Constitution and nominated by PWDs themselves are passive, thereby rendering themselves 'window dressers'. Considering that PWDs have historically been marginalised, the state should make efforts to equip such senators with adequate knowledge and skills to enable them to effectively fulfil their mandate.

However, drawing from studies undertaken in other parts of the world,[69] there is evidence that PWDs may gain self-reliance through formal employment; hence the state should consider imposing on employers a legal responsibility to employ PWDs. Such responsibility should not only mean preferential treatment of PWDs, but it should allow employers to terminate the contracts of PWDs who fail to perform tasks as provided in their job descriptions or who violate the code of conduct and for reasons that are not related to disability. Article 27 of the CRPD directs state parties to recognise the right of PWDs to work on an equal basis with others and to create a labour market and work environment which is open, inclusive and accessible to PWDs. Section 22(3)(a) of the Constitution directs the development of programmes for PWDs, especially work programmes consistent with their capabilities and acceptable to them or their legal representatives. However, an alignment of the Constitution and the DPA is urgently required because the DPA prohibits discrimination of PWDs in the workplace, but it does not award PWDs the right to work, perhaps because the Act was promulgated before both the CRPD and the current Constitution. The employment of PWDs in accordance with their capabilities as highlighted in the Constitution needs to be upheld. Failure to do that may result in the situation that has been noted in South Africa,[70] where PWDs reportedly do not get jobs which they are qualified to do but instead are commonly employed as receptionists, etc. by companies that take a cosmetic approach to employing PWDs.

There is need for the state to formulate a disability policy which promotes the education and training of PWDs so as to prepare them to enter the world of work and to take measures to ensure that PWDs have access to job opportunities such as implementing the quota system or levy system. The International Labour Organisation is a significant and strategic resource centre for guidelines.[71] The practice of quota systems which has been prevalent in Global North countries and in South Africa for years directs both the public and private sector to employ a particular minimum number of PWDs, which ranges from between two to six per cent

[69] P. Thornton, *Employment Quotas, Levies And National Rehabilitation Funds For Persons With Disabilities: Pointers For Policy And Practice Report*, prepared on behalf of the International Labour Office, 1998, and P. K. S. Wong, *Being Different: Understanding People with Disabilities*, Lecture 11 Employment, 2012.

[70] ENCA interview with deputy minister on employment of persons with disabilities in the workplace, Department of Women, Children and People with Disabilities.

[71] Thornton, *supra* note 69.

of the eligible workforce depending on the size of the organisation or industrial sector. Employers who do not abide by the law can be fined for contempt and the introduction of the levy system can also go a long way in promoting the rights of PWDs to employment. Levy systems allow employers to deposit a certain amount of funds to a special fund in lieu of employing the target proportion of PWDs when the possibility of directly employing PWDs has been exhausted or in cases where it is a legitimate choice. Such levies can then be deposited into a special rehabilitation fund which is then used to advance the cause of self-reliance of PWDs which may include state funded education and vocational training programmes.

However, imposing legislation on the quota or levy system without proper consultation of both PWDs and employers is futile. As noted elsewhere, many employers are not willing to recruit PWDs because they lack knowledge about what disability is and how PWDs can be integrated into the mainstream workforce. A study carried out in South Africa in 2011 revealed that only 1.8 per cent of PWDs were formally employed in the public sector, thereby falling short of the two per cent target that is directed by national policy.[72] Employers may worry that something may go wrong with the employ of PWDs, or such employment may negatively affect the performance of their businesses or other employees may not want to work with PWDs. Yet, research has indicated that the employment of PWDs may offer a diversity of skills and increase the morale of the mainstream workforce and also enable PWDs to develop goal-setting and persistence skills.[73] A South African study revealed that PWDs are easy to train because of their positive attitude towards work, and managers of PWDs become more sensitive and perform better as they learn to make adaptations for PWDs.[74] There is therefore need for the state to raise awareness among employers so as to challenge stereotypes about PWDs and influence the development of company policies that favour the inclusion of PWDs.

By removing barriers such as physical infrastructure which is not disability friendly and learning about disability and addressing negative attitudes, stereotypes and non-supportive behaviour towards PWDs, employers will be moving towards the social and human rights models of disability. Stories have been told in South Africa that some employers are so ignorant of disability issues that they phone the Ministry of Labour just to ask what disability is. However, borrowing practice from South Africa, the government of Zimbabwe should develop technical guidelines on employing PWDs which offer practical assistance to both employees and employers as well as trade unions on the implementation of non-discriminatory practices in the workplace. In addition, the state should put in place a professional and experienced support service or reference point in each province or district for both employers and PWDs that can help to solve problems when they arise. However, the reality is that Zimbabwe, at the time of writing, is a low income country which is currently experiencing economic difficulties which include a high unemployment rate. The

[72] P. A. Maja *et al.*, 'Employing People with Disabilities in South Africa', 14:1 *South African Journal of Occupational Therapy* (2011).
[73] Wong, *supra* note 69.
[74] Brand South Africa, *Employing the Disabled: Guidelines*, 2003, available at: <https://www.brandsouthafrica.com/governance /services/rights/disabled-employment_041103>.

policy of promoting self-reliance should therefore not just be centred on formal employment, but it should also include the development of self-help programmes as further discussed below.

At face value, some people may mistrust and dismiss the concept of self-reliance as an unrealistic and naïve development approach which is not worth implementing, particularly in areas where both non-disabled people and PWDs are accustomed to viewing PWDs as incapable persons or objects of charity (charity model) or as sick persons (medical model). It therefore follows that a human rights approach which seeks to promote the rights of PWDs to self-reliance but which does not address such negative attitudes will not yield much. There is need for the state to use existing government structures to develop and implement a disability policy which directs periodic disability awareness raising programmes which transcend to district and ward levels and which include both community leaders and community members in all the ten provinces of Zimbabwe so as to counter such misconceptions. The approach is likely to move disability from the charity and medical models to the social and human rights models. In any case the social model calls for change at family, community and societal levels within which PWDs live. Furthermore, Article 8 of the CRPD in part directs state parties "to promote awareness of the capabilities and contributions of persons with disabilities". Awareness raising is important because human rights policy may say one thing, but on the ground society may still create barriers for the inclusion of PWDs due to ignorance. For example, stories have been told in Manicaland of healthy and capable deaf persons who are isolated from the food for work programmes at community levels on the grounds that they are disabled.[75]

By raising awareness on disability issues, the state is likely to help both non-disabled and disabled citizens to unlearn the idea that PWDs are sick and helpless recipients of handouts and foster cooperation between non-disabled persons and PWDs who both have equal rights to undo the present structures of injustice. In any case self-reliance is not about economic issues alone but the ability to network and to build alliances, a key primary strategy of sharing ideas and supporting PWDs who have historically been marginalised. PWDs who are self-reliant do not only assist themselves, but they also reduce their expectations and dependency on government support, and as noted in Eritrea they can also make a significant contribution to the mainstream development agenda,[76] not as receivers of charity but as income earners and tax payers. The idea is for the state to make concerted efforts to move the provisions of the Constitution from paper to the real world to empower PWDs to be self-reliant. Nevertheless, in aligning the DPA with the Constitution, there is need to pay attention to the intersection of various identity markers such as disability, culture, poverty and gender in creating the marginalisation of PWDs and in undermining their right to self-reliance so as to develop appropriate intervention strategies.

[75] C. Peta, *Discrimination and Marginalization of PWDs in Zimbabwe*, ongoing study.
[76] Ghebrehiwet, *supra* note 66.

From a gender point of view, both men and women with disabilities face challenges in the economic arena, but international research has indicated that the situation is worse for women.[77] In Zimbabwe, traditional practices which view men as breadwinners as compared to women perpetuate the discrimination of women with disabilities in accessing education, vocational training, employment and self-help programmes as disability, gender and culture intersect to frame their oppression, thereby setting them up on a highway to poverty. Recent research has indicated that disability adds an additional layer of disadvantage for women with disability and their children as some men are reluctant to provide for children who have disabled mothers.[78] Such a scenario is common among mothers who acquire disability in the course of their marriages, with children also despised and stigmatised for having mothers with disabilities. When things go wrong in relationships, custody of the children often rests with women, including women with disability, resulting in them assuming greater responsibility alongside a lower or zero income.

The phrase 'feminisation of poverty' was invented by the United Nations to refer to an apparent trend in which an increasing number of those living in poverty are women.[79] We therefore call upon the state to conduct a gendered analysis of the strategies that women with disability employ in dealing with the diversity of patriarchy in so far as fending for themselves and raising their children is concerned in settings where fathers are absent. Ignoring the intersection of gender, poverty and culture in promoting the rights of women with disabilities to become self-reliant means neglecting the concerns of a large part of the population of PWDs, especially in light of the fact that more than half of PWDs who live in developing countries are women.[80] A gendered approach in the context of disability and human rights is required if the different ways in which men and women with disabilities experience poverty and disability are to be illuminated as well as the ways in which gendered self-reliance can be promoted among PWDs.

5.2 *Measures to Enable PWDs to Live with Their Families and Participate in Social, Creative or Recreational Activities*

The state also has the constitutional duty to adopt "measures to enable PWDs to live with their families and participate in social, creative or recreational activities".[81] The above provision is in part aligned to Article 19 of the CRPD, albeit not addressing the contemporary issue of independent living which is discussed later on in this section. Enabling PWDs to live with their families is a noble practice, but a proper definition of family needs to be clearly articulated, perhaps in the process of aligning the DPA with the Constitution. Whilst the concept of family is regarded as universal,

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[77] E. Boylan, *Women and Disability* (Zed Books, London, 1991).
[78] C. Peta, 'The 'Sacred" Institution of Marriage: The Case of Disabled Women in Zimbabwe', 35:1 *Sexuality and Disability* (2016) pp. 45–58.
[79] Holmes, *supra* note 48.
[80] L. Hershey, 'Women with Disabilities, Health, Reproduction and Sexuality', in *International Encyclopaedia of Women: Global Women's Issues and Knowledge*, four volumes (Routledge Press, 2000), also available at <http://cripcommentary.com/women.html>.
[81] Section 83(1)(b) of the Constitution.

given that it is found in all societies of the world, adopting a Global North definition of family and applying it in Zimbabwe may be irrelevant to the promotion of the human rights of PWDs in the local context because such a Global North definition may include same sex parents with adopted children, whereas same sex marriages are prohibited by the Constitution of Zimbabwe. Could living with a family mean PWDs that live perpetually (from birth to old age) with their parents because of severe disability or PWDs who have their own families (they are married and they have children, or they are single parenting or they are cohabiting and they have children)? Could family also refer to child headed and female headed households, kingship relations or the small house concept that has gained prominence in post-colonial Zimbabwe? There are no visible Zimbabwean studies thus far that have drawn conclusions about appropriate living arrangements for PWDs, and studies undertaken in the Global North have also not been conclusive about which type of living is most suitable for PWDs. If Section 83(b) of the Constitution is not backed by findings of contextual research, the Constitution runs the risk of formulating inappropriate disability policy and implementing intervention strategies which PWDs may not find appropriate.

The notion of enabling PWDs to live with their families may be positive in the sense that it seeks to 'move' PWDs from the restrictions of institutional life to family life, but the provision takes a narrow approach, which fails to holistically adopt the contemporary concept of living independently as directed by Article 19 of the CRPD. The CRPD in Article 19(a) directs state parties to ensure that PWDS "have the opportunity to choose their place of residence and where and with whom they live on an equal basis with others and are not obliged to live in a particular living arrangement". By denying PWDs a choice, the Constitution assumes that PWDs are a homogenous group, and they all desire to live with their families, yet under independent living PWDs should simply have civil rights, options and control over choices in their own lives as do people without disabilities.[82] Research undertaken in the US revealed that some PWDs may actually prefer to live in disability institutions as opposed to living with their families, thereby separating themselves from the eyes of the oppressor, in other words the eyes of non-disabled people who stigmatise them.[83] In addition, the traditional conceptualisation of disability which associates disability with spirits, taboos and witchcraft may result in some husbands abandoning their disabled wives.[84] As culture, gender and disability intersect to frame the oppression of women with disabilities, such women may prefer to live in institutions than to re-join their maiden families. Institutional life may allow them to hold on to some form of independent living as well as avoid the stigma of both disability and divorce, in a Zimbabwean context where marriage is regarded as a highly respectable achievement, particularly among women.

[82] G. MacDonald and M. Oxford, *Independent Living History A Brief History of the Independent Living Movement*, available at: <https://www.accessliving.org/Independent-Living-History>.
[83] R. Garland-Thomson, *Extraordinary Bodies: Figuring Physical disability in American Culture and Literature* (Columbia University Press, New York, 1997).
[84] Mpofu and Harley, *supra* note 24.

The concept of independent living began in the US in the 1970s, and it began to grow as a worldwide movement of PWDs advocating for self-determination, self-respect and equal opportunities and rights to pursue a course of action and having the freedom to fail and to learn from one's own failures in the same way that non-disabled people do.[85] A national survey which facilitates the voice of PWDs who live in both institutions and in homes would therefore go a long way in informing disability policy and practice in Zimbabwe. There is need to hear the voice of parents of children with disabilities, and in cases where such children are able to share their experiences and views regarding living arrangements, their direct voice should also be heard. That is important because decisions "claimed to be made in the interests of children often reflect what parents want of their children and may not necessarily be in the interests of children".[86] In any case Article 7(3) of the CRPD directs state parties to "ensure that children with disabilities have the right to express their views freely on all matters affecting them, their views being given due weight in accordance with their age and maturity, on an equal basis with other children, and to be provided with disability and age-appropriate assistance to realize that right". However, such an approach is not meant to undermine parental rights to decision making concerning their children, but it is to uphold the right of children to express themselves on issues that affect their lives; the views of both parents and children should therefore be taken into consideration.

A blanket approach which seeks to enable PWDs to live with their families as a universal remedy leaves a lot to be desired; through research the state needs to establish the functionality of family structures and the extent to which such structures address the concerns of PWDs. The reality is that misconceptions about disability result in some families loathing the practice of living with PWDs, particularly those with psychosocial impairments. That is not to say that living with their families is not fulfilling particularly in cases where PWDs live with their spouses and children, but it is to say that one of Zimbabwe's predominant vernaculars, Shona, labels a disabled person as '*chirema*' translated in English to mean a 'heavy object'. Such delineation means that disability is portrayed as a heavy or very difficult condition to carry; hence PWDs may find themselves experiencing persecution, stigma and discrimination within their own families as disability and culture intersect to frame their oppression. To escape agony, some PWDs may retreat to the streets or informal legal settlements and turn to begging as a livelihood source thereby running the risk of being abused. On the other hand, a charity approach to disability may result in some family members opting to live with PWDs alongside a belief that such a practice attracts God's blessings. Disability in Zimbabwe is therefore characterised by what Kisanji[87] calls a "concoction of both persecution and acceptance". In aligning the DPA with the Constitution, the state needs to realistically consider the intersection of culture, gender, age and disability if it is to effectively promote the right of PWDs to

[85] MacDonald and Oxford, *supra* note 82.
[86] A. Moyo, 'Reconceptualising the "Paramountcy Principle": Beyond the Individualistic Construction of the Best Interests of the Child', 12:1 *African Human Rights Law Journal* (2012) pp. 142–177.
[87] J. Kisanji, Attitudes and Beliefs About Disability in Tanzania', in B. O'Toole and R. McConkey (eds.), *Innovations in Developing Countries for People with Disabilities* (1995) pp. 51–70.

make choices about living arrangements, as well as pay particular attention to the needs and concerns of both adults and children with disabilities.

Children with disabilities may live with their families until adulthood, but depending on the nature of their disabilities and just like every other young adult, they may also want to move out of the family home and live on their own. The government of Zimbabwe may want to borrow the concept of assisted living residences from the US, under which homes are established for about seven PWDs within a given residential centre.[88] For a particular fee, the home could provide not only housing but nutritious meals and other activities such as educational, sporting and entertainment activities as well as ensure the provision of transport to health care centres. The state should consider issuing licenses to families who may wish to operate such homes within their communities or business partners that may come together to establish such homes or development agencies who may set up such homes for non-profit. In addition, the possibility of providing state accommodation for groups of PWDs in given communities needs to be explored. Some people may argue that such an arrangement is tantamount to perpetuating the isolation of PWDs by assigning them to special residential homes. But we argue that the residential homes suggested in this chapter are different from the archaic medical homes such as restricted mental institutions, and they should be supported by social services that enable PWDs to live in communities of their choice which allow interaction of non-disabled persons and PWDs and promote social, creative and recreational activities.

State designed disability awareness raising programmes should also be able to point out what PWDs or their families should look out for when they are searching for a disability residence, least they run the risk of being abused by unscrupulous business persons; the full care, security and training offered by the residence to PWDs is important. PWDs ought to articulate their expectations, look out for potential problems of abuse and negligence and check with other residents as well as probe the administrator for information. Once a home has been selected, paying regular visits to the home before making a commitment is important so as to look out for cleanliness and levels of care and attentiveness given to residents. Homes should not just offer leisure and social interaction, but the homes should focus on building communities where PWDs can learn, grow and reach their full potential.[89] Under the supervision of family and staff, residents should be involved in planning their lives, setting goals, therapy, skills training, etc. Daily activities should move PWDs towards attaining their set goals. Skills training is meant to enable PWDs to not be dependent on other people for their daily routines.

To enable social, creative or recreational activities, the state should formulate policies which direct disability residential homes to arrange for PWDs to watch sporting activities such as athletics, attend arts festivals or music concerts, attend local churches and go for sight-seeing; awareness raising in that regard also needs

[88] C. Marak, *Disabled: How Assisted Living Facilities and Adult Family Homes Serve Disabled Persons*, 2017, available at: <https://www.assistedlivingfacilities.org/resources/who-lives-in-assisted-living-/disabled/>.
[89] *Ibid.*

to be promoted among families and communities. The homes should encourage residents to use various activities such as exercises to improve their health and well-being and vitality and to enjoy their lives. Without necessarily fostering a medical model of disability, but bearing in mind that PWDs just like any other persons may get sick, there is need for a nurse to be engaged perhaps on a part-time basis and for transportation to be made available for medical purposes. PWDs who take regular medication should do so under an established system of resident health services and evaluations, which includes medical reminders. Some PWDs may require assistance with laundry, personal hygiene and bathing by care workers; residents who exhibit certain health related or negative behavioural symptoms need to be timeously attended to. Whichever way, adopting the concept of homes albeit adjusting it to suit the local context is of paramount importance. Considering that within an African context an individual's disability even among adults is commonly regarded as a family affair, it is important for such homes to have a policy of interaction between residents and their families so as not to break existing family bonds.

5.3 *Measures to Protect PWDs from All Forms of Exploitation and Abuse*

Article 16 of the CRPD directs state parties to "take all appropriate legislative, administrative, social, educational and other measures to protect persons with disabilities, both within and outside the home, from all forms of exploitation, violence and abuse, including their gender-based aspects". By directing the state to protect PWDs from all forms of exploitation and abuse, section 83(c) of the Constitution echoes the provisions of the CRPD, the African Charter and other international or regional human rights instruments. The state's duty to protect PWDs from exploitation and abuse emanates from the founding value of respect for the inherent dignity and equality of the human person.[90] In addition, children with disabilities are constitutionally afforded additional guarantees with respect to protection from exploitation, abuse, maltreatment and neglect. Section 81(1)(e) of the Constitution provides for every child's "right to be protected from economic and sexual exploitation, from child labour, and from maltreatment, neglect or any form of abuse". The meaning and reach of abuse and exploitation, including sexual exploitation, are fully explored in a chapter on children's rights in this volume.[91] For this reason, it is not necessary to examine, in great detail, what exploitation and abuse mean for PWDs. However, it is necessary to emphasise, particularly in light of gender roles and stereotypes in the African cultural context, that girls and women bear the brunt of sexual exploitation and other forms of abuse that confront PWDs.

One of the shortcomings of the Constitution is that it is silent on the gendered aspects of exploitation and abuse. Gender is important because experiences of exploitation and abuse are primarily shaped by gender roles; girls and women and boys and men

[90] Section 3(1) of the Constitution.
[91] *See* A. Moyo, 'The Legal Status of Children's Rights in Zimbabwe', in this volume.

do not experience exploitation and abuse in similar ways.[92] For example, research has indicated that perpetrators desire to exert power and control over all their victims; hence women with disabilities suffer increased levels of sexual abuse because they are usually regarded as easy targets upon which both disabled and non-disabled men wield dominance.[93] The current DPA is gender blind, and hence we call for its urgent revision to enable the Act to adopt a gender lens and to articulate what constitutes exploitation and abuse in gendered terms. However, gender does not function on its own; therefore an understanding of the intersectional nature of exploitation and abuse is important if PWDs are to be adequately protected from exploitation and abuse.

The government needs to sanction a national survey which illuminates the predictors, dynamics and outcomes of abuse and violence among men and women with disabilities so as to be able to formulate appropriate disability policy. In aligning the Constitution with the DPA, the first port of call should be to explicitly define what constitutes exploitation and abuse? We argue that such a definition should be accompanied with rigorous training of relevant stakeholders and awareness raising programmes if the provisions of the Constitution are to be moved from paper to the ground to make a positive difference in promoting the rights of PWDs. We acknowledge that the concept of exploitation and abuse is encompassed within a broad spectrum of issues which include sexual, physical, economic and emotional abuse as well as neglect, among others. However, in this section we use the example of sexual abuse to articulate the multidimensional aspects of the exploitation and abuse, which should be understood if PWDs are to be effectively protected. Discussing all the forms of the concept in this chapter would take the chapter beyond its requirements in terms of length, therefore our focus on sexual abuse under the umbrella of sexuality below.

Sexuality forms a core part of being human, and it determines both the physical and mental well-being of all human beings.[94] Acknowledging the reality that no human being is asexual, the US has seen 'assistance with sexuality' being suggested for inclusion on the list of tasks that encompass the job description of personal assistance service (PAS) providers for PWDs and the identification of a personal assistant (PA) who is comfortable with the subject of sexuality. Duties of a PA may, for example, include undressing and positioning the client for masturbation, placing the PA's hands on the client's hands to guide stimulation, helping two disabled clients

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[92] *See* J. Biegon, 'The Promotion and Protection of Disability Rights in the African Human Rights System', in I. Grobbelaar du Plessis and T. Van Reenen (eds.), *Aspects of Disability Law in Africa* (Preotoria University Law Press, Pretoria, 2012) p. 53, at p. 54, where the author argues as follows: "For women with disabilities, the intersection between their gender and disability constantly expose them to double discrimination. They are always susceptible to physical and sexual abuse, which in turn puts them at risk of contracting HIV and other sexually transmitted diseases. Moreover, women who give birth to children with disabilities are prone to be blamed for such births and consequently abandoned by their spouses. Not surprisingly, many women with disabilities are single parents."

[93] M. A. Nosek *et al*., 'Vulnerabilities for Abuse among Women with Disabilities', 19:3 *Sexuality and Disability* (2001) pp. 177–189.

[94] T. G. Gomez, 'The S Words: Sexuality, Sensuality, Sexual Expression and People with Intellectual Disability', 30:2 *Sexuality and Disability* (2012) pp. 237–245.

to stimulate each other, guiding penis/vagina or penis/anal intercourse,[95] all in an effort to build the sexual confidence of PWDs and to enable them to realise their right to addressing their sexuality. The argument is that PWDs are usually assisted with various tasks such as bladder/bowel care and eating and menstrual care, and hence sexual activity might simply be one more activity to add to the list. However, challenges may arise in relation to drawing a line between assisting with sexual activity and practically engaging in the sexual activity; intimate work of this nature may have legal ramifications in a context where there are no clear guidelines and policy on assisting with sexual expression.

In Zimbabwe there is a common assumption that PWDs are asexual beings who are innocent of sexual thoughts, feelings and experiences and who are unable to give sexual consent. Most men who have sexual relations with women with disability, particularly women with mental disability, are viewed with suspicion and are likely to be regarded as sexual abusers who should be brought before the courts to stand trial, but the truth is with or without disability no human being is asexual. PWDs have a right to engage in sexual relations with people of their choice, and women who have mental disabilities are not in perpetual mental relapse, and hence they have full decision making capacity during certain periods of their lives. Why then should a non-disabled person who engages in sexual relations with a consenting woman with disability be uncritically regarded as an abuser who should be thrown in prison? In any case, invisible disabilities are usually a challenge as women with disabilities are often faced with an ethical dilemma in deciding how and when to reveal their true condition to a potential lover. Whilst the women are conscious of the moral worthiness of not being deceptive to a loved one, they are also confronted with the fear of rejection if a partner walks away when they have revealed the true nature of their disability;[96] hence they often have to make complex decisions in relation to self-disclosure.

However, when something goes wrong, such as the occurrence of an unwanted pregnancy, should the justice delivery system treat every man who engages in sexual relations with a PWD as a criminal, detach them from their partner (woman with disability) and throw them in prison? Whilst protecting PWDs from exploitation and abuse is a noble cause, are the courts and police in Zimbabwe appropriately equipped with disability knowledge, skills and facilities to ensure fairness for both the 'perpetrator' and the 'victim' of sexual abuse? Does the justice delivery system understand the dynamics of disability and its intersection with other identity markers such as sexuality, class and gender to be able to draw a clear line between adults with disabilities who consent to have sex and those who do not? Do the police and courts have knowledge about visible and invisible disabilities and about self-disclosure in sexual relations? If not, one wonders about the number of men, particularly non-disabled men, who may be languishing in prison for engaging in consensual sexual relations with women with invisible disabilities, who may not have

[95] L. R. Mona, 'Sexual Options for People with Disabilities: Using Personal Assistance Services for Sexual Expression', 26:3–4 *Women & Therapy* (2003) pp. 211–221.
[96] R. Basson, 'Sexual Health of Women with Disabilities', 15:4 *Canadian Medical Association Journal* (1998) p. 359.

disclosed the nature of their impairments to their partners. In any case is it illegal for non-disabled men to fall in love with women with visible and invisible disabilities? If the justice delivery system has not been trained specifically on disability issues, what then guides the analysis and determination of cases of exploitation and abuse that involve persons with different kinds of disabilities? However, by arguing that PWDs are sexual beings who desire to address their sexuality just like everyone else, we do not mean to say that PWDs are not vulnerable to sexual abuse, but we acknowledge that disability adds another rung of vulnerability to the exploitation and abuse of PWDs as further discussed below.

Based on their US study, Plummer and Findley[97] state that disability does not shield a person from exploitation and abuse, but it may cause a person to be at an increased risk in cases where they depend financially, emotionally or physically on the perpetrator. The nature of impairment makes a difference in relation to experiences of exploitation and abuse, given that circumstances appear to be worse for deaf persons due to communication barriers.[98] In addition, deaf people experience communication problems if they try to report cases of exploitation and abuse to the police because in most cases the police are unable to use sign language.[99] A British study revealed that it is difficult to obtain information on the kind of abuse that could have been experienced by women with intellectual impairment. That is so because victims may not be able to distinctly narrate what transpired, particularly in cases where the incident would have taken place in the distant past compared to recent times. However, McCarthy and Thompson[100] note that in some cases stories of abuse are shared by the victims without them even realising that what they have experienced is abuse. Whichever way, it is critical for researchers to record all forms of abuse as experienced by PWDs with intellectual impairment and to give PWDs the vocabulary to describe the abuse if such persons are ever to receive effective and appropriate support, particularly when they approach the justice delivery system for recourse. The state should keep accurate gender disaggregated data on exploitation and abuse which occurs among PWDs so as to inform policy and practice.

There is need for the state to adequately provide police officers, prosecutors, magistrates and judges in Zimbabwe with appropriate knowledge regarding disability issues. It is wrong to assume that disability erases all the other qualities of a human being, thereby reducing the complex being to a single social life attribute of disability at the express exclusion of an individual's other identity markers, and erroneously concluding that PWDs are 'damaged' goods who do not desire to address their

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[97] S. B. Plummer and P. A. Findley, 'Women with Disabilities' Experience with Physical and Sexual Abuse: Review of the Literature and Implications for the Field', 13:1 *Trauma, Violence, and Abuse* (2012) pp. 15–29.

[98] J. Hanass-Hancock, 'Interweaving Conceptualizations of Gender and Disability in the Context of Vulnerability to HIV/AIDS in Kwazulu-Natal, South Africa', 27 *Sexuality and Disability* (2009) pp. 35–47.

[99] M. McCarthy and D. Thompson, 'A Prevalence Study of Sexual Abuse of Adults with Intellectual Disabilities Referred for Sex Education', 10:2 *Journal of Applied Research in Intellectual Disabilities* (1997) pp. 105–124.

[100] *Ibid.*

sexuality with partners of their choice, fall pregnant or have children of their own. The undertaking of a national survey which involves both perpetrators and victims, family and community members is critical, thereby bringing to the fore a realistic picture of the structural, situational and cultural context within which exploitation and abuse takes place. Whilst most studies have indicated that compared to men women are more vulnerable to abuse and violence, it is essential to obtain a holistic view of the gendered aspects of exploitation and abuse so as to also consider the behaviour of women towards their male partners, including their violent behaviours. The only thing that is clear at the moment is that exploitation and abuse of PWDs is a gendered and multifaceted phenomenon, but the broader question of how so has remained largely unexplored. In the absence of such knowledge the commitment of the Constitution to protecting PWDs against exploitation abuse is threatened.

To mitigate vulnerability, international pronouncements on human rights pertaining to disability as well as the Constitution of Zimbabwe award individuals the mandate to seek redress in the event of exploitation and abuse. However, from an African perspective, whilst existing human rights instruments are crafted along the lines that the body belongs to an individual, such instruments may not be applicable in some African contexts. That is so because within some African settings bodies do not belong to the individual, but they belong to the entire family and community, influenced at most by cultural ideologies.[101] As such, in most African communities a person does not own his or her body; hence people usually seek to claim their rights within a shared space, and decisions about disability or exploitation and abuse are taken at family and community level, even in extreme instances where a PWD is raped. In aligning the DPA and the Constitution, it is critical for the state to take such cultural ideologies into consideration if the government is to formulate effective policy and practice for protecting PWDs against exploitation and abuse. Lastly, a multi-layered and multidimensional approach is required.

5.4 *Measures to Give PWDs Access to Medical, Psychological and Functional Treatment*

In terms of section 83, the Constitution requires the state to adopt measures to give PWDs access to medical, psychological and functional treatment in line with international legal obligations. For instance, Article 25 of the CRPD directs state parties to provide affordable health care including sexual and reproductive health care to PWDs and to bring such health care close to communities including in rural areas. By committing in Section 83(d) to providing PWDs with access to medical, psychological and functional treatment, the Constitution adopts such a provision of the CRPD, albeit being silent on sexual and reproductive health care. The state should conduct participatory research among PWDs, parents of CWDs and health care staff so as to establish the experiences of PWDs in accessing health care and those of practitioners in delivering health care to PWDs. The findings of such a study

[101] C. Izugbara and C. Undie, 'Who Owns the body? Indigenous African Discourses of the Body and Contemporary Sexual Rights Rhetoric', 16:31 *Reproductive Health Matters* (2008) pp. 159–167.

should inform disability policy and practice thereby enhancing the promotion of the rights of PWDs to medical, psychological and functional treatment.

Constitutional provisions which do not seek to identify and address the injustices that are embedded within the health care structures in which PWDs are meant to enjoy rights are futile. In Zimbabwe, negative attitudes of health care staff towards the sexual and reproductive health of PWDs have been reported.[102] Some health care staffers are of the opinion that PWDs are ill people who should consult health care centres for issues related to their illnesses or disability alone. But PWDs have a right, just like everyone else, to access health care for reasons which go beyond disability such as sexual and reproductive issues.

Sexual and reproductive health information in appropriate formats, such as sign language for the deaf and braille for the blind, is almost non-existent, in a scenario which points at a serious violation of the rights of deaf and blind persons in accessing health care. This is in spite of the fact that Section 8 of the DPA prohibits the denial of any service or amenity to PWDs. Those who enrol in some rehabilitation institutions in Zimbabwe are required to first of all undergo tubal ligation, as a condition of enrolment. Yet, Article 23(c) of the CRPD clearly states that PWDs should be allowed to retain their fertility in the same manner that every other person does. In addition, Article 23(b) of the CRPD states that PWDs have a right to responsibly and freely decide on the number and spacing of their own children. The fact that section 83(d) of the Constitution is silent on the subject of sexual and reproductive health for PWDs may have serious ramifications, considering some of the challenges that are confronted by PWDs, as discussed below.

The work ethic of medical staff is usually that of 'we know best'; hence PWDs are rarely consulted even about their own bodies. Regarded as a solid base of truth and personifying the healing front of technology and science, medicine is believed to be absolutely genuine. The medical discourse is rarely questioned because once a bodily status has been certified by the medical fraternity as being sub-standard, people seldom query such certification. In relation to disability the state should come up with a strategy of moderating excessive emphasis on medical diagnoses because the understanding of disability requires much more than clinical 'facts' about the body, albeit the necessity of such 'facts' in determining medicinal remedies in cases where they are required. The problem arises when the power of medicine goes beyond the prescription of medicine to frame the manner in which people should live their lives. An example is given of a couple that was given permission by medical doctors to marry but was directed not to have sex, in a context where medicine becomes an authorising practice. Instead of embracing disability and assisting people to live with it, medicine regards disability as an undesirable element which should be eradicated.

The conscious inclusion of PWDs in the recruitment processes of health care staff should be considered. Trained PWDs are likely to bring awareness to mainstream health care staff about the health care needs of PWDs which include sexual and

[102] Peta, *supra* note 19.

reproductive health. In addition, the subject of disability should be included in the training of all health care professionals. Formulating a policy which directs the Ministry of Health and Child Care to ensure that all health care centres provide services and information to PWDs in appropriate formats such as sign language for the deaf and braille for the blind promotes the rights of PWDs to access medical, psychological and functional treatment. To have nil sign language using staff or a mitigating strategy implies that the state is indifferent to the health care needs of deaf persons. To be ignored or to be prevented from accessing health care due to communication barriers is to have one's very legitimacy as a human being assaulted. Whilst generic health care approaches may apply to all people, PWDs may need unique communication and health care attention which is tailor-made to suit specific impairments.

In addition, a proper definition of the national health care delivery system to which PWDs are awarded rights is required. Focusing on the contemporary health care approach only and ignoring traditional and religious health care practices is likely to leave other key health care areas unattended to, thereby perpetuating the injustices that are embedded in such spheres. If the state ignores traditional and religious healing in disability policy formulation, how then for example will it be able to address challenges such as the exploitation and abuse of PWDs by traditional healers and religious prophets? During a personal discussion, a woman with mental disability said:

> My parents took me to hospital because I was violent, the hospital stabilised me with injection, and my parents took me to a traditional healer. The healer said I must throw away my mental tablets because if I continue taking them I will die. After one week I went into mental relapse, and my parents took me back to hospital, after that back to the traditional healer, I kept doing that, moving between the hospital and traditional healers, but I am still not healed of mental disability.

The Ministry of Health and Childcare should establish a policy which directs all players in the three mode health care delivery system (traditional, religious, contemporary) in Zimbabwe to collaborate in the provision of health care, particularly in aspects that are related to 'curing' impairment. Such an approach is likely to reduce suspicion and antagonism among religious, traditional and contemporary health care practitioners, which prevails at the detriment of the health and well-being of PWDs who simultaneously consult all the three modes of health care. There is no use adopting an international human rights framework which in its domestication fails to pay attention to the realities of the local three mode health care approach. In any case, section 16 of the Constitution states that "[t]he State and all institutions and agencies of government at every level must promote and preserve cultural values and practices which enhance the dignity, well-being and equality of Zimbabweans". Pretending that traditional healing practices do not exist and that PWDs and their families do not consult traditional healers results in the formulation of unrealistic policies and intervention strategies. The Ministry of Health and Child Care needs to seek to collaborate with other players in the health care delivery system, such as the Zimbabwe National Association of Traditional Healers (ZINATHA), so as to be able

to understand the intricacies of the three mode approach and its impact on the health and well-being of PWDs and to ultimately formulate meaningful policy.

5.5 *Measures to Provide PWDs with State-Funded Education and Training*

The Zimbabwean Constitution contains essential principles relating to the protection and promotion of the rights of PWDs. Section 83 of the Constitution provides that the state must take appropriate measures, within the limits of the resources available to it, to ensure that persons with disabilities are provided with special facilities for their education and are provided with state-funded education and training where they need it.[103] Theoretically, Zimbabwe has begun to embrace a human rights approach to disability as the country has largely conformed to most provisions of the CRPD[104] and other international or regional instruments.[105] With regards to education of CWDs, the Disabled Persons Act mandates the National Disability Board[106] to formulate and develop measures and policies designed to achieve equal opportunities for disabled persons by ensuring that they obtain education and employment, among other functions.[107] The Education Act, as the primary law that addresses education for all learners,[108] codifies the state's obligation to ensure free and compulsory primary education in the following terms:

It is the objective in Zimbabwe that primary education for every child of school-going age shall be compulsory and to this end it shall be the duty of the parents of any such child to ensure that such child attends primary school.[109]

Whilst primary education has been largely labelled as 'free' and therefore 'state-funded', current practices at the majority of schools raise doubts about this claim. The reality of the matter is that there have been increases, not in tuition fees, but in levies and other charges at many schools across the entire country. In many if not all schools, the amounts payable in levies are multiple times higher than the money prescribed for tuition fees. With the government currently reported to face perpetual financial challenges, the state's capacity to provide state-funded education and training to PWDs who need it remains in serious doubt. Nonetheless, it is encouraging to note that the Constitution seeks to impose on the state the duty to provide for the quality education needs of PWDs. Given that the majority of PWDs cannot fend for themselves and their children, it is critical for a national constitution to require the state to fulfil this duty to ensure that PWDs are not left out of many educational and developmental programmes. However, it is not clear whether the

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[103] Section 83(e) and (f) of the Constitution of Zimbabwe Amendment No.20.
[104] P. Manatsa, 'Are Disability Laws in Zimbabwe Compatible with the Provisions of the United Nations Convention on the Rights of Persons with Disability (CRPD)?', 4:4 *International Journal of Humanities and Social Science Invention* (2015) p. 25, at p. 32.
[105] *See*, for example, Article 13(2) of the African Charter on the Rights and Welfare of the Child.
[106] A Board established in terms of Section 4 of the Disabled Persons Act [Chapter 17:01] Act 5 of 1992.
[107] Section 5(1) of the Disabled Act.
[108] E. Mandipa 'A Critical Appraisal of the Right to Inclusive Education for Children with Disability in Zimbabwe', 3 *African Disability Rights Yearbook* (2015) p. 11.
[109] Section 5 of the Education Act [Chapter 25:04]. *See also* Article 28 of the CRC. On the meaning of 'compulsory' and 'free' education, *see* paras. 6 and 7 of General Comment No. 11.

Constitution requires the state to prioritise the education and training needs of PWDs ahead of the needs of other 'vulnerable' groups such as women and children. In all fairness, it would appear that the Constitution imposes on the state the duty to take affirmative action measures, in the context of education and training, to ensure that PWDs ultimately realise their full mental and physical potential.

At the international plane, access to education for PWDs is extensively regulated by the CRPD. Article 24(1) thereof explicitly recognises the right of PWDs to education which is to be realised without discrimination and on the basis of equal opportunity for all persons. It seeks to remedy the exclusion and marginalisation that PWDs have faced for centuries. This shows that the international community is aware that the prevailing trend is that PWDs tend to have much less access to education than their non-disabled counterparts.[110] The exclusion of PWDs from education results in life-long barriers to meaningful employment, health and political participation. For this reason, the main focus of Article 24 is on the elimination of disability based discrimination in educational settings, as well as the provision of inclusive education at various levels. Further, the CRPD focuses primarily on access of PWDs to the general education system, rather than separate or segregated educational settings that perpetuate further stigmatisation.[111]

Article 24 envisages the need for increased accessibility of educational settings and the need to train teachers and staff, including teachers with disabilities, as some of the ways by which equal access to education can be enhanced. For countries such as Zimbabwe to meet the obligations created by Article 24, they must increase the accessibility of their educational spaces, develop inclusive curricula and provide adequate learning assistance.[112] This is particularly important in light of the Millennium Development Goal of 'education for all', which by definition cannot be attained if an entire segment of any given population is denied equal access to education

In line with international developments, section 83(e) and (f) of the Constitution directs the provision of special educational facilities for PWDs and state-funded education and training where it is required. The DPA provides for non-discrimination of PWDs with regards to "the choice of persons for training, advancement, apprenticeships, transfer" and many other issues. Unfortunately, both the Constitution and the DPA do not place adequate focus on inclusive education as required by international law. For instance, the Constitution provides that the state should take measures, within its available resources, to provide special facilities for their education. If improperly implemented, this provision may justify discriminatory government policies that perpetuate segregation of PWDs from inclusive learning settings.

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[110] K. Guernsey, M. Nicoli and A. Ninio, *Convention on the Rights of Persons with Disabilities: Its Implementation and Relevance for the Bank*, The World Bank, 2007, p. 13.

[111] *See* Article 24(1) of the CRPD. However, special schools should continue to exist for those individuals still wishing to opt-out of mainstream settings and those who cannot – because of severe learning disabilities – cope with the expected pace of learning in inclusive settings.

[112] Guernsey, Nicoli and Ninio, *supra* note 110.

In addition, there seems to be inadequate focus on early childhood education in both the Constitution and the DPA. As a result, it remains questionable whether PWDs can reach advanced developmental stages in the absence of a concrete foundation in the form of earlier education. Studies show that students who have access to early childhood learning are more likely to "graduate high school, hold a job, and form more stable families of their own".[113] Denying CWDs access to appropriate education settings is tantamount to thwarting their potential to attain full growth; a scenario which is in direct contradiction with treaties which seek to secure the rights of CWDs, which include the CRPD, the Convention on the Rights of the Child (1989) and the African Charter on the Rights and Welfare of the Child (1990). Nevertheless, in spite of such treaties, the reality is that early childhood years have not received much attention or investment from governments in most nations including in Zimbabwe. This scenario can be attributed to the fact that the promulgation of human rights treaties does not automatically mean the availability of appropriate knowledge regarding disability or adequate capacity and budgets.

There is need to undertake a national survey which begins with early childhood education (ECE) for PWDs right through to tertiary level education so as to establish the status quo and to ultimately inform policy and practice. A holistic approach which pays attention to curricula, staffing, resources, parental involvement and transition into adulthood employment is required. We argue that the voyage should begin with early childhood learning because research has indicated that 80 per cent of the brain's capacity develops before the age of three; hence the early years of a child's life plays a significant role in fostering developmental gains.[114] In this chapter, we emphasise early childhood education because it lays a strong foundation upon which later education (primary school, high school and tertiary level) can be constructed, thereby creating an avenue through which PWDs can escape vulnerability to abuse and poverty.

Study after study shows that the sooner a child begins learning, the better he or she does down the road … And for poor kids who need help the most, this lack of access to preschool education can shadow them for the rest of their lives … Every dollar we invest in high-quality early education can save more than seven dollars later on.[115]

Children who come from poor families and who live in rural areas usually do not have access to ECE, and they are most likely to drop out of school,[116] thereby perpetuating the cycle of poverty as such persons will ultimately have narrow employment opportunities as disability and poverty intersect to frame their marginalisation. A study carried out in Zimbabwe reveals that some women with disabilities who have not had access to education are left with minimal livelihood choices to the extent that they resort to the sex work industry. That is not to say that such an industry is not

[113] B. Obama, *Obama's 2013 State of the Union Speech*, 2013, full text available at: <https://www.theatlantic.com/politics/archive/2013/02/obamas-2013-state-of-the-union-speech-full-text/273089/>.
[114] UNESCO, *Strong Foundations: Early Childhood Care and Education*, UNESCO, Paris, 2006.
[115] Obama, *supra* note 113.
[116] UNESCO, *supra* note 114.

profitable or that it does not employ millions of people across the world,[117] but it is to say that the livelihood options of PWDs from poor backgrounds may be limited by their lack of education which usually begins in early childhood.

The state should aim to generate funds through disability levies so as to provide state-funded education and training, particularly for PWDs from poor backgrounds. Nevertheless, the provision of special educational facilities and state funded education for PWDs may not materialise if it is not accompanied by an adequate number of special education teachers who are properly trained. Therefore, it is arguable that the government's introduction in 2005 of early childhood development as a compulsory practice which is embedded in schools is significant. But thus far Zimbabwe does not have an adequate number of professionals who are trained in early childhood development.[118] There is need for the government to train 5,800 more qualified teachers, and at the moment only 21.6 per cent of children aged 36–59 months are attending a mainstream early childhood education programme. Of notable concern is that such statistics are silent on the number of early childhood education teachers who are trained to cater for the special needs of CWDs or the number of such children who are accessing education. Sex disaggregated data about the education of CWDs will play a big role in informing policy and practice,

> The provision of appropriate educational facilities and teachers and state funded education on its own may not yield much if the initiative is not accompanied by a rigorous awareness raising programme. Unplanned or *de facto* inclusion ranks among the key types of inclusive education that are prevalent in Zimbabwe.[119] A large number of students with disabilities are therefore enrolled in mainstream schools by parents or guardians without any accompanying documentation of the nature of their disabilities. In some instances, parents just decide to keep their children at home alongside a belief that they are 'sub-standard' beings on the ground of disability and hence their lives will presumably not amount to anything. The Ministry of Primary and Secondary Education, civil society and disabled peoples' organisations need to work together to raise awareness about the need and value of obtaining a formal diagnosis of the disability and thereafter enrolling CWDs for education at an early stage. Such awareness will enable families and communities in both rural and urban areas to realise the need for understanding the nature of a child's disability and the importance of educational programmes from an early age and to demonstrate the negative impact of a lack of such education. Involving teenage or adult persons with disabilities in such awareness raising campaigns may go a long way in demonstrating the advantages of gaining access to education and the disadvantages of a lack thereof.

Whilst it is undisputable that Zimbabwe's attitude towards education is that of valuing high quality standards, a health and nutrition study carried out in Zimbabwe revealed that many early childhood centres in mainstream primary schools do not provide food for children; the children are expected to bring their own food and drink from home.[120]

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[117] *See* C. Hakim, 'The Male Sex Deficit', 19:4 *International Sociology* (2015) pp. 314–335, and W. Spice, 'Management of Sex Workers and Other High-Risk Groups' *Occupational Medicine* (2007) pp. 322–328.

[118] P. Makokoro, *The Status of Education and Early Childhood Development (ECD) in Zimbabwe*, 2017.

[119] M. I. Mutepfa, E. Mpofu and T. Chataika, 'Inclusive Education in Zimbabwe: Policy, Curriculum, Practice, Family, and Teacher Education Issue', 83:6 *Childhood Education* (2007).

[120] Makokoro, *supra* note 118.

The economic decline in the country has resulted in some children not being able to bring any food from home, and they are forced to watch whilst others eat. The government should consider the establishment of a holistic policy which directs synergy of education, nutrition, health and social welfare so as to provide a wholesome supportive and rich experience for all children including CWDs. Families should be educated on the importance of early education, balanced diets and good health for children through community engagement, lobbying and activism. However, whilst there is growing international interest in the early learning of children, the focus on CWDs is grossly under-researched within the Global South. We therefore call upon interdisciplinary scholars to undertake further research on this valuable topic particularly within African contexts.

The Education Act does not clearly make provision for state-funded education for persons with disabilities where it is required.[121] To this end, the Constitution offers better protection to the rights of PWDs, at least in theory. It has been highlighted that while the BEAM is having a positive impact, children with disabilities are significantly less likely to be beneficiaries of the BEAM programme.[122] According to UNICEF, at least one third of the world's children who are not in school have a disability.[123] It has also been suggested that children with disabilities may be better served by a different funding mechanism, especially if they do not fit the current poverty based criteria.[124] In line with this, it is arguable that more needs to be accomplished to translate positive attitudes into action (even if supported by policy) and that a shift is needed in the entire education system in Zimbabwe to support meaningful inclusion.[125]

6 Shortcomings of the Constitutional Provisions

This section briefly discusses some of the shortcomings of the constitutional provisions entrenching the rights of persons with disabilities. These include, among others, the failure by the legislature to craft the applicable provisions in the language of rights and the fact that the measures to be adopted by the state are subject to available resources.

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[121] *See*, for example, Centre for Applied Legal Research (CALR), *Reviews of Laws Affecting Persons with Disability in Zimbabwe: Alignment of Legislation to the Convention on Rights with Disability (CRPD) and the Constitution of Zimbabwe*, 2016, p. 15, available at: <http://www.ca-lr.org/wp-content/uploads/2016/12/>.

[122] H. Smith *et al*., *Zimbabwe: Evaluation of the Basic Education Assistance Module Programme,* Ministry of Labour and Social Services, Government of Zimbabwe, available at: <http://www.unicef.org/evaldatabase/index_69966.html>.

[123] United Nations General Assembly, *Report of the Secretary-General on the Status of the Convention on the Rights of the Child*, 3 August 2011, UN Doc A/66/230, at para. 29.

[124] M. Deluca *et al*., *Including Children with Disability in Primary School: The Case of Mashonaland, Zimbabwe* (2014) p. 14.

[125] R. Chireshe, 'The State of Inclusive Education in Zimbabwe: Bachelor of Education (Special Needs Education) Students Perception', 34:3 *Journal of Social Science* (2013) pp. 223–228.

6.1 *The Failure to Draft the Applicable Provisions in the Language of Rights*

Section 83 of the Constitution is mischievously misleading to the extent that its heading purports that the provisions therein are 'Rights of persons with disabilities' whereas in actual fact they are merely directives relating to possible action to be taken by the state in its attempt to meet the 'needs' of PWDs. The provisions of section 83 of the Constitution are not couched in the appropriate language which depicts actual and concrete entitlements of PWDs.[126] Instead, the entire section enumerates measures which the state should take in order to ensure that PWDs 'realise their full mental and physical potential'. The entire section totally fails to articulate the rights which PWDs are entitled to under the Constitution, and this inadequacy is made more conspicuous when one juxtaposes section 83 to other sections of the Constitution which immediately precede it. The preceding sections, which enumerate the rights of other disadvantaged groups, clearly mete out concrete rights for certain categories of persons, and this is borne out expressly from the language in which they are couched. For example:

> **81 Rights of children**
> (1) Every child, that is to say every boy and girl under the age of eighteen years, has the right –
> **82 Rights of the elderly**
> People over the age of seventy years have the right –

The foregoing provisions clearly announce that they extend 'rights' to certain individuals, and this is different from the language adopted under section 83 which opens with the phrase "[t]he State must take appropriate measures". Section 83 presents a curious case of elusiveness in terms of depicting the actual content of the rights which PWDs are afforded under the Constitution. The operational text provides that "[t]he State must …" which implies a peremptory obligation on the state to take steps to ensure that all the obligations relating to PWDs are fulfilled.[127] However, that very small glimpse of hope is immediately taken away by the infamous phrase "within the limits of the resources available to it". This creates a double jeopardy situation in that, firstly, the provisions of section 83 do not strictly extend rights to PWDs but are merely 'directives' relating to appropriate government actions, and, secondly, the fulfilment of these 'directives' is contingent upon the resources available to the state.

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[126] Section 83 of the Constitution reads:
The State must take appropriate measures, within the limits of the resources available to it, to ensure that persons with disabilities realise their full mental and physical potential, including measures –
(a) to enable them to become self reliant;
(b) to enable them to live with their families and participate in social, creative or recreational activities;
(c) to protect them from all forms of exploitation and abuse;
(d) to give them access to medical, psychological and functional treatment;
(e) to provide special facilities for their education; and
(f) to provide State-funded education and training where they need it.

[127] It can be argued, to a limited extent, that the obligations imposed on the state under section 83 of the Constitution create corresponding rights for PWDs. However, this does not detract from the compelling argument that section 83 is not sufficiently couched in adequate human rights language and that this may ultimately have a bearing on how PWDs approach the courts to *see*k relief in terms of the Constitution.

This effectively means that the state's reluctance to fulfil its obligations under section 83 can be mischievously justified by reason of lack of adequate resources.[128] The very idea of tying the rights of PWDs to the availability of resources indicates a common yet unfounded assumption that all of the envisaged rights of PWDs invariably have budgetary implications.

Indeed, the key provisions of the Constitution extend many human rights to 'everyone', including PWDs, and the temptation that there is no need for further protection is very high. One of the obvious risks that lies in leaving the rights of PWDs within the same scope of the general provisions of the Constitution is the tendency to overgeneralise, and with that comes the turning of a blind eye to some of the nuances that might arise insofar as PWDs are concerned. Besides, the Constitution also singles out specific categories of persons who have been historically marginalised and unfairly discriminated against in order to reinforce (and in some instances extend) the rights which they are already afforded under the 'general' provisions of the Constitution. This evinces the legislature's appreciation of the dangers which are inherent in approaching human rights issues from a generalised perspective. For example, even though section 51 extends the right to human dignity to 'every person', section 80(1) nonetheless re-packages this right within the context of women's rights. By no means should this be considered unnecessary repetition. Rights applicable to specific groups come as a realisation of the past injustices which these groups have suffered at the hands of society and the state, thus the need to go the extra mile in protecting their rights within the scheme of the Constitution.

Section 83 does not enumerate any rights in the appropriate language which enables PWDs to approach the courts for redress. The fact that the Constitution confers on other historically marginalised groups such as women, children and the elderly additional rights that address their specific circumstances raises the question of why the legislature failed to equally do the same for PWDs. All PWDs are entitled to under the current constitutional framework is the right to request the state to "take appropriate measures, within the limits of the resources available to it, to ensure that [they] realise their full mental and physical potential". The exact meaning of this right is not immediately clear, but the provision subjects the realisation of the rights of PWDs to the caveat to which the realisation of all socio-economic rights is subjected. Besides, the entire provision proceduralises the rights of PWDs in that it does not confer on them concrete entitlements that are enforceable in a court of law but stipulates procedures that ought to be taken to ensure that PWDs realise their full potential.

There is no indication of what happens if the state decides not to take the stipulated measures or procedures in light of the limited resources that might be available. This makes it hard for PWDs to demonstrate that the state's failure to take the stipulated measures is not justified by the resources available to it, especially given that

[128] For cases to do with obligations which generate budgetary implications for the state, *see Soobramoney v. Minister of Health Kwazulu Nata*l 1998 1 SA 765 (CC), *Governmnet of the Republic of South Africa and Others v. Grootboom and Others* 2001 1 SA 46 (CC) and *Minister of Health and Others v. Treatment Action Campaign and Others* 2002 5 SA 721 (CC).

information on how much money is available to promote the rights of PWDs may not be in the public domain. If courts were to require the state to take the stipulated measures ahead of other goals considered to be compelling by the state, such a path would constitute priority-setting and is highly likely to offend the separation of powers doctrine. This is because making a command that the state adopt measures that have cost implications without asking the legislative and executive branches of the state whether the resources for such measures are available would be tantamount to usurping the functions of these political branches of the state.

It is self-evident that for a provision which carries the heading "[r]ights of persons with disabilities" section 83 leans heavily on the side of misrepresentation. One hopes that the state of section 83 is a result of an unfortunate drafting error, if not, that failure to clearly spell out the rights to which PWDs are entitled is a serious indictment on the legislature and ultimately the entire Zimbabwean society. Not much faith should be placed in the argument that the rights of PWDs are fully protected under the other general clauses of the Constitution, especially against the backdrop that the very same Constitution singles out other categories of persons in order to reinforce or add other rights for their protection and advancement. To their credit, the drafters of the Constitution do refer to 'rights' of PWDs as part of national objectives under Chapter 2 of the Constitution. Even then, however, it should be recalled that national objectives are not fundamental rights that are binding on the state. Whilst they provide interpretive guidance to the courts and other agencies of the government, national objectives are not rights and do not ground concrete legal obligations that are enforceable in the courts of law. There is, therefore, dire need to have specific provisions of the Constitution which deal directly and substantively with the rights of PWDs.[129]

6.2 *The Measures to Be Taken by the State Are Subject to Available Resources*

In terms of our constitutional framework, the obligations imposed on the state by the rights of PWDs are subject to the availability of resources. For instance, the DoRs, under section 83 of the Constitution, provides that "[t]he State must take appropriate measures, within the limits of the resources available to it, to ensure that persons with disabilities realise their full mental and physical potential". Section 22 of the Zimbabwean Constitution provides that the state and all institutions and agencies of government at every level must, within the limits of the resources available to them, assist persons with physical or mental disabilities to achieve their full potential and to minimise the disadvantages suffered by them.

What is apparent from these provisions is that the obligations imposed on the state with regards to rights of PWDs are dependent upon the availability of resources for such purposes. Thus, the corresponding rights themselves are, at the

[129] For example, the CRPD provides a full range of rights, and even though these rights are normally extended to every individual, the Convention adds elements that are significant in the context of disability. *See generally* G. Quinn and C. O'Mahony, 'Disability and Human Rights: A New Field in the United Nations', in C. Krause and M. Scheinin (eds,), *International Protection of Human Rights: A Textbook*, 2nd edition (2012).

implementation level, limited by reason of the lack of resources. Whilst the relevant provisions can be commended to a greater extent, it can be argued that the inclusion of a claw back clause in sections 22(2) and 83(1) of the Constitution may water down or dilute the rights of PWDs.[130] Given the lack of resources and the significant demands placed on them, an unqualified obligation to meet these needs would not ordinarily be capable of being fulfilled.[131] The conditionality of resource availability gives the state an excuse in the event of a failure to promote and fulfil the rights of PWDs.[132] Arguably, while section 83(1) of Constitution makes the realisation of the economic, social and cultural rights of PWDs contingent upon resources that are available to the state, it does not necessarily provide that these rights are subject to progressive realisation.[133]

The scope of the state's obligations to protect, promote and fulfil the rights of PWDs under section 83 of the Constitution can be partly determined by making reference to some of the national objectives stated in section 22 of the Constitution. This follows the peremptory obligation imposed on the courts, when interpreting the provisions of the DoRs to "pay due regard to all the provisions of the Constitution, in particular the provisions of Chapter 2". When performing their interpretive functions in terms of section 83 of the Constitution, courts must therefore refer to the provisions relating to the rights of PWDs under section 22 of the Constitution. Section 22 of the Constitution mandates all government institutions and agencies at every level to develop programmes for the welfare of persons with physical or mental disabilities especially work programmes consistent with their capabilities and acceptable to them or their representatives.[134] Government institutions and agencies are also mandated to consider the specific requirements of persons with all forms of disabilities as one of the priorities in their developmental plans.[135] This responds to the demand to have support for disability programmes and organisations in Zimbabwe.[136] The constitutional provision obliging the state to develop welfare programmes for persons with physical or mental disabilities appears to be aligned to an outdated approach which views disability as a welfare rather than a human rights issue.[137] However, the level of support and the type of disability organisations to be supported has not been specified.[138] The new Constitution simply states that governmental institutions and agencies have to render assistance to persons with

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[130] Manatsa, *supra* note 104.

[131] *Soobramoney v. Minister of Health*: Province of KwaZulu-Natal D &CLD 5846/97, 21 August 1997, unreported. *See also* the Committee's General Comment No. 13, para. 1.

[132] J. Mungumbate and C. Nyoni, 'Disability in Zimbabwe under the New Constitution: Demands and Gains of People with Disabilities', *Southern Peace Review Journal* (2013) p. 10. *See also* King George VI School and Centre for Children with Physical Disabilities, *Disability in Zimbabwe*, available at: <http://www.kinggeorge6.org/home/the-centre/disability-in Zimbabwe>.

[133] *See also* L. Nyirinkindi, 'A Critical Analysis of Paradigms and Rights in Disability Discourses', 12 *East African Journal of Peace and Human Rights* (2006) p. 49, at p. 52.

[134] Section 22(3)(a) of the Constitution of Zimbabwe Amendment No. 20. *See also* the preamble of the Social Welfare Assistance Act 10 of 1988 [Chapter 17: 06].

[135] Section 22(3) (b) of the Constitution of Zimbabwe.

[136] Mungumbate and Nyoni, *supra* note 132, p. 11.

[137] C. Ngwena, 'Deconstructing the Definition of Disability under the Employment Equity Act: Social Deconstruction', 22 *South African Journal on Human Rights* (2006) p. 620.

[138] Mungumbate Nyoni, *supra* note 132, p. 11.

physical and mental disabilities without indicating the nature of assistance to be provided.[139]

7 COVID-19 and the Rights of Persons with Disabilities

Pandemics exacerbate inequalities and further marginalise the poor and other vulnerable groups in society. The COVID-19 pandemic has excessively affected persons with disabilities across the world, including in Zimbabwe. Persons with disabilities are severely exposed and affected because of their specific conditions and needs. During the lockdown, PWDs have limited ability to undertake informal livelihoods activities; access health and education services; food and nutrition; and information on COVID-19. According to the International Disability Alliance (IDA) and WHO, PWDs are more likely to face barriers during a humanitarian crisis, unless some practical solutions are availed to effectively address the range of potential risks.[140] The UN Convention on the Rights of Persons with Disabilities (CRPD) requires countries to ensure equal access to facilities and services. In humanitarian crises, such as pandemics, Article 11 of the CRPD obligates states to protects the safety of PWDs. Section 83 of the Zimbabwean Constitution provides for the rights of PWDs in all contexts (including public health emergencies) and section 56(3) of the Constitution prohibits discrimination on the basis of disability among other grounds.[141] The pandemic has negatively impacted PWDs, especially given the government's failure to take urgent measures to prevent or curb the challenges confronted by all vulnerable groups.

Persons with disabilities have unique medical needs as well as communication and information needs, some of which require specific technologies, formats and language. In times of crises and disasters, a lack of access to communication and information platforms for persons with various types of disabilities makes them more vulnerable and prone to life-threatening situations.[142] Disabled persons' failure to access communication platforms and vital information during global times of crises is traceable to social, technical and affordability (financial) reasons.[143] An ableist culture is often blamed for giving low priority to persons with disabilities and favouring able-bodied persons in providing services in these critical times of crises and disasters; hence, able-bodied people are implicated in making decisions that disproportionately negatively impact persons with disabilities, instead of providing best practice accessibility that benefits everyone.[144] The fact that most decision makers are able-bodied and the lack of awareness of the intricate needs of PWDs

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[139] *Ibid.*

[140] UNESCO, 'Assessing the Impact of COVID-19 on Persons with Disabilities in Zimbabwe', available at <https://en.unesco.org/news/assessing-impact-covid-19-persons-disabilities-zimbabwe> (accessed on 18 December 2020).

[141] Constitution of Zimbabwe Amendment (No. 20).

[142] M. Kent and K. Ellis, 'People with Disability and New Disaster Communications: Access and the Social Media Mash Up', *Disability Society* (2015) p. 421.

[143] N. A. Mhiripiri and R. Mudzi, 'Fighting for Survival Persons with Disabilities: Activism for Mediatisation of COVID-19 Information', *Media International Australia* (2020) p.1, p. 2.

[144] *Ibid.*

relegates PWDs to the margins of social provisioning programmes because governments rarely take the rights of marginalised groups very seriously.

Lack of access to information for disabled persons, especially the deaf and hard of hearing (DHH) and the virtually impaired, has been a thorny issue in Zimbabwe since the pandemic started. This culminated in an urgent chamber application in *Centre for Disability and Development and Two Ors v. Zimbabwe Broadcasting Holdings (Private) Limited and Three Others*[145] where it was held that the lack of access to information that is accessible to persons with disability places them at high risk as a result of missing out on critical information pertaining to COVID-19 and was a violation of Article 16 of the CRPD which provides for freedom of expression and access to information as read together with section 83 of the Constitution. Without this information, PWDs might unknowingly go about their normal business and thereby endanger themselves and others with the risk of contracting the deadly and incurable coronavirus disease which has wreaked havoc in several parts of the world.[146]

In addition, the failure by government authorities to ensure that written communications are also distributed in formats which are accessible to blind and partially sighted persons is equally a violation of the rights to access to information.[147] This case was a landmark in that it immediately ensured that PWDs have access to sign language materials as a matter of right. It also ensured that that all written information related to COVID-19 and provided by the government is also made available in formats accessible to blind and partially sighted persons, such as audio versions, large text, and or readable digital text and distributed to the intended beneficiaries. It was also ordered that the Ministry of Health and Child Welfare's COVID-19 hotlines and centres be staffed with persons who are equipped to deal with the unique needs of PWDs. The information provided by government institutions both to prevent infection and to know how to act in case of illness must be available in accessible formats, including sign language, video captioning, the use of alternative text in images and graphics displayed digitally, and easy-to-read versions. This has not happened in Zimbabwe and other African countries, leaving the majority of PWDs and those around them largely exposed to the pandemic.

Due to the nature and characteristics of the coronavirus, some PWDs might be at a higher risk of infection or severe illness due to underlying medical conditions. Persons at higher risk of severe illness from COVID-19 include those with serious underlying chronic medical conditions like chronic lung diseases, serious heart conditions, or weakened immune systems. Furthermore, evidence from past epidemics indicates that resources are often diverted from routine health services during pandemics. This further reduces the already limited access of many girls and young women with disabilities to sexual and reproductive health services, as well as maternal, new-born and child health services. Some SRHR services delivery points

[145] *Centre for Disability and Development (CDD) and Two Ors v. Zimbabwe Broadcasting Holdings (Private) Limited and Minister of Information Publicity and Broadcasting*, <www.veritaszim.net> (accessed on 21 December 2020).
[146] *See CDD v. Zimbabwe Broadcasting Holdings*, para. 6.
[147] *Ibid*., para. 7.

have been forced to close and increased financial pressures have made contraception for sexually transmitted infections and maternity services unaffordable for PWDs.[148] This is in violation of Article 28 of the CRPD which states that state parties should recognise that PWDs have the right to the enjoyment of the highest attainable standard of health without discrimination on the basis of disability and shall take all appropriate measures to ensure access for PWDs to health services that are gender sensitive, including health related rehabilitation.[149]

Article 16 of CRPD provide that states parties should take all appropriate legislative, administrative, social, educational and other measures to protect persons with disabilities both within and outside the home from all forms of exploitation, violence and abuse, including their gender based aspects.[150] Despite this women and girls with disabilities are experiencing high rates of gender based violence (GBV) and have limited access to legal services. Children with disabilities have also been exposed to abuse as school closures have left them without any reliable protective environment. The increase of violence against women with disabilities has attributed to their increased poverty, vulnerability and dependence on their abusers. Women and girls with disabilities, particularly those in rural areas, face additional barriers in accessing SRHR including GBV services such as the clinical management of rape. Access to GBV services should not be put to hold during the pandemic. UNDP Zimbabwe through the Spotlight Initiative has reprogrammed some of its activities to provide a disability and gender inclusive response to the pandemic.[151] This is being achieved through community engagement and awareness campaigns which are providing information and training on legislative processes and policies, gender responsive institutions, violence prevention programmes and essential services.[152]

More importantly, COVID-19 has undermined the ability of public services, including policing, to respond to women's needs despite the designation of GBV response services as 'essential' by government.[153] Survivors of GBV, including PWDs, describe facing multiple barriers in accessing services such as transportation, being turned away at roadblocks, courts being closed, and police responses being insufficient.[154] This can be largely attributed to the lack of implementation of the decision to declare responses to GBV an essential service, underpinned by a lack of clarity on the types of GBV services designated essential and a lack of clear communication to frontline government officials.

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[148] Social Development Direct, 'COVID-19 and Gender Based Violence in Zimbabwe: How Is the Pandemic Increasing the Risk of Violence Against Women and Girls?', available at <https://www.sddirect.org.uk/news/2020/12/covid-19-and-gender-based-violence-in-zimbabwe-how-is-the-pandemic-increasing-the-risk-of-violence-against-women-and-girls/> (accessed on 18 December 2020).

[149] *See also* section 83(d) of the 2013 Zimbabwean Constitution.

[150] *See also* section 83(c) of the 2013 Zimbabwean Constitution.

[151] UNDP Zimbabwe, 'COVID-19 and Persons with Disabilities: Leaving No One Behind', available at <https://www.zw.undp.org/content/zimbabwe/en/home/presscenter/articles/covid19-and-persons-with-disabilities--leaving-no-one-behind-.html> (accessed 18 December 2020).

[152] *Ibid.*

[153] SAFE Zimbabwe, *Report on Gender Based Violence –Data in Zimbabwe During COVID-19* (2020) p. 2.

[154] *Ibid.*

Movement restrictions imposed by governments to stop the spread of COVID-19 have made it difficult for PWDs who use personal assistants to take part in daily activities. This was due to the requirements of travelling permits by the Zimbabwe Republic of Police. This requirement was later declared unconstitutional but the harm had already been done as the majority of PWDs lost their livelihoods. The restrictions on movement limit the participation of PWDs in political and public life.

In addition, the COVID-19 pandemic has had far-reaching implications for education services for PWDs. Prolonged school closures have exacerbated existing vulnerabilities and inequalities among children, especially girls, children with disabilities, those in rural areas, orphans and vulnerable children, as well as those from poor households and fragile families.[155] Article 24 of the CRPD states that state parties should recognise the right of PWDs to education with a view to realising the right without discrimination on the basis of equal opportunity to ensure an inclusive education system at all levels and lifelong learning.[156] Be that as it may, when the public radio lessons were introduced no measures were taken by the government to carter for the DHH; hence education for persons with disabilities during the lockdown has not been inclusive and equitable as envisaged in the CRPD and the Constitution. Thus parents and guardians who had the knowledge and tools resorted to home schooling for their children with disabilities. This has not yielded results as many parents are not equipped to respond to the learning demands of children with disabilities.

To eliminate the barriers preventing PWDs from enjoying their rights during the pandemic, the state should adopt affirmative action measures to address the multiple and intersecting disadvantages affecting PWDs in the educational, health, social services and other contexts. This is because every right conferred on PWDs has an equality dimension that requires the state to respond to each of the existing barriers (to achieving full potential) to level the playing field for those with multiple impairments. Apart from prohibiting discrimination based on disability, gender and other factors, section 56(6) of the Constitution requires the state to take reasonable legislative and other measures to promote or advance the rights of persons or categories of persons that were historically subjected to unfair discrimination. Persons with disabilities fit into this category and are constitutionally entitled to benefit from remedial measures that seek to push back the challenges confronted by PWDs during public health emergencies such as COVID-19. In fact, their increased vulnerability and their limited capacity to realise personal goals without any assistance from the state, especially during emergencies, creates an immediate obligation to act on the part of the state.

[155] OCHA Zimbabwe, 'Cluster Status: Education', available at <https://reports.unocha.org/en/country/zimbabwe /card/4qUWJuEhk6>/ (accessed on 18 December 2020).

[156] *See also* section 83 (e) and (f) of the Zimbabwean Constitution.

8 Conclusion

This chapter discussed, at length, the rights of PWDs in Zimbabwe, particularly within the context of the provisions of the Constitution and the CRPD. Given that disadvantage is by nature plural, the chapter revolved around and sought to explain the importance of multi-layered or intersectional responses to the challenges confronted by PWDs. Intersectionality considers the identities and experiences of people without assigning them to permanent categories or placing people in specific boxes that denote their identity. It implies that society and the state should not place their focus on fighting injustices solely on the basis of disability because other problems may be arising in other attributes such as gender, age, ethnic origin, economic status and the like among the same PWDs. The idea is to acknowledge the intersectional nature of various identity markers in framing the oppression of PWDs and dealing with them at once instead of fragmenting policies and approaches that eventually converge on the PWDs. In aligning the DPA with the Constitution, different layers of identity should not be treated as stand-alone attributes, but the significance of the intersectional nature of various identity markers in framing the life worlds of PWDs needs to be acknowledged if disability policy is to effectively promote the realisation of their human rights. The reality is that disability does not operate in isolation nor does gender; hence an understanding of the intersectional, multi-layered and multidimensional nature of various identity markers in creating the oppression of PWDs is likely to result in disability policies that contribute to making a meaningful difference in the lives of PWDs.

This chapter discussed, in detail, the measures that need to be taken by the state to promote the rights of PWDs in relation to the provisions of section 83 of the Constitution, albeit referencing international law at a wider level. In terms of section 83 of the Constitution, the measures to be adopted by the state include those that are designed to enable PWDs to become self-reliant and to participate in social, creative and recreational activities, to protect PWDs from exploitation and abuse, to give PWDs access to medical, psychological and functional treatment, to provide special facilities for the education of PWDs and to provide state funded education and training where it is needed. The importance of these measures for the enjoyment by PWDs of their rights has been discussed in detail in this chapter.

The state's duty to promote the self-reliance of PWDs should be read together with the founding values and principles of the nation state, as well as the national objectives protected in Chapter 2 of the Constitution. These values and principles lie at the heart of the new constitutional order and, together with measures that promote self-reliance, create the necessary preconditions for the achievement of the full potential of PWDs. The idea behind self-reliance is to encourage citizens to foster the essence of solidarity in which non-disabled people and PWDs work together and learn to use their own initiative and local resources to improve their well-being instead of passively waiting for the government or donor to deliver the goods. Self-reliance does not necessarily mean that external assistance should be rejected. A collective self-reliance approach, which is embedded in the mainstream community development agenda, encourages PWDs and their families to look inwards, to be

creative and to assist funding partners to view the world through their own indigenous lens. This scenario is not possible if PWDs are inactive and voiceless; too much and prolonged charity perpetuates dependency syndromes and weakens the ability of PWDs to develop themselves for self-reliance.

With regards to measures that enable PWDs to live with their families and to participate in social, creative or recreational activities, the notion of enabling PWDs to live with their families is a positive development in the sense that it seeks to 'move' PWDs from the restrictions of institutional life to family life, but the provision takes a narrow approach, which fails to holistically adopt the contemporary concept of living independently as required by international law. The equivalent provision of the CRPD, Article 19(a), directs state parties to ensure that PWDS "have the opportunity to choose their place of residence and where and with whom they live on an equal basis with others and are not obliged to live in a particular living arrangement". Denying PWDs a choice, the Constitution assumes that PWDs are a homogenous group, and they all desire to live with their families, yet under independent living PWDs should simply have civil rights, options and control over choices in their own lives as do people without disabilities.

As for measures to protect PWDs from all forms of exploitation and abuse, it is necessary to emphasise, particularly in light of gender roles and stereotypes in the African cultural context, that girls and women bear the brunt of sexual exploitation and other forms of abuse that confront PWDs. One of the shortcomings of the Constitution is that it is silent on the gendered aspects of exploitation and abuse. Thus, it is imperative to read the prohibition of exploitation and abuse together with the non-discrimination clause in the Constitution. Gender is important because experiences of exploitation and abuse are primarily shaped by gender roles; girls and women and boys and men do not experience exploitation and abuse in similar ways. In many cases, perpetrators of abuse and exploitation desire to exert power and control over all their victims; hence women with disabilities suffer increased levels of sexual abuse because they are usually regarded as easy targets upon which both disabled and non-disabled men wield dominance. The current DPA is also gender blind. We therefore call for its urgent revision to enable the Act to adopt a gender lens and to articulate what constitutes exploitation and abuse in gendered terms. However, gender does not function on its own. Thus, an understanding of the intersectional nature of exploitation and abuse is important if PWDs are to be adequately protected from exploitation and abuse.

In the context of access to medical, psychological and functional treatment, constitutional provisions which do not seek to identify and address the injustices that are embedded within the health care structures in which PWDs are meant to enjoy rights are futile. In Zimbabwe, negative attitudes of health care staff towards the sexual and reproductive health of PWDs have been reported. Some health care practitioners are of the opinion that PWDs are sick people who should consult specialist health care centres for issues related to their illnesses or disability alone. However, PWDs have a right, just like everyone else, to access health care for reasons which go beyond disability such as sexual and reproductive issues. The work ethic of medical staff is usually that of 'we know best', with the result that PWDs

are rarely consulted even about their own bodies. Regarded as a solid base of truth and personifying the healing front of technology and science, medicine is believed to be absolutely genuine. In relation to disability the state should come up with a strategy of moderating excessive emphasis on medical diagnoses because the understanding of disability requires much more than clinical 'facts' about the body, albeit the necessity of such 'facts' in determining medicinal remedies in cases where they are required.

Section 83 of the Constitution also provides that the state must take appropriate measures, within the limits of the resources available to it, to ensure that persons with disabilities are provided with special facilities for their education and are provided with state-funded education and training where they need it. Whilst primary education has been largely labelled as 'free' and therefore 'state-funded', current practices at the majority of schools raise doubts about this claim. The reality of the matter is that there have been increases, not in tuition fees but in levies and other charges at many schools across the entire country. In many if not all schools the amounts payable in levies are multiple times higher than the money prescribed for tuition fees. With the government currently reported to face perpetual financial challenges, the state's capacity to provide state-funded education and training to PWDs who need it remains in serious doubt. Nonetheless, it is encouraging to note that the Constitution seeks to impose on the state the duty to provide for the quality education needs of PWDs. Given that the majority of PWDs cannot fend for themselves and their children, it is critical for a national constitution to require the state to fulfil this duty to ensure that PWDs are not left out of many educational and developmental programmes.

Going forward, there is need for the state to develop a culture of research which informs policy and practice. By taking into account the voice of PWDs, the state is able to gain first-hand knowledge about the status of PWDs, and determine appropriate strategies for intervention in protecting PWDs from exploitation and abuse, promoting their right to live with their families and to gain access to education, health and self-reliance. If the elected disability senators are unable to facilitate the voice of PWDs, and to ensure that such a voice is heard, or if they are unable to facilitate research and identify new laws, such senators may end up being 'window dressers' who fail to meet the expectations of the citizens whom they represent. Furthermore, given the conflict that appears to reign between international human rights treaties and traditional practices, coupled with contextual differences, there is need for policy makers and implementers to make an effort to reconcile the law with cultural practices, if at the end of the day the concerns of PWDs in Zimbabwe are to be effectively addressed and their rights are to be adequately promoted. Finally, the vulnerability of PWDs requires that states be sensitive to the accelerated marginalisation confronted by this category of persons during public health and other emergencies. This chapter has demonstrated that international law and the Constitution have provisions that mandate states to take remedial measures that give PWDs preferential treatment in post disaster recovery efforts and development programming. These measures should not just address disability as a marker of

disadvantage, but also respond to other identity markers such as gender, age, ethnic identity and many others if all PWDs are to benefit meaningfully from them

9 The Legal Status of Children's Rights in Zimbabwe

Admark Moyo*

1 Introduction

Child law and children's rights are relatively new phrases in Zimbabwean legal terminology. This is partly because children are largely viewed as objects of parental care and state protection. The characterisation of children as 'property' is also evident in the way the family, society and the state construct childhood as no more than a period of paternalistic socialisation. Thus children are rarely consulted when decisions affecting them are made. They are deemed to be incompetent to make rational decisions that are in their best interests or consistent with adult thoughts. This thinking is deeply entrenched in social, cultural and educational practices which underestimate children's abilities to think and act on their own thoughts in an orderly and intelligent manner. Historically, the Lancaster House Constitution did not help at all in efforts made towards dismantling the idea that children are merely objects of social and parental control. This is because it shielded oppressive customary laws from constitutional provisions and therefore ensured the ongoing observance of traditional norms that violate children's rights.[1]

The new Constitution – adopted in 2013 – calls for a change of perspective as it portrays children as being entitled to protection, provision and participation rights. It also constitutionalises a number of children's socio-economic rights. More importantly, it is clear that the constitutionalisation of children's rights is a direct response to legal developments at the international level. Whilst the exact scope and meaning of the rights entrenched in the new Constitution has not been fully, if at all, explored, it is beyond doubt that these rights have significant implications for the protection, participation and autonomy of children. Further, it is common cause that these rights impose obligations, both direct and indirect, on parents, the family and the state. Third, the fact that the new Constitution has horizontal effect means that non-state actors should also respect, promote and fulfil children's rights. Besides, the supremacy of the Constitution suggests that the obligations imposed by children's constitutional rights deserve serious consideration when decisions affecting children are made.

Against this background, this chapter explores the legal status of children's rights under the current Zimbabwean Constitution, the Children's Act and other relevant laws. Due to space constraints, sporadic reference is made to equivalent provisions of international and regional instruments entrenching children's rights to ensure that readers have full knowledge of positive developments at the international and domestic levels.

The chapter is divided into five broad sections of which this introduction is the first.

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[1] *See* section 23 of the Lancaster House Constitution.

In section 2, the chapter identifies and briefly discusses various categories of children's rights in national and international law. These categories include protection, provision and participation rights.

Section 3 identifies participation and protection as dominant or overarching themes in children's rights and demonstrates that the concept of the evolving capacities of the child can be used to reconcile these seemingly oppositional themes. It is demonstrated that the degree to which every child is entitled to protection or autonomy largely rests on the evolving capacities of the child.

Section four describes in great detail the scope and legal content of each of the rights enumerated in section 81(1)–(3) of the Constitution. All the rights are examined in the order in which they appear in the Constitution. In terms of the Constitution, every child has the rights to equal treatment before the law, including the right to be heard;[2] to a given name and family name;[3] to the prompt provision of a birth certificate;[4] to family or parental care or to appropriate care when removed from the family environment;[5] to be protected from sexual exploitation, from child labour and from maltreatment, neglect or any form of abuse;[6] and to education, health care services, nutrition and shelter.[7] Apart from these largely positive rights, children also have negative constitutional rights not to be recruited into a militia force or take part in armed conflict or hostilities;[8] not to be compelled to take in any political activity;[9] and not to be detained except as a measure of last resort.[10]

When a child offender is detained as a measure of last resort, they have a triad of positive rights to be detained for the shortest period of time; to be kept separately from detained persons over the age of 18 years; and to be treated in a manner and kept in conditions that take account of the child's age.[11] In addition to these sets of rights, the Constitution also codifies two rights of very broad application which have implications for the manner in and extent to which children enjoy all other rights. These include the child's rights to have their best interests taken as a paramount consideration in every matter concerning the child and to be adequate protection by the courts, in particular by the High Court as their upper guardian. All these rights are discussed in section 4 of this chapter, and section 5 concludes the discussion.

2 Categories of Children's Rights

This section discusses the different categories of rights and briefly investigates how each category deals with the relationship between the child, the parent and the state.

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[2] Section 81(1)(a) of the Constitution.
[3] Section 81(1)(b) of the Constitution.
[4] Section 81(1)(c) of the Constitution.
[5] Section 81(1)(d) of the Constitution.
[6] Section 81(1)(e) of the Constitution.
[7] Section 81(1)(f) of the Constitution.
[8] Section 81(1)(g) of the Constitution.
[9] Section 81(1)(h) of the Constitution.
[10] Section 81(1)(i) of the Constitution.
[11] Section 81(1)(i)(i)–(iii) of the Constitution.

In international human rights law, children's rights have been divided into three broad categories. These include provision or socio-economic rights, protection rights and participation or empowerment rights.[12] These categories of rights should be read holistically as they are indivisible, interrelated and mutually reinforcing. Each set of rights largely represents specific interests of children, with provision rights broadening the child's interest in developing optimally, participation rights promoting the child's interest in making decisions once competent to do so and protection rights emphasising the child's interest in being protected from harm, neglect, violence, degradation and all forms of exploitation. Protection in the decision-making context largely comes in the form of parental duties and the responsibility of the state in ensuring that parental duties are exercised in the best interests of the child.

2.1 *Provision Rights*

These are rights to the provision of goods and services. The Constitution recognises the indivisibility of children's rights[13] and acknowledges that rights are more than injunctions against the state.[14] The provision or socio-economic rights are largely derived from and broaden the scope of the right to life, survival and development.[15] The Zimbabwean Constitution provides for the rights to "education, health care services, nutrition and shelter".[16] Rights to provision are important in fostering the child's physical and intellectual development. Their importance must be seen against the indivisibility of human rights and the need to adopt a holistic approach to children's rights.[17] Thus, the inclusion of socio-economic rights in the overall design of the Constitution emphasises the link between the provision of certain goods, balanced growth and full citizenship. Apart from their role in enhancing the child's physical and intellectual development, provision rights rarely raise tensions between different players in society.

2.2 *Protection Rights*

Protection rights are intended to promote the child's basic right to life, survival and development. The Constitution contains provisions entrenching the child's right to be "protected from economic and sexual exploitation, from child labour, and from maltreatment, neglect or any form of abuse".18 These rights require both state and non-state actors to protect children from all forms of exploitation, maltreatment, neglect and abuse. More importantly, however, children are protected from potential

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[12] *See*, for example, P. Alderson, *Young Children's Rights: Exploring Beliefs, Principles and Practice*, 2nd edition (2008) p. 17.
[13] On the indivisibility of human rights, *see* CRC General Comment No. 5, paras. 6 and 25.
[14] R. L. Barsh, 'The Convention on the Rights of the Child: A Re-assessment of the Final Text', 7 *New York Law School Journal of Human Rights* (1989–1990) p.142, at p. 143.
[15] *See* L. J. LeBlanc, *The Convention of the Rights of the Child* (1995) p. 65.
[16] Section 81(1)(f) of the Constitution.
[17] On indivisibility and universality of human rights, *see generally* J. W. Nickel, 'Rethinking Indivisibility: Towards a Theory of Supporting Relations between Human Rights', 30 *Human Rights Quarterly* (2008) p. 948.
[18] Section 81(1)(e) of the Constitution.

violations of rights in the criminal justice system, especially when they are alleged to have committed an offence.

Just like the Child's Rights Convention (CRC), section 81(1)(i) of the Constitution provides that a child should not be "detained except as a measure of last resort and if detained, to be detained for the shortest appropriate period of time; to be kept separately from detained persons over the age of eighteen years and to be treated in a manner and kept in conditions, that take into account the child's age". Children are also protected against the harmful effects of armed conflict, and the state is bound to ensure that those below the age of 15 years do not directly participate in armed hostilities.[19] At the domestic level, the fact that the state has not incorporated some of the rights protected at international law does necessarily mean that children may not, for instance through using the best interests principle, be protected from practices which threaten these rights.

Protection rights represent minimum conditions of treatment to which children are entitled and with which the state and private persons must comply. Accordingly, the state may not rely on resource constraints or other excuses to justify its failure to comply with the minimum levels of protection envisaged in the Constitution. Protection rights seek to prohibit practices that endanger the child's right to life, survival and development. Neglectful and abusive parents or caregivers have the potential to harm children physically and emotionally, and the state may intervene by moving children into alternative care to remedy the problem.[20] As noted by Wald, protection rights "encompass claims that the state should more actively protect children from harm [caused] by adults, especially their parents".[21] Protection rights require the state not only to refrain from engaging in conduct that infringes these rights but also to prevent natural and juristic persons from infringing these rights. When violations of rights have already occurred, the state should take measures to ensure that they would not happen again.

2.3 *Participation and Autonomy-Related Rights*

Participation and autonomy-related rights relate to every citizen's rights to express their views freely and to influence decision-making in all matters that concern them. They constitute an acknowledgment that people (including children) are "active, creative beings in charge of, or at least struggling to shape their lives. People must not simply be protected against attacks by the state or other citizens, they must be empowered to act and to lead autonomous lives."[22] In the category of participation

[19] Section 81(1)(g) of the Constitution stipulates that "every child has the right not to be recruited into a militia force or take part in armed conflict or hostilities". For levels of protection at international and regional law, *see* Articles 38(1)–(4) of the CRC and 22(1)–(3) of the African Children's Charter.

[20] For empirical evidence supporting this view, *see* M. Barry, 'Minor Rights and Major Wrongs: The Views of young People in Care', in B. Franklin (ed.), *The New Handbook of Children's Rights* (2001) pp. 239–254.

[21] M .Wald, 'Children's Rights: A Framework for Analysis', 12 *University of California, Davies Law Review* (1979) p. 255, at pp. 261–262.

[22] J. Donnelly and R. Howard, 'Assessing National Human Rights Performance: A Theoretical Framework', 10 *Human Rights Quarterly* (1988) p. 214, at pp. 234–235.

rights falls the right to be heard; freedom of expression; access to information; freedom of thought, conscience and religion; and freedom of association and assembly. This set of rights is constitutionally protected as belonging either to everyone or specifically to children.

One may also add in the category of participation-related rights the rights to privacy and education. Apart from the right to be heard, which is protected as part of the rights specifically applicable to children, the other participation-related rights are protected as rights that are held by everyone, including children. These rights have direct implications for the triangular relationship between the child, the parent and the state, particularly in the context of decision-making.

3 Protection and Autonomy as Overarching Themes in Children's Rights

For over 50 years, child protection and autonomy have stood out as overarching themes in the children's rights movement. This is largely because children's rights to protection and autonomy have been cast as 'polar opposites' and not two sides of the 'same coin'. On one side of the ledger are protagonists of children's rights to protection who are of the view that children need to be protected from an array of social, cultural, political and economic problems that bedevil families and communities within which they live. These are traditionally known as the 'child savers'.[23] Most of the 'child savers' largely consider children as vulnerable, immature and in need of protection from parents/guardians, society and the state. More importantly, the majority of protectionists argue that for children to enjoy the greatest benefits and to develop optimally, it is imperative for society and the state to confer on parents the autonomy to direct, guide and bring up their children as they see fit.[24] Over time, however, the 'child savers' also began to emphasise the need to protect children not only from strangers but also from parents and even children themselves in some instances.[25] Under the protective approach to children's rights, paternalistic intervention is justified in the name of advancing the best interests of the child.

On the other side of the ledger are advocates of children's rights to participation, autonomy and liberation. This group of theorists consider the right to self-determination as the most important of all children's rights.[26] From the perspective of child liberationists – often referred to as 'kiddie libbers' – the protective approach to rights is undesirable because it impairs the dignity and status of the child.[27] Under this approach to children's rights, the child's status should never be determined by

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[23] *See generally* D. Platt, *The Child Savers* (1989). *See also* B. C. Feld, *Bad Kids: Race and the Transformation of the Juvenile Court* (1999) p. 51.

[24] *See* H. Foster and D. Freed, 'A Bill of Rights for Children' *Family Law Quarterly* (1972) pp. 343–347 and M. Jones and L. A. Marks, 'The Dynamic developmental Model of the Rights of Child: A Feminist Approach to Rights and Sterilisation', *The International Journal of Children's Rights* (1994) p. 265, at p. 270.

[25] J. E. Coons and R. H. Mnookin, 'Towards a Theory of Children's Rights', in I. F. G. Baxter and M. A. Eberts (eds.), *The Child and the Courts* (1978) p. 391, at pp. 391–392.

[26] *See generally* R. Farson, *Birthrights: A Bill of Rights for Children* (1974) and J. Holt, *Escape from Childhood: The Needs and Rights of Children* (1974).

[27] H. Cohen, *Equal Rights for Children* (1980) p. viii.

their age, and all rights extended to adults should also be extended to children, including the very young.[28] Theorists who elevate liberation and autonomy over protection often seek to limit the control exercised by parents, guardians and the state over children and to vest on children themselves decisional autonomy over many if not all aspects of life. Any version of paternalistic control of children's lives and decisions is viewed as unnecessary, arbitrary, oppressive and unjustifiable.

The contrast often made between autonomy and protection as 'polar opposites' patently overlooks the sophisticated nature of the relationship between these two complimentary themes of children's rights. In reality, a well-balanced theory of children's rights should have elements of both protection and autonomy. As such, children's autonomy and protection should be seen as phases in the continuum of a child's development and life course. To enjoy better protection from harmful conduct or practices, children need to be heard and to have their perspectives taken into account when protective measures are adopted by parents, society and the state. By the same token, if a child wishes to take an autonomous decision that endangers his or her life, parents and the state have the authority to veto that decision on the basis that it violates the child's protection rights and undermines the child's best interests. In addition, child protection creates platforms for children to express their views freely and without fear of reprisals and victimisation. Therefore, there are overlaps between different categories of children's rights, and the enjoyment of all of them makes optimal development a possibility.

The distinction between children as independent individuals seeking autonomy and as dependents requiring protection has been characterised as "perhaps the most difficult and controversial issue in children's rights".[29] The tension between participation/autonomy rights and protection rights is most evident in provisions which cast the child as an autonomous agent and those that describe the parent or guardian as the person responsible for guiding the child in exercising his or her legal rights. Naturally, the tension is between the child's right to autonomy and the parent's right to control their child's upbringing, growth and development.[30] The protection of child participation rights in section 81(1)(a) of the Constitution (an equivalent of Article 12 of the CRC) and parental rights in section 60(3) of the Constitution (an equivalent of Article 5 of the CRC) embodies the enduring tension between children's personal autonomy claims and parents or the state's duty to protect children from themselves. Whereas section 81(1)(a) of the Constitution and Article 12 of the CRC recognise the child as a potentially autonomous person with the ability to participate fully in society and as an individual separate from the family,[31] section 60(3) of the

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[28] *See generally* M. D. A. Freeman, *The Rights and Wrongs of Children* (1983) pp. 22–23.

[29] E. Evatt, 'Children's Rights and the Legal Regulation of Families', Paper presented at the Third AIFS Australian Family Research Conference, Ballarat, 1989.

[30] *See* Article 9 of the African Children's Charter stating as follows:

(1) Every child shall have the right to freedom of thought conscience and religion;

(2) Parents, and where applicable, legal guardians shall have a duty to provide guidance and direction in the exercise of these rights having regard to the evolving capacities, and best interests of the child;

(3) States Parties shall respect the duty of parents and where applicable, legal guardians to provide guidance and direction in the enjoyment of these rights subject to the national laws and policies.

[31] C, Barton and G. Douglas, *Law and Parenthood* (1995) p. 42.

Constitution and Article 5 of the CRC cast the child as a member of the family subject to parental control and guidance in light of the child's individual capacities.

To bring out the contrast between participation (in the sense of autonomy) and protection, and to demonstrate how national and international law resolves this potential conflict, it is imperative to refer to key provisions of the Constitution and the CRC. To begin with, section 60(3) of the Constitution provides that "parents and guardians of minor children have the right to determine, in accordance with their beliefs, the moral and religious upbringing of their children, provided they do not prejudice the rights to which their children are entitled under this Constitution, including their rights to education, health, safety and welfare". This provision allows parents to take several measures to protect children and to advance children's rights according to their own value system, subject of course to the caveat that the measures adopted by parents may not prejudice any of the rights of the child. It allows parents to disregard the wishes of the child if those wishes undermine the child's rights to health, safety, welfare and other protection rights. Section 60(3) of the Constitution domesticates Article 5 of the CRC, which is the umbrella provision codifying parental responsibilities and rights.[32]

For purposes of balancing protection and autonomy, it important to note that international law and, to a limited extent, domestic law declare that the exercise of parental responsibility should be consistent with the child's evolving capacities. Article 5 of the CRC provides that:

> States Parties shall respect the *responsibilities, rights and duties* of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the *evolving capacities of the child*, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.[33]

This provision requires states parties to respect the parental responsibility and right to provide *appropriate* direction and guidance in the exercise by the child of the rights in the CRC. Parents thus have the right to guide children in the latter's exercise of their right to participate in decision-making. It was intended to address the protection to be accorded to the parental right and duty to provide direction and guidance to the child, in light of the child's evolving capacities. The direction and guidance to which the child is entitled should be provided in a manner consistent with the evolving capacities of the child. In exercising their rights and responsibilities to guide and direct children, parents may not ignore the evolving capacities of the child. As the child grows up, parents must, in Locke's words, reduce the "rigour of parental government" or the level of control over the child's life. It is evident, from the provisions referred to in this section, that while children are seen as separate

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[32] *See Technical Review of the Text of the Draft Convention on the Rights of the Child*, UN Doc. E/CN.4/1989/WG.1/CRP.1/Add.1, 5 at 7.

[33] Emphasis added. Article 14(2) of the UNCRC also states that:
States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child.[33]

individuals with rights of their own, the importance of parents, guardians and members of the extended family to the child's development is also recognised.[34]

The concept of the evolving capacities of the child ground both parental control and the child's relative autonomy from paternalistic decisions. It plays an important role in maintaining the balance between child participation and protection through the exercise of parental responsibility and state intervention.[35] It recognises that children experience rapid growth in their "physical, cognitive, social and emotional functioning", pass through zones of rational autonomy before attaining adulthood and vary in the ages at which they become capable of making particular decisions.[36]

As an emancipatory concept, the evolving capacities of the child seeks to broaden youth autonomy and encourage children to assume responsibility for their actions. With age and maturity, the consequences of children's decisions increase and diversify until they reach the age of majority, when they begin to fully exercise the totality of their rights. As the child's capacities evolve, the child plays a central role in defining what is in his or her best interest, authorising courts, in limited instances, to override parental preferences.[37] When a child is sufficiently mature to be rationally autonomous in making a particular decision, it would be inconsistent with the concept of the evolving capacities of the child to insist that her views be co-terminus with parental preferences.[38]

The concept of the evolving capacities of the child also grounds parental control and state intervention. The primary responsibility of parents is to protect children from the immaturity of their youth and to help them make difficult decisions in life. The CRC, the African Children's Charter and the Zimbabwean Constitution recognise children's vulnerability and immaturity as grounds for entrenching children's right to special protection. As observed above, the child's protection rights provide a solid reason for limiting the child's desire to exercise personal autonomy in the decision-making process.

The protective dimension of the evolving capacities of the child entails, among others, protection from personal decisions that negatively affect the child's own life, survival and development. In many contexts, the child's un(der)developed capacities require the parent and the state to shield the child against unsound personal decisions. In most cases, the child's long-term interests are not promoted by giving effect to his or her present desires and preferences. In an adult's case, present autonomy takes precedence over future good (the adult has the right to choose). With children, future good *often* takes precedence over present autonomy (adults

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[34] *See* A. B. B. Munir, 'Child Protection: Principles and Applications', 2 *Child Abuse Review* (1993) p. 119, at p. 122.
[35] G. Lansdown, *The Evolving Capacities of the Child,* UNICEF Innocenti Research Centre, Florence, 2005, p. 15.
[36] *See* CRC General Comment No. 4, paras. 1 and 7, and CRC General Comment No. 7, para. 17.
[37] *See* L. Krappman, 'The Weight of the Child's View (Article 12 of the Convention on the Rights of the Child)', 18 *International Journal of Children's Rights* (2010) p. 501, at pp. 506–509 and CRC General Comment No. 4, para. 17.
[38] R. Hart, 'The Evolving Capacities for Children to Participate', in V. Johnson *et al.* (eds.), *Stepping Forward: Children and Young People's Participation in the Development Process* (1998) pp. 27–31.

have the right to override the child's free choice if such choice threatens the child's best interests, life and gradual development into responsible adulthood).

There is hardly any consensus about the nature and extent of the protection to which children are entitled in the context of personal decision-making. For the very young, most decisions are justifiably taken by adults exercising parental responsibilities and rights. The rationale for ceding control of young children to parents is that children generally lack the capacity to make decisions in ways that maximise their stock of the good. Through the idea of the evolving capacities, international law recognises that an immature child needs to be protected from their own actions when such actions threaten the child's basic right to life, survival and development. The protective dimension of the evolving capacities of the child does not only ensure that incompetent children are not given the burden to make complex decisions in their life course, but also prevents parents from putting children in the middle of adult conflicts.[39] The fact that children's capacities are 'evolving' authorises parents to invoke the protective dimension of the child's evolving capacities to evaluate whether the child's views promote the present and future good of the child, often referred to as their best interests.

However, the protective element of the evolving capacities of the child does not justify the total exclusion of children from the decision-making world as this undermines the participation rights of children, particularly adolescents.[40] In Freeman's words, "to take children's rights more seriously, requires us to take more seriously both the protection of children and recognition of their autonomy, both actual and potential".[41] Finally, whether the exercise of parental responsibility is 'appropriate' largely depends on whether it is justified by the child's (in)capacity to make the decision in question. To be appropriate, parental responsibility should protect children from exercising autonomy rights during earlier stages of their life course, enhance their capacities for autonomy as they grow up and allow for relative autonomy from parental control when the child acquires the capacities to make particular decisions in their best interests.

4 Children's Rights under the New Constitution

4.1 *The Rights to Equal Treatment before the Law and to Be Heard*

In terms of section 81(1)(a) of the Constitution, every child has the right to equal treatment before the law, including the right to be heard. To fully engage with what this provision entails, it is necessary to divide the right into two separate but related

[39] *See* I. Thery, 'The Interest of the Child and the Regulation of the Post-Divorce Family', in C. Smart and S. Sevenhuijsen (eds.), *Child Custody and the Politics of Gender* (1989) p. 78, at p. 92.
[40] *See generally* J. Miller, *All Right at home: Protecting Respect for the Human Rights of Children in the Family* (1998).
[41] M. Freeman, 'Whither Children: Protection, Participation, Autonomy?', 22 *Manitoba Law Journal* (1994) p. 307, at p. 324.

sections: the first dealing with the right to equal treatment before the law and the second unpacking the legal content of the right to be heard.

4.1.1 The Right to Equal Treatment before the Law

Every child has the right to equal treatment before the law. This right should be read in light of the broader constitutional framework for equality as provided for in section 56(1)–(6) of the Constitution and the provisions of relevant international and regional instruments. When it comes to equal treatment before the law, children should enjoy better protection than adults, especially in light of their vulnerability and limited capacity for rational decision-making. For example, it can be argued that statutory provisions authorising the imposition of corporal punishment as a sentence to be imposed on male juvenile offenders violates the equal protection and benefit of the law clause. In addition, these laws also violate the non-discrimination clause. This is because the laws in question directly subject young male offenders to a condition to which other people are not subjected and indirectly accords to all other categories of persons a privilege or advantage which young male offenders are not accorded.[42] The unfair treatment experienced by male offenders in the penal context appears at two levels, that is as a manifestation of both age-based and sex-based discrimination.

The child's right to equal treatment before and protection of the law came to the spotlight in *Bhila v. The Master of High Court and Others*.[43] In this case, the applicant as the surviving spouse was appointed as executrix of her husband's deceased estate. Upon processing the estate, the applicant who had advertised the estate got to know that her late husband had three children born out of wedlock. The three children or their guardians then sought to inherit from their late father's estate. The first respondent (the Master) then appointed a neutral executor who subsequently prepared a distribution plan in terms of which the matrimonial property was awarded to the applicant as the surviving spouse. The rest of the property which included a Borrowdale house was then treated as free residue of the estate. Upset by this distribution plan the applicant raised an objection with the first respondent. However, the first respondent directed that the distribution plan as given by the second respondent be advertised and the surviving spouse made an application for this distribution plan to be set aside.

Mwayera J, for the Court, held that the common law position of excluding children born out of wedlock violated the constitutional rights to equal protection of the law and freedom from discrimination. Drawing inspiration from *Smyth v. Ushewokunze and Anor*,[44] the learned judge held that the provisions of the Constitution must be given a purposive interpretation so as not to strangle the right that is being protected. With regards to the constitutional position on equality and non-discrimination, the Court held that:

[42] *See* section 56(4) of the Constitution.
[43] HH 549-15.
[44] 1997 (2) ZLR 544.

To seek to discriminate the third to fifth respondents on the basis of them being children born out of wedlock would not only be unfair and unjust but undemocratic for it would amount to punishing innocent children in an inhuman manner for an iniquity beyond their control. An "iniquity" by those who sired them at no request by the said children let alone their consultative input, would surely be discrimination which no civilised democracy would legally sanction.[45]

The Court was at pains to emphasise that the question whether or not children born out of wedlock can inherit *ab intestato* from the estate of their father was sufficiently answered by the provisions of the Constitution. It then pointed out that section 56(3) of the Constitution explicitly provides for every person's right not to be treated in an unfairly discriminatory manner regardless of whether they were born in or out of wedlock. To the Court, it was patent that section 56(3) outlawed discrimination on the basis of being born out of wedlock, and therefore the third to fifth respondents had a right to equality and non-discrimination.[46] Accordingly, excluding children or descendants of a deceased from inheriting from the estate of their father *ab intestato* on the basis that they were born out of wedlock is *ultra vires* the Constitution.[47] In perhaps some of the most important passages against discrimination based on prohibited grounds, the Court held that:

> The current constitution outlaws any sort of discrimination against children on the basis that they are born in or out of wedlock … The reasoning where children born out of wedlock were viewed as "devils, bastard illegitimate" is unacceptable and has been overtaken by dynamics in culture, society and legal development. Social and legal dictates clearly show that no child should be punished by virtue of not having been sired in a registered union or marriage. It is not in dispute the third to fifth respondents are the late's children thus his descendants and beneficiaries to the estate. The fifth respondent is a juvenile and again well protected by the law, section 81 of the constitution clearly spells out the rights of children. The constitution outlaws rules, conduct, practice and law which is discriminatory. Hence the third-fifth respondents as off spring/descendants/children/progeny albeit out of wedlock are also entitled to a share of the free residue just like the children/descendants or off springs born in wedlock.[48]

The right to equal treatment before the law does not prevent parents, society and the state from treating children differently from adults or from treating different children differently.

However, it is necessary to emphasise that when children of different ages or backgrounds are treated differently by state institutions, there must be a legitimate government purpose behind the differentiation as otherwise the courts will declare the conduct of the relevant person or body invalid and unconstitutional. For instance, the state may adopt laws or policies that extend to children with disabilities or from poor backgrounds the right to attain basic state-funded education as a measure designed to bridge the skills gap between children from poor backgrounds and those from elite backgrounds. Affirmative action measures or policies in favour of underprivileged individuals or groups are permissible in terms of section 56(6) of the

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[45] *Bhila v. The Master of the High Cou*rt, p. 5.
[46] *Ibid.*
[47] *Ibid.*, p. 6.
[48] *Ibid.*, pp. 6, 7 and 8.

Constitution, provided that they are meant to address circumstances of genuine need. The legitimate government purpose would then immunise the affirmative action measure against the charge that it offends the non-discrimination clause.

4.1.2 The Right to Be Heard

Section 81(1)(a) of the Constitution protects the child's right to be heard as part of the right to equal treatment before the law. This section explores the content of section 81(1)(a) of the Zimbabwean Constitution and explains in some detail the scope of the child's right to be heard in all matters affecting them. In this part of the chapter, particular focus is given to the key aspects of the child's right to be heard.

4.1.2.1 The Duties to Ensure That the Child Expresses Views Freely and to Give Due Weight to the Views of the Child

Participation rights recognise that children have perspectives of their own, that they are at liberty to elect not to express the views they form and that their unique vulnerability to adult or peer pressure may unduly influence their decision-making.[49] The Constitution seeks to ensure that children do not become mouthpieces for parroting the views of other people. The more grave the problem, the greater the freedom (to choose whether to be involved) to be granted to the child. When the child participates through an intermediary, the intermediary must ensure that the child expresses her own opinion freely, has not been subjected to external pressure and receives all, not partial or condensed, information to enable the child to make an informed choice.[50] The duty to ensure that the child expresses views freely requires the decision-maker to inform the child of all available alternatives, the likely decisions to be made, the possible consequences of each decision and the conditions under which the child will express their own views.[51]

Listening to children speak is one thing, taking what they say seriously is another. Children's views should be accorded 'due weight', and this suggests going beyond tokenistic ventures towards achieving full participation.[52] Giving 'due weight' means analysing the child's views, giving them feedback on how their views have been interpreted, informing them the extent to which their views have influenced the final outcome and providing them with the opportunity to challenge the analysis of the findings and to participate in follow-up processes, if any.[53] Giving 'due weight' requires 'real change',[54] not only to the way we envision children's views but to the weight we accord those views. However, it does not mean that the child's preference

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[49] *See* L. Steinberg and E. Cauffman, 'Maturity of Judgment in Adolescence: Psychological Factors in Adolescent Decision-Making', 20:3 *Law and Human Behaviour* (1996) p. 249.
[50] R. A. Washak, 'Payoffs and Pitfalls of Listening to Children', 52:4 *Family Relations* (2003) p. 373, at p. 375.
[51] *See* CRC General Comment No. 12, para. 25.
[52] R. Hart., *Children's Participation: From Tokenism to Citizenship*, Innocenti Essays No. 4 (UNICEF International Child Development Centre, Florence, Italy, 1992) pp. 9–10.
[53] *See* CRC General Comment No. 12, para. 134.
[54] *See* CRC General Comment No. 5, para. 12.

should be given systematic pre-eminence, but that their view will be considered in light of the nature of the problem and the degree to which it represents the child's interests and the interests of others – parents and other members of the family for instance. If the decision to be taken, for example inter-country adoption, has imminent and heavy consequences on the child, the child's views deserve considerable attention.

Lastly, whether a child is competent enough to have their views given determinative weight depends on the seriousness of the decision to be made and the risks associated with it. As demonstrated above, respecting children's evolving capacities is not synonymous with extending absolute autonomy to children. Competence is not an all or nothing concept in terms of which the subject either lacks it or possesses it. It is task-specific, and there is no concrete stage at which the child can be regarded as categorically capable of making all decisions and therefore free from parental control. The capacities of the child and the nature of the decision to be made influence the degree of autonomy to be given to the child in exercising his or her rights.[55]

4.1.2.2 The Application of the Right to Be Heard in Domestic Courts

There have also been domestic developments in the area of child participation in decision-making. In *Hale v. Hale*,[56] the Court emphasised that it was important to give the children concerned an opportunity to be heard before making a final determination on whether the best interests of the child required a shift in the court-sanctioned custody arrangement. Tsanga J, for the Court, made the following remarks:

> In any event it would also seem to me that this issue regarding the children's schooling cannot be dealt with satisfactorily without hearing the views of the children themselves, especially the two older children who are already at the boarding school in question. I say this because a particularly noteworthy aspect of the new Constitution is that it grants both parents and children rights …Yet all these rights that undoubtedly impact on parents now have to be balanced against those which our Constitution also gives to children. This is even more so where parents as in this case, are not in agreement as to what is best for the child. Constitutionally, as of right, children are no more at the margins and periphery of decisions affecting them. They effectively have a right to be part of those decisions.[57]

According to the Court, section 81(1)(a) "effectively gives a 'voice' to children on matters that concern them" and commendably incorporates into our legal system the spirit of the equivalent provision of the CRC.[58] Accordingly, the Constitution

[55] As Kleinig once wrote, "a child is likely to be able to decide with the requisite rationality whether and what games it will play, before it is able to decide whether and who to marry". *See* J. Kleinig, 'Mill, Children and Rights', 8:1 *Educational Philosophy and Theory* (1976) p. 1, at p. 7.
[56] HH 271-14.
[57] *Ibid.*, pp. 8–9.
[58] *Ibid.*, p. 9.

advances the notion of child participation and inclusion in decision-making processes affecting children.[59]

The Court also observed that the best interests principle, which has traditionally been the traditional criteria used by our courts in matters concerning children, has not only been constitutionalised but also exists amidst certain rights extended to children by the Constitution. More importantly, however, the Court emphasises that the best interests principle cannot be interpreted in a vacuum but derives its meaning from the rights set forth in the Constitution, including the right to be heard. To quote the Court:

> Thus the principle of the best interests of the child, said to be paramount in every matter concerning the child under s 81(2) of the Constitution, is now also better placed to take its specific character and meaning from the rights that are accorded children by our Constitution. Pertaining to this case, *it is their best interests that they be heard, especially for the older children who are in boarding school and have an appreciation of the issue. Their views are necessary to obtain an order for the court to make an informed decision that takes into account their experiences with boarding school. My assumption here is that having already spent time at the boarding school they are able to comprehend the issue at stake and exercise their right to be heard on what they think is best for them. Given that participation has to be age appropriate, in practice courts have often achieved participation through a judge or judicial officer speaking to the children themselves or where it is not practical through child welfare professionals giving their report*. The youngest child Oscar may not be able to exercise this right due to his age, thus a welfare report that is done in consultation with those at his nursery would fulfil the purpose.[60]

There are two vital points from this and other paragraphs in the Court's judgment. First, the Court emphasises that gone are the days when adults would decide what is best for children without giving the very children an opportunity to be heard. At the heart of this observation is a subtle claim that even if the best interests of the child are viewed as a protective concept, then children cannot be better protected by marginalising them when decisions to protect them are made. More likely, however, the Court's merging of child participation rights and the best interests principle appears to be inspired by the indivisibility, independence and interrelatedness of children's rights – a move away from an understanding of children's rights as discrete silos towards a holistic perception of all the rights extended to children. This argument about the Court's approach to children's rights is buttressed by Tsanga J's idea that all the rights entrenched in section 81(1)–(3), including the right to be heard, provide the context against which the best interests principle ought to be interpreted.

The second vital point relates to the Court's enunciation of the concept of the evolving capacities of the child. Its observations that "participation has to be age appropriate" and that "the youngest child may not be able to exercise this right due to their age" formally import the concept of the evolving capacities of the child into the Zimbabwean legal system. The evolving capacities concept justifies near-autonomous decision-making by the child provided the child has competences to

[59] Article 12(1) of the CRC, also cited in the judgment, provides that "a child who is capable of forming his or her own views has the right to express those views freely in all matters affecting the child, the views of that child being given due weight in accordance with the age and maturity of the child".
[60] *Hale v. Hale*, pp. 9–10, emphasis added.

make the decision in question. It recognises that children experience rapid growth in their "physical, cognitive, social and emotional functioning", pass through zones of rational autonomy before attaining adulthood and vary in the ages at which they become capable of making particular decisions.[61]

4.2 *The Right to a Name and a Family Name*

The right to a name is one of the most fundamental human rights and is important to the realisation of children's rights. The right to a name is primarily enforceable against parents, and, to a limited extent, the state.[62] A name is an important element of an individual's identity.[63] Theoretically, the right could be enforced against parents who either fail to name their children or take the necessary steps to facilitate recognition and registration.[64] The obligation to give a child a name and family name lies with his/her parents or guardians. However, in order to give requisite effect to the right to a name, the state has an obligation to regulate the attribution of names. The right to a name is protected in section 81(1)(b) of the Constitution which states that "[e]very child … has the right to be given a name and a family name". The two names play an important role in establishing an individual's identity and, depending on the applicable laws, in determining the child's nationality or citizenship.

For all persons, including children, nationality is a right that is of fundamental importance to their well-being and ability to lead a dignified life. States determine which people are their nationals and which ones are not.[65] The right to a name and a family name acts as a gateway to acquiring nationality while nationality acts as an enabling right without which it is often impossible to exercise many other rights. Accordingly, denying children a particular name or nationality can have a significant impact on all other child rights including their access to education, healthcare, free movement and family life.

4.3 *The Right to the Prompt Provision of a Birth Certificate*

Section 81(1)(c) provides that every child has the right to the prompt provision of a birth certificate provided that the child is either born in Zimbabwe or born outside the country to Zimbabwean citizens by descent. Birth registration is widely regarded as a gateway to the attainment of other fundamental rights because it facilitates access to essential services such as education and health care.[66] Children with no birth certificates do not exist before the law, and are in danger of remaining on the margins of society, or being shut out altogether. Children who legally exist (from an official

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[61] *See* CRC General Comment No. 4, paras. 1 and 7, and CRC General Comment No. 7, para. 17.
[62] S. Woolman and M. Bishop, *Constitutional Law of South Africa*, vol. 3, 2nd edition (2014), p. 42–3.
[63] I. Ziemele, 'Article 7: The Right to Birth Registration Name and Nationality and the Right to Know and Be Cared for by Parents', in A. Alen *et al.* (eds.), *A Commentary on the United Nations Convention on the Rights of the Child* (2007) para. 20.
[64] Woolman and Bishop, *supra* note 62, p. 42-3.
[65] *See* Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws, 1930.
[66] J. Todres, 'Birth Registration: An Essential First Step toward Ensuring the Right of All Children', 10:3 *Human Rights Brief* (2003) pp. 32–35.

perspective) are less likely to be exploited or trafficked than those who do not.[67] Birth registration therefore diminishes the risk of the abduction or sale of or trafficking in children.[68] Without birth registration, domestic proof of identity may be difficult, if not impossible, to obtain.[69]

Birth registration facilitates the early identification of vulnerable children such as those with disabilities,[70] thus allowing them to access state support and assistance at the earliest possible level.[71] Birth registration is also of particular importance in redressing the inequalities experienced by indigenous children.[72] Elsewhere, it has been observed that birth registration is not only a record of fact, it also unlocks essential civil and constitutional rights, both for the child and for their parents.[73] Harm to children can result from a deficient system of birth registration.

International law requires that registration takes place 'immediately after birth'.[74] A state's obligations in relation to birth registration include the duty to register the birth of children born abroad to any of its nationals.[75] Thus, birth registration is compulsory in Zimbabwe.[76] However, the Birth and Death Registration Act is fraught with a number of provisions and omissions that make it a less comprehensive piece of legislation. The Act does not make it a right for a child to be registered at birth. In addition, the requirements for a guardian, a parent or a witness to register a child does not take into consideration the socio-economic realities on the ground, such as the fact that some children are double orphans and that they may not have guardians. More so, few people who are non-relatives would want to be burdened with registering such children.

4.4 *The Right to Family or Parental Care or to Appropriate Care When Removed from the Family Environment*

4.4.1 The Right to Family or Parental Care

Section 81(1)(d) of the Constitution guarantees the right of every child "to family or parental care". It should be noted that parental care has been interpreted in the case law not only to refer to natural parents, but also to adoptive parents, foster parents and step-parents.[77] In the case of *SW v. F*, the Court held that the right to parental care was not a bar to adoption "where the care of the natural parents was lacking or

[67] CRC General Comment No. 7, para. 36(h).
[68] HRC General Comment No. 17, para. 7.
[69] CRC General Comment No. 3, para. 32.
[70] CRC General Comment No. 9, para. 56.
[71] Todres, *supra* note 66, p. 35.
[72] CRC General Comment No. 11, para. 41.
[73] L. Schafer, *Child Law in South Africa* (2011) p. 118.
[74] *See* Articles 6 of the African Charter and 7 and 8 of the CRC.
[75] For example, Committee on the Rights of the Child, Concluding Observations of the Committee on the Rights of the Child: The Philippines, CRC/C/15/ Add. 259 (2005), at paras. 36–37.
[76] Section 10 of the Birth and Death Registration Act [Chapter 5:02].
[77] *SW v. F*, 1997(1) SA 796 (O).

inadequate".[78] At common law, a parent (or other person) who has the custody of a minor child is entrusted with the care of the child's person and the decision-making power in respect of the child's day-to-day life, upbringing and education.[79] Similarly, guardianship is widely construed to include custody, and embraces the care and control of the minor's person as well as the administration of their property and business affairs. Where custody and guardianship are separated, the custodian parent has the care and control of the minor's person, while the guardian parent administers the child's property and business affairs (i.e. 'guardianship' in the narrower sense).[80]

In the case of *Jooste v. Botha*,[81] the Court considered, amongst other things, what is included in a child's right to family or parental or appropriate alternative care. The Court stipulated that the family means a father, mother and child or it can mean the extended family, which includes grandparents, aunts and uncles. The Court interpreted the term 'parental care' to mean care supplied by a custodian parent. In the case at hand, the three kinds of care were defined rigidly:

> (a) family care is where the child is part of a family, whether nuclear or extended; (b) parental care is where there is no family and only a single parent; (c) alternative care is where the child is removed from the family environment.[82] The Court must be incorrect in claiming that a single-parent household is not a family or that two parents provide family care and not parental care.[83]

The child's right to family or parental care is emphasised in other provisions of the Constitution. At the national level, section 60(3) of the Constitution provides that "[p]arents and guardians of minor children have the right to determine, in accordance with their beliefs, the moral and religious upbringing of their children, provided they do not prejudice the rights to which their children are entitled under this Constitution, including their rights to education, health, safety and welfare". What immediately emerges from this provision is that parents and families, ahead of all others, are the default bearers of the responsibility to make decisions concerning the care, religion and education of the child. There is an element of autonomy from state control which attaches to this responsibility. Sections 60(3) and 81(1)(d) of the Constitution echo both the presumption that children enjoy their rights better when supported by adult members of the family and that states should rarely exercise coercive intervention in matters concerning the child's family life and parental care unless the parents act in a manner that threatens the child's rights to education, health care services, nutrition and shelter.

At a deeper level, however, most of the provisions cited above portray the family as a mini-state in which parents are entitled to exercise wide authority in making decisions affecting children. This is most evident from provisions which state that

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[78] *Ibid*., at 799B-C.
[79] H. R. Hahlo, *South African Law of Husband and Wife*, 5th edition (1985) p. 394.
[80] *See Uzoingwe and Another v. Immigration Department Principal Director and Another*, HH 337-16 HC 499/16 [2016] ZWHHC 337.
[81] 2000 (2) SA 199 (T), 208D-E 2000 (2) BCLR 187 (T) ('*Jooste*').
[82] *Ibid.,* at 208D-G.
[83] Woolman and Bishop, *supra* note 62, pp. 42-6

states parties should 'respect' the rights and responsibilities of parents responsible for guiding children seeking to exercise the enumerated rights.[84] As a negative concept, the duty 'to respect' fits in well with the traditional liberal view of the family as a private institution. Generally, the duty to 'respect' implies that parents have wide powers to determine what constitutes 'appropriate child care' and to provide for the material needs of their children. Nonetheless, parental autonomy is theoretically limited on two fronts: first, by the state's duty to intervene (in the best interest of the child) to protect abused or exploited children's basic rights and, second, by the evolving capacities of the child.

4.4.2 The Right to Appropriate Care When Removed from the Family Environment

Section 81(1)(d) of the Constitution enshrines the child's right to "appropriate care when removed from the family environment". Under normal circumstances, children should grow up under parental or family care, but they may be removed from the family environment if the best interests of the child would be compromised by the child's continued residence at the family home. Removal from the family home becomes a solution if it is shown that the child is suffering from neglect, maltreatment, economic or sexual exploitation or abuse at the hands of the persons in whose hands the child's care has been entrusted.

In *Mukundu v. Chigumadzi & Others*,[85] the Court had to decide whether it was appropriate to grant full custody to the children's maternal grandmother or whether custody had to be accorded to the children's biological father. The facts of the case were that the maternal grandmother of the two children involved sought an order granting her their custody and guardianship. The first respondent, the biological father of the children, opposed the application despite the fact that he had not been involved in their lives since his separation from their late mother in 2005. He lived in the United Kingdom with his wife and child from a subsequent marriage. Uchena J held that the first respondent's conduct did not show that he had the best interests of the children at heart and that the applicant had shown deep concern for her daughter's children by taking care of them and putting them back in school.[86] The Court narrated the first respondent's neglect of his children in the following terms:

> The disposition of a litigant is judged from his conduct as demonstrated by what he has done or not done and not by what he promises to do in the future. The first respondent has in the past neglected his children to the extent of their having to drop out of school until the applicant had to seek SOS's intervention. He neglected them and their mother to the extent of denying them education, health care services, nutrition and shelter. He left them in that condition until the applicant came to their rescue. He therefore has demonstrated his attitude towards his children. He has contrary to the provisions of s 81 (1)(f) [of the Constitution] exposed them to lack of education, shelter and nutrition. When they came back from his homestead in Murehwa they were not going to school and had been starving, as their mother was sick and could no-longer fend for them as the first respondent had abandoned them. The first respondent now opposes

[84] For a detailed discussion of the state's duty to respect the rights of parents, *see* CRC General Comment No. 4, para 18.
[85] (HC 7048/15) [2015] ZWHHC 818 (15 September 2015).
[86] *Ibid.*, p. 2.

> his daughter's chance to get sound education. He clearly does not have her best interest at heart. The court as the upper guardian of all minors cannot be swayed by the whims of a parent who has for years displayed that he does not care about the welfare of his children.[87]

Uchena J emphasised that in deciding whether to remove children from the care of parents, the Court had to be guided by the best interests of the child as entrenched in section 82(2) of the Constitution and regional child rights instruments.[88] To this end, the Court should not be detained by the feelings and protestations of the parties. As upper guardian of minors, the Court has a duty to adequately protect the rights of a child and "[i]n appropriate cases the court may have to protect the children from harmful conduct by the child's own biological parents".[89] Apart from recognising that children sometimes need protection from harmful conduct by their biological parents, the Court reiterated that the case did not arise from a contest between the litigants' rights over minor children but from which person would better promote the best interests of the child as a paramount consideration in all decisions concerning children.

4.5 *The Right to Be Protected from Exploitation, Child Labour, Maltreatment, Neglect or Any Form of Abuse*

4.5.1 Protection from Economic Exploitation

There are many obstacles to improving children's protection from violence, exploitation, neglect and abuse. The rights of the child appear to be the least contentious of all human rights in the world, particularly as they pertain to protection from violence, exploitation and abuse. Under the Constitution, children are protected from economic and other forms of exploitation. Further, Zimbabwe's Children's Act[90] contains the same prohibition in sections 10 and 10A and makes it a punishable offence to use a child in begging or to intentionally absent them from school and engage them in some income-generating work when the child is reasonably expected to be in school. All this speaks to children's rights to be protected from exploitation, abuse and neglect.

The Children's Act prohibits child participation in hazardous economic activities. It defines hazardous work in relation to a child or young person as any work that is likely to interfere with their education, make them contact hazardous substances or working in underground mines, exposure to electronically powered hand tools or cutting tools, night shift jobs or exposure to extreme heat, cold or whole body vibration. These multiple forms of economic exploitation are prohibited by the Constitution and the Children's Act. Therefore, it would be an offence for the state, families and non-state actors to engage in activities that tend to suggest that the child is being required to carry out work for the economic benefit of another.

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[87] *Ibid.*, p. 3.
[88] *Ibid.*, p. 5.
[89] *Ibid.* To this end, the Court relied on section 81(3) of the Constitution which provides that "[c]hildren are entitled to adequate protection by the courts, in particular by the High Court as their upper guardian".
[90] Chapter 5:06 of the Laws of Zimbabwe.

4.5.2 Protection from Sexual Exploitation

The term sexual exploitation covers a multitude of situations or practices and a comprehensive range of acts which fall within the broad offence of sexual exploitation of children.[91] Generally, the offence of sexual exploitation of a child is committed when a person unlawfully and intentionally engages the services of a child, with or without a child's consent, for financial or other reward, favour or compensation to either the child or a third person for purposes of engaging in a sexual act with the child, irrespective of whether the sexual act is committed or not,[92] or by committing a sexual act with the child.[93] This definition casts the net as wide as possible by including not only the actual commission of a particular sexual act under certain circumstances as punishable conduct but also soliciting the services of a child merely for purposes of engaging in a sexual act with the child. The perpetrator or victim may either be male or female. In *S v. Ndlovu*,[94] the Bulawayo High Court commented on sexual exploitation of children in the following terms:

> Sexual abuse of children is viewed in a very serious light. This type of conduct is very common thus exposing children to untold trauma and incurable diseases. Contrary to the view held by the learned trial magistrate, the Sexual Offences Act protects children equally be they girls or boys. The definition of a young person in section 2 clearly states that this means a boy or girl under the age of sixteen. Some of the old cases give the impression that abusers of boys should be treated more leniently than abusers of girls. It is clear that in those days the abuse of boys was not as prevalent as that of girls. In this day and age I do not find any legal basis for the distinction. Sexual abuse of all children is prevalent and should be viewed in a very serious light.

By protecting children from all forms of sexual exploitation, the Constitution imports the country's international legal obligations into the domestic legal system.

A few cases have applied the constitutional provisions on the sexual exploitation of children to concrete factual situations. In *S v. Peter Chigogo*,[95] Tsanga J stated that children should be protected from abuse and offenders should not be given lenient sentences. Writing in the context of sexual abuse, Tsanga emphasised that "[t]he continued lenient attitude towards grown men who abuse young girls and then get off lightly with their offence on the basis of 'intended marriage' of the complainant is not in consonance with the spirit of the Constitution in discouraging the marriage of girls below the age of 18".[96] Unfortunately, the trend of giving lenient sentences to paedophiles appears to be a common practice in Zimbabwe. In *S v. Banda, S v. Chakamoga*,[97] both accused were married mature adults, more than 30 years old, who had sexual intercourse with young girls aged 15 years, about half the accused persons' ages. They both impregnated the young girls. Both accused were charged

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[91] UNHCR, *Abuse and Exploitation* (2001) p. 10.
[92] Section 17(1)(a) of the South African Sexual Offences Amendment Act.
[93] Section 17(1)(b) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.
[94] HB-66-03, p. 3.
[95] HH 943-15.
[96] *Ibid.*, p. 2.
[97] HH 47-16.

with contravening section 70 of the Criminal Law Code, having sexual intercourse with a young person. Both were tried by the same magistrate, and sentenced to two years imprisonment of which one year was suspended for five years on the usual conditions for such cases, each remaining with one year effective imprisonment.

On review, the High Court lamented that the sentences handed down trivialised the protective measures for young persons prescribed in our law and in the current international framework for safeguarding young persons.[98] The Court noted that various provisions of the Constitution protected children from "economic and sexual exploitation ... and from maltreatment, neglect or any form of abuse".[99] Charehwa J, for the Court, observed that the best interests principle required courts to hand down appropriate sentences that deter those preying on children to refrain from doing so in order to give the maximum protection accorded to children by law. In the eyes of the learned judge, courts should consider the message they are sending to the general public when sentencing predatory adults who sexually exploit young persons who are more than twice the age of the child. In the judge's view, sentencing super predatory paedophiles to limited periods of imprisonment tended to suggest that were it not for section 70 of the Criminal Law Code, the sexual exploitation of children would be perfectly acceptable in our society. [100]

4.5.3 Protection from Child Labour

Section 81(1)(e) of the Constitution provides that children have a right to be protected against economic exploitation and child labour. Section 10A of the Children's Act narrowly deals with this matter by prohibiting a parent or guardian from causing or permitting their children to absent themselves from school in order to engage in employment for gain, prevents any person from employing for gain a child when the child might reasonably be expected to attend school and outlaws the employment of children in hazardous occupations. This provision should be expanded to prohibit child labour more generally in accordance with the constitutional provision and the provisions of section 11 of the Labour Act.[101]

It should be noted that although there is no absolute prohibition on the employment (broadly understood) of children, it is subject to important restrictions.[102] Human rights bodies and institutions have traditionally found child labour harmful and 'child work' acceptable.[103] The United Nations Children's Fund makes a distinction between 'dangerous and exploitative work' and 'beneficial work'. Dangerous and exploitative work is that which is carried out full-time and at too early an age.[104] Child

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[98] *Ibid*., p. 1.
[99] Sections 19(2)(c) and 81(1)(e) of the Constitution.
[100] *S v. Banda, S v. Chakamoga,* p. 3.
[101] Chapter 28:01 of the Laws of Zimbabwe.
[102] L. Schafer, Child Law in South Africa Domestic and International Perspective (2011) p. 139.
[103] *See generally* S. N. Mishra and S. Mishra, *Tiny Hands in Unorganised Sector: Towards Elimination of Child Labour* (2004) p. 15.
[104] T. Nhenga-Chakarisa, 'What Does the Law Seek to Protect and From What? The Application of International Law on Child Labour in an African Context', 10 *African Human Rights Law Journal* (2010) p. 180.

labour exists where the working day is very long and working conditions are very harsh. Child labour is carried out in unsafe working conditions, it is not sufficiently paid for, it involves excessive responsibility, and it undermines the child's dignity and self-esteem.[105] Beneficial work, on the other hand, is that which promotes or stimulates a child's physical, cognitive and social development without interfering with scholastic or recreational activity or rest.[106]

An emphasis on the distinction between work and labour may be useful if one is looking for a way to ban some forms of child labour.[107] The work-labour distinction also implies that all profit-motivated activities are harmful to child development and all gratuitous activities are benign.[108] It does not consider children in family situations as exploited.[109] This understanding of labour implies that it is paid employment, whereas a great deal of children's work is not remunerated for and is not productive.[110] Once something is classified as child labour, it is identified as bad and therefore has to be abolished.[111] It evokes an emotional reaction rather than a careful consideration of the actual situation of the child.[112]

The idea of establishing minimum ages for many things reflects the general concern that children should be specially protected.[113] The Zimbabwean Constitution appears to follow the minimum age approach. This approach implies that "a child who is below the minimum ages stipulated by the Convention would be engaging in child labour if they do the work prohibited for their age. These minimum age standards express an ideal of childhood as a privileged phase of life, properly dedicated only to play and schooling, and with an extended period of dependence during which economic activity is discouraged or actually denied."[114] Whilst this is a positive development for purposes of protecting children, it tends to negate children's contribution to the country's social and economic development.

4.5.4 Protection from Maltreatment, Neglect or Any Form of Abuse

Section 81(1)(e) of the Constitution of Zimbabwe enshrines the child's right to protection from "maltreatment, neglect or any form of abuse". Unfortunately, none of these terms are defined in the Declaration of Rights nor has much judicial effort been dedicated to unpacking the tinted lenses of the differences that exist between them.

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[105] *Ibid. See also* E. Ochaita *et al.*, 'Child Work and Labour in Spain: A First Approach', 8 *International Journal of Children's Rights* (2000) p. 15, at p. 19 and UNICEF, *Child Protection from Violence, Exploitation and Abuse*, available at <http://www.unicef.org/protection/index_childlabour.html> (accessed 18 June 2008).

[106] Nhenga-Chakarisa, *supra* note 104, p. 179.

[107] J. C. Andvig, 'Child Labour in Sub-Saharan Africa: An Exploration', 2 *Forum for Development Studies* (1998) p. 327, at p. 328.

[108] Nhenga-Chakarisa, *supra* note 104, p. 181.

[109] *Ibid.*

[110] L. Abernethie, 'Child Labour in Contemporary Society: Why Do We Care?', 6 *International Journal of Children's Rights* (1998) p. 81, at p. 91.

[111] Nhenga-Chakarisa, *supra* note 104, p. 181.

[112] M. F. C. Bourdillon, *Earning a Life: Working Children in Zimbabwe* (2000) p. 9.

[113] Nhenga-Chakarisa, *supra* note 104, p. 182.

[114] *Ibid.*, 184.

Although there are many references to section 81(1)(e) in reported judgements, it has mainly repeatedly been used by courts to elucidate the context in which legislation was made, instead of as a primary weapon of attack against abusive tendencies or treatment.[115] In Yacoob J's view, the scope of the obligation to protect children from maltreatment, abuse, neglect and degradation normally includes passing laws and creating enforcement mechanisms against degradation and providing for the prevention of such occurrences.[116] No matter how compelling these observations may be, they do not solve the prevailing definitional challenges arising from the phrase 'maltreatment, neglect or any form of abuse'.

Neglect of a child can be defined as "failure in the exercise of parental responsibilities to provide for the child's basic physical, intellectual, emotional or social needs".[117] The Children's Act provides that a parent, guardian or other person caring for a child is guilty of an offence if that parent or other person assaults, ill-treats, neglects, abandons or exposes him or allows, causes or procures them to be assaulted, ill-treated and neglected.[118] A person who is legally liable to maintain a child is guilty of an offence if the person, while able to do so, fails to provide the child with adequate food, clothing or lodging for them or failed to pay for the maintenance of a child or person who has been placed in an institution,[119] fails to provide or pay for dental, medical or surgical aid or other effective remedial care necessary for their health or well-being.[120] The offences carry heavy penalties, with a fine not exceeding level ten or imprisonment not exceeding five years.[121] Neglect must be 'deliberate', thus adding a *mens rea* requirement to the act that constitutes a violation of the child's right to freedom from any form of abuse or neglect.[122]

Child abuse, a generic term for various forms of ill-treatment of children and neglect of the rights of children, involves any form of harm or ill-treatment deliberately inflicted on a child. The term is amply defined in the South African Children's Act to mean:

- Assaulting a child or inflicting any other form of deliberate or calculated injury to a child;
- Sexual abuse of children or allowing the child to be sexually abused;
- Bullying by another child;
- Labour practices that exploit children; or
- Exposing or subjecting a child to behaviour that may harm the child psychologically or emotionally.[123]

These elements cast the net of harmful practices that constitute 'abuse' very wide to ensure that children are adequately protected from all forms of abuse. To ensure the adequate protection of children from abuse, it may be important for certain

[115] L. Schafer, *Child Law in South Africa Domestic and International Perspectives* (2011) p. 132.
[116] *Government of South Africa v. Grootboom*, para. 78.
[117] Woolman and Bishop, *supra* note 62, 47-25.
[118] Section 7(1) of the Children's Act [Chapter 5:06].
[119] Section 7(2)(a) of the Children's Act.
[120] Section 7(2)(b) of the Children's Act.
[121] Section 7(5) of the Children's Act. *See also S v. Nyirenda*, HB-86-03 and *S v. Fikizolo*, HB-131-04.
[122] Wolman and Bishop, *supra* note 62, 47-25.
[123] *See* section 1(1)(a)–(e) of the Children's Act of South Africa Act 30 of 2005.

professionals and the government to deliver services to child victims of physical or mental abuse or neglect, assist children temporarily or permanently separated from their parents or families, provide special support services to children with disabilities and ensure the protection of children from economic exploitation, drug abuse and sexual exploitation.[124] This implies that there are overlaps between child abuse, economic exploitation, sexual exploitation, maltreatment and other practices that are harmful to children.

A causal link may exist between the use of corporal punishment on children, on the one hand, and, on the other, physical or emotional abuse and the negative development of children.[125] Section 241 of the Criminal Law Code authorises 'moderate corporal punishment' of children by parents, guardians and school teachers. Section 7 of the Children's Act also confirms the right of parents and guardians to 'administer reasonable punishment'. Nonetheless, there are no bright lines between 'moderate corporal punishment' and child abuse. This creates room for parents or guardians to cross the line between acceptable corporal punishment and child abuse. If a parent or guardian unreasonably assaults his or her child, he or she will be prosecuted under the Criminal Law Code for murder or culpable homicide if the child dies or assault if the child does not die.

4.6 *Children's Socio-Economic Rights*

Socio-economic rights are fundamental rights that protect the human dignity of individuals by way of securing and protecting the social, economic and cultural welfare and interests of human beings.[126] Accordingly, Zimbabwe is bound to ensure that its citizens enjoy the full complement of socio-economic rights, thereby further providing for domestic remedies for violations thereof.[127] Socio-economic rights are therefore at the core of the achievement of the constitutional objective set out under section 8 of the Constitution which is to establish "a sustainable, just and democratic society in which people enjoy prosperous, happy and fulfilling lives". This section examines the protection of children's socio-economic rights under the current Constitution.

The current Constitution responds appropriately to the historical anomaly of neglecting socio-economic rights.[128] Children's socio-economic rights are protected at two possibly three levels under the prevailing constitutional framework. First, they

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[124] *See*, for example, the social welfare programmes described in the South African Department of Social Development's Annual Report for 2007/08, presented to the Portfolio Committee on Social Development, November 2008, at pp. 12–24.

[125] A. Smith *et al*., *The Discipline and Guidance of Children: A Summary of Research*, 2004, pp. 15–17. *See also Global Initiative to End All Corporal Punishment of Children*, *Ending Legalised Violence Against Children: Global Report 2008*, Association for the Protection of All Children, 2008, pp. 7–10.

[126] J. Mavedzenge and D. Coltart, *A Constitutional Law Guide Towards Understanding Zimbabwe's Fundamental Socio-Economic Human Rights* (2014) p. 32.

[127] N. Ndlovu, *Protection of Socio-Economic Rights in Zimbabwe. A Critical Assessment of the Domestic Framework under the 2013 Constitution of Zimbabwe* (2016) p. 7.

[128] *Ibid*. *See also* Chapter 4 of the 2013 Constitution which contains the Declaration Rights that entrenches, among others, socio-economic rights as justifiable rights.

are provided for as part of the socio-economic rights that are conferred on 'everyone', including children. Accordingly, the rights to an environment that is not harmful to every person's health or well-being,[129] to freedom from eviction,[130] to basic state-funded education,[131] to access to health care services,[132] to sufficient food and to safe, clean and potable water[133] belong to everyone and can be vindicated on behalf of children. At this level, the enjoyment of most of the socio-economic rights is subject to progressive realisation within the state's available resources.

Secondly, children's socio-economic are protected as part of the rights that are only extended to persons under the age of 18 years. Section 81(1)(f) of the Constitution provides that "[e]very child has the right to education, health care services, nutrition and shelter". At this level, the enjoyment by children of socio-economic rights is not, theoretically at least, subject to progressive realisation within available resources. Third, children's socio-economic rights are protected as part of the national objectives stipulated in section 19(1)–(3) of the Constitution. The legal status of national objectives remains questionable because they are not part of the justiciable Declaration of Rights entrenching directly enforceable entitlements. Nonetheless, the Constitution provides that courts must pay due regard to the national objectives when interpreting the rights protected in the Declaration of Rights.[134]

As has been shown above, the Constitution is not short of provisions protecting children's socio-economic rights. However, the degree to which children actually enjoy the socio-economic rights stipulated in the Constitution remains a subject of contestation. The prevalence of school drop outs and child-headed households, the number of children dying from treatable diseases, the number of children working or living in the streets, the plight of orphans, children with disabilities and other vulnerable groups of children and the huge number of children who end up resorting to marriage as a means to escape poverty and marginalisation tend to suggest that large scale violations of children's rights are still taking place. In addition, thousands of homes have been demolished in Zimbabwe's towns without the authorities investigating the manner and extent to which these demolitions negatively affect children's access to education, food and water, health care services and many other socio-economic rights.

More recently, the courts clarified most of the outstanding constitutional issues relating to children's socio-economic rights. In *Zimbabwe Homeless People's Federation and Others v. Minister of Local Government and National Housing and Others*,[135] the Supreme Court of Zimbabwe had the opportunity to interpret and apply the child's right to shelter as protected in section 81 of the Constitution. To begin with, the Court observed that it is immediately apparent that the right to shelter imposes on the state the obligation to avail access to adequate shelter progressively

[129] Section 73(1) of the Constitution.
[130] Section 74 of the Constitution.
[131] Section 75(1) of the Constitution.
[132] Section 76(1) of the Constitution.
[133] Section 77 of the Constitution.
[134] *See* sections 8(2) and 46(1)(d) of the Constitution.
[135] SC 94/2020.

within the limits of the resources available to it.[136] Drawing inspiration from *Government of the Republic of South Africa v. Grootboom*,[137] the Court emphasised that although socio-economic rights should be realised progressively within available resources, the state remains bound to move as expeditiously and effectively as possible towards the goal of full realisation of these right, with full use of the maximum resources available.[138]

More importantly, however, the Court emphasised that the state's obligation to provide shelter to children is not contingent upon the absence of parental care or other appropriate care under section 81(1)(d) of the Constitution. The obligation of the state in this respect is not negated or diluted by the primary duty of care ordinarily imposed upon parents.[139] However, the Court did concede that under normal circumstances, where children are living with their parents, the parental duty of care proportionately reduces the state's correlative child care obligations. However, where the parents themselves are financially or otherwise incapacitated from fulfilling their parental obligations, it then becomes incumbent upon the state to intervene and perform its own obligation to ensure that the children's welfare is adequately addressed and safeguarded.[140] In Patel J's words, "the primary duty of care reposed with parents in respect of their own children does not operate to absolutely absolve the State of its underlying obligation of care towards those children".[141] These findings are groundbreaking in the sense that they portray 'parental' care as a joint responsibility between parents and the state, thereby ensuring that even children who live with their parents get additional support in order to have access to the goods and services needed for a minimally decent life.

4.7 *The Rights Not to Be Recruited into a Militia Force or to Take Part in Armed Conflict or Hostilities*

Section 81(1)(g) of the Constitution enshrines every child's right not to be recruited into a militia force or to take part in armed conflict. This right has two components: first, the right not to be recruited into a private or dissident armed group and, second, the right not to take part in armed conflict or hostilities. The protection of these twin rights follows gradual legal developments at the international and regional levels, although it is arguable that our Constitution contains refined versions of these rights. Unlike international human rights, the Constitution protects all children (that is persons below the age of 18 years) and does not confine the application of the relevant rights persons below the age of 15 years. Accordingly, children who are captured and fall within the hands of the enemy while unlawfully taking part in hostilities are entitled to special protection from any further attack and victimisation by the opposing forces.

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[136] *Ibid.*, p. 11.
[137] 2001 (1) SA 46 (CC) para 45.
[138] *Zimbabwe Homeless People's Federation and Others v. Minister of Local Government*, p. 11.
[139] *Ibid*, p. 23.
[140] *Ibid.*
[141] *Ibid.*

In the Zimbabwean context, there is need to impose an absolute ban on the recruitment of children of whatever age into the national armed forces, especially given the realities of human rights abuse suffered by children in armed forces where they "risk being killed, injured or permanently disabled"[142] and are "sexually assaulted, raped, forced to become wives of commanders, and … exposed to drugs and forced labour".[143] All children deserve maximum protection from the negative effects of participation in armed forces. Therefore, it should not matter whether the armed forces that have recruited them belong to the state or militia forces. The Constitution offers better protection in that it requires the state to ensure that children do not participate in hostilities, and it does not matter whether the participation is direct or indirect. The law should protect all children under the age of 18 years "from any involvement in hostilities – direct or indirect – and any recruitment into armed forces, whether compulsory or involuntary".[144] If interpreted progressively and in line with the principle of the best interests of the child, the Constitution patently gives a higher standard of protection to prevent child participation in armed conflict.

4.8 *The Right Not to Be Compelled to Take Part in Any Political Activity*

The child's right not to be compelled to take part in any political activity is primarily couched in negative terms and refers to all political activities, whether campaigning for or joining or forming a party. This suggests that the general expectation is that no child should be required to directly or indirectly take part in political activities as they have a choice on whether or not to do so. The fact that children have to make an election on whether or not they should participate in politics implies that the relevant provisions of the Constitution only address the situation of those children with the capacity for rational action. In other words, only adolescents who are sufficiently mature to be rationally autonomous have the right to take part in political activities. The very young or those who lack the capacity to understand the benefits, risks and social implications of involvement in politics may not be required to take part in political activities.

4.9 *The Right Not to Be Detained Except as a Measure of Last Resort and Conditions Governing Detention of Child Offenders*

This section investigates the scope of children's rights in the criminal justice context as provided for in the Constitution. The focus is on the child offender's right not to be detained except as a means of last resort. In essence, the general rule is that no child offender should be lightly caged. However, the law foresees circumstances when the demands of justice and fairness may call for the imprisonment of the child offender. When it becomes necessary to cage a child for committing a crime, the court should ensure that the conditions of detention comply with at least three

[142] UNICEF, *Machel Study 10 Year Strategic Review: Children and Conflict in a Changing World*, 2009, p. 151.
[143] B. D. Mezmur, *Children's Rights in Africa: A Legal Perspective* (2008) p. 200.
[144] R. Hodgkin and P. Newell, *Implementation Handbook for the Convention on the Rights of the Child*, Geneva, UNICEF, 2007, pp. 9 and 660.

explicitly stipulated constitutional requirements or standards. These requirements include the idea that the child offender should be detained for the shortest appropriate period, the child offender should be kept separately from adult offenders and the child offender should treated in a manner and kept in conditions that take account of the child's age. These requirements, or rather rights, are discussed immediately after an examination of what the phrase 'detention as a last resort' means.

4.9.1 The Right Not to Be Detained Except as a Measure of Last Resort

At international law, deprivation of the liberty of youth offenders is permitted as a disposition of last resort and for the minimum necessary period and should be limited to exceptional cases.[145] In the same measure, section 81(1)(i) of the Constitution provides for the child's right not to be detained except as a means of last resort and, if detained, to be detained for the shortest appropriate period of time. It is vital to note that the Constitution does not prohibit the imprisonment of young offenders but requires that the courts consider other alternatives before imposing custodial sentences. Accordingly, the fact that a sentence of imprisonment should be imposed as a means of last resort implies that sometimes it is necessary to impose custodial sentences on youth offenders. The words 'as a measure of last resort' mean that juvenile offenders should be deprived of their liberty only if they have committed serious crimes or persist to commit serious offences.[146] It also implies that deprivation of liberty can only be imposed in cases where there is 'no other appropriate response' to the child's delinquent behaviour.[147]

In *S v. C (A Juvenile)*,[148] the Harare High Court correctly observed, in the context of rape trials, that generally speaking juveniles should not be sent to prison, but in cases where there are aggravating features – such as multiple counts, transmission of sexually transmitted diseases to the victim, serious psychological and or physical trauma, a high degree of violence or force used during the rape and the use of a weapon during the rape – effective imprisonment might be called for especially if the juvenile offender is between 16 and 18 years.[149] However, the Court was at pains to emphasise that the periods of imprisonment should vary according to the age and the moral blameworthiness of the offender.[150]

Even before the adoption of the current Constitution in 2013, there were indications that local courts were slowly moving away from imprisonment as a sentence for youth offenders who committed minor crimes. In *S v. CM (A Juvenile) and Another*,[151] the two cases (dealt with simultaneously) involved two youth offenders who had been convicted of theft after diverting different sums of money towards their own use

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[145] *See* Rule 2 of the United Nations Rules for the Protection of Juveniles Deprived of Liberty 1990.
[146] *See* Rule 17.1(c) of the Beijing Rules.
[147] *Ibid*.
[148] HH 718-14.
[149] *Ibid.*, p. 9.
[150] *Ibid*.
[151] Judgment No. 67/2003, Case No. HC 1546/2003 and Case No. HC 1547/2003.

without their employers' consent. In *S v. CM*, a 16 year old had been sentenced to 18 months imprisonment with ten months suspended on condition of restitution, and in *S v. ZD* (referred to above as another), a 17 year old had been sentenced to 24 months imprisonment with 18 months suspended on condition of restitution.

On review, Ndou J, for the Bulawayo High Court, held that in both cases the sentences were not individualised by carrying out meaningful pre-sentence investigations.[152] Given that the accused persons were both juvenile first offenders, the trial magistrate should have considered non-custodial sentences.[153] In the circumstances, the trial court appeared to have "paid lip service" to the well-established "principle that imprisonment is a severe and rigorous form of punishment which should be imposed only as a last resort and where no other form of punishment will do".[154] Given that the ultimate effective sentence was below 24 months, the Court should have sentenced both accused persons to community service.[155]

More importantly, the Court reiterated that there is no room for instinctive sentencing in our jurisdiction, and the sentence must fit the crime and the offender, be fair to both the state and the accused person and be blended with an acceptable measure of mercy.[156] Ultimately, the Court substantially reduced the imposed sentences and ordered that they be immediately released from prison. In *S v. TM (A Juvenile)*,[157] a 16 year old was convicted of house breaking with intent to steal and theft, and escaping from lawful custody in contravention of the Criminal Procedure and Evidence Act.[158] The accused was convicted of both counts and sentenced to undergo prison terms of seven months and five months respectively. Of the total 12 months imprisonment, five months were suspended on condition of good behaviour. Ndou J stressed that he was "perturbed by the imprisonment of the 16 year old juvenile first offender. It is trite that juveniles should not be sentenced to custodial sentences unless there is absolutely no alternative."[159] He then reduced the sentences for both counts to three months imprisonment and ruled that since the juvenile had served the sentences, the juvenile was entitled to immediate release.[160]

As such, every sentencing court dealing with youth offenders ought to be given discretion in sentencing them in order to give effect to the conditions of international law and the Constitution pertaining to the individualisation of sentences and the need

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[152] *Ibid.*, p. 2.
[153] *Ibid.*
[154] *Ibid.* In this respect, the Court referred to *S v. Kashiri*, HH-174-94, *S v. Gumbo*, 1995(1) ZLR 163 and *S v. Sikhunyane*, 1994(1) SACR (TL).
[155] For this principle, *see* the cases of *S v. Sithole*, HH-50-95 and *S v. Santana*, HH-110-94.
[156] *S v. CM* (A Juvenile) and Another, p. 3. *See also S v. Sparks and Another*, 1972 (3) SA 396 (A).
[157] Judgment No. HB 65/2003, Case No. HC 1472/2003 and CRB ZVI 313/02.
[158] Chapter 9:07 of the Laws of Zimbabwe.
[159] *S v. TM (A Juvenile)*, p. 3. The Court was following *S v. Ncube and Another*, HB-9-87, p. 1, where Blackie J, for the same Court, held that "[o]ur courts have repeatedly said that teenage minors should not be sentenced to terms of imprisonment unless there is absolutely no alternative". *See also S v. Mbewe*, HH-323-87, p. 2, where Sansole J held that "it is the policy of these courts to do as much as is reasonably practical to keep juvenile first offenders out of prison".
[160] *S v. TM* (A Juvenile), p. 4.

for proportionality to be applied to the youth offender, the offence they would have committed and the circumstances surrounding the commission of the offence. This means that the court should start with 'a clean slate' when sentencing a child offender and not be required to impose the prescribed minimum sentence. Minimum sentences are inconsistent with the constitutional principle of 'detention as a last resort', especially where they are mandatory. This is precisely because the twin concepts of detention as a last resort and best interests of the child raise serious questions about the appropriateness of custodial sentences for child offenders.

4.9.2 Where Imprisonment Is Strictly Necessary, It Should Be for the 'Shortest Appropriate Period' of Time

The Constitution does not only regulate the circumstances under which incarceration as a sentencing option should be pursued but also regulates the nature and duration of the incarceration. Section 81(1)(i) requires particular focus to be placed on the youth offender and their needs rather than on the rigid starting point of the statutorily ordained periods of imprisonment. The appropriateness of a particular custodial sentence for a particular offender depends not only upon society's interests as embodied in the length of the incarceration vis-á-vis the offence, the offender and the circumstances in which the offence was committed but also on the goals the sentencing judge wishes to achieve by imposing a particular sentence. The Constitution prescribes that when dealing with child offenders, the overriding goal should not be the infliction of pain and punishment on the child but their rehabilitation and reintegration into society.

Section 81(1)(i) of the Constitution envisages that the sentence imposed on a child offender should reflect the desirability of promoting the child's reintegration and assuming a constructive role in society. That is why the Constitution places restrictions on the circumstances under and period for which children can be deprived of their liberty.[161] However, these objectives should always be counter-balanced with public safety concerns and the enduring value of proportionality.

Clearly, there are circumstances in which the juvenile offender must at least be committed to a custodial institution (jail for instance), and what is left for discussion is the appropriate duration of custody. In cases of pre-meditated violent murder, for instance, what usually matters is not whether the child has been jailed 'as a last resort' but whether the duration of incarceration is the 'shortest appropriate' one for the crime. The central word in the relevant constitutional provisions seems to be 'shortest appropriate' because it emphasises not only the proportionality but also the suitability of a particular sentence in the circumstances.[162] In the case of juveniles, 'appropriate' should mean that the applicable law should preserve judicial discretion

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[161] *Cf.* section 81(1)((i)(i) with Article 37(b) of the CRC and Rule 17(b) of the United Nations Standard Minimum Rules for the Administration of Justice (The Beijing Rules), adopted by General Assembly Resolution 40/33 of 29 November 1985.

[162] Rule 17.1(a) of the Beijing Rules states that the "reaction taken shall always be in proportion not only to the circumstances and gravity of the offence but also to the circumstances and needs of the juvenile as well as the needs of society".

to justify especially downward departures from statutorily prescribed sentences in light of children's psychological immaturity and need for reintegration.[163]

There are indications that judges are prepared to review harsh sentences imposed on young offenders and to ensure that a convicted child offender is incarcerated for the shortest appropriate period of time. In *S v. Mtetwa*,[164] the accused, aged 17 years, was convicted of eight counts of unlawful entry into premises and eight counts of theft. For purposes of sentencing, the counts for both unlawful entry and those for theft were paired alongside into eight counts. The accused was sentenced to an effective nine years in prison. On review, the Harare High Court admitted that the Court *a quo* was indeed faced with an unrelenting offender who had the propensity to commit crimes. Tsanga J, for the Court, observed that while the convictions were proper, the sentence induced a profound sense of shock for a young offender.[165] Drawing inspiration from the Constitution, the Court held as follows:

> The sentence appears to be clearly dictated by the need to protect the public from a perceived delinquent and incorrigible young criminal offender. *Yet the risks of incarcerating such a young offender over a lengthy period of time should not be so easily sacrificed at the altar of expediency as our courts have always emphasised. Our Constitution adopts the principle that juveniles should be detained for the shortest possible time and only as a last resort* – an obligation that is found in international law as exemplified by article 37 (b) of the [CRC] to which we are a party. Section 81(h)(i) of the Constitution … provides that a person under 18 has the right "not to be detained except as a measure of last resort". Also, if detained he or she has the right to be detained for the shortest appropriate period. *Giving a 17 year old an effective 9 year sentence runs contrary to the letter and spirit of this Constitutional imperative when it is considered that he had not committed any violent offences such as robbery, murder, or rape. From the point of view of children's rights custodial punishment is regarded as criminally damaging for children due to the criminogenic influences of prison.* The Constitution also places emphasis on the best interests of the child being paramount at all times in matters involving children (emphasis added).[166]

Tsanga J thought, rightly so, that with a nine year sentence the child offender would spend a substantial part of his youthful life in prison. Accordingly, the lengthy prison term meant that the child had been sentenced as an adult offender and lacked justification, especially in light of the child offender's home background (there were indications from the probation officer's report that family ties and lack of proper supervision might have predisposed the accused to anti-social behaviour).[167] Tsanga J insisted that "[r]ather than rushing to impose adult punishment in the form of a lengthy prison sentence that may merely accentuate his path to becoming a hardened criminal, it seems to me at 17, he could have been given a chance by being referred to an appropriate juvenile institution for rehabilitation".[168] In addition,

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[163] A. Moyo, 'Youth, Competence and Punishment: Reflections on South Africa's Minimum Sentencing Regime for Youth Offenders', 26:1 *SA Public Law* (2011) p. 229, at pp. 240–241.
[164] HH 112-15.
[165] *Ibid.*, p. 2.
[166] *Ibid.*, pp. 2–3. *See* section 81(2) of the Constitution. Clearly the magistrate did not fully take into account theses Constitutional provisions which emphasise the duty to respect and protect children's rights in dealing with children under the age of 18
[167] *Ibid.*, pp. 3 and 4.
[168] *Ibid.*, p. 4.

the learned judge held that a prison sentence of nine years effectively removes the accused from society by locking him up and throwing away the keys for a very long time.

Ultimately, the Court sentenced the accused to three years imprisonment for all counts, of which one year was suspended for five years on condition that the accused did not during that time commit any offence involving unlawful entry for which he is sentenced to a term of imprisonment without the option of a fine.[169] Imprisonment for the shortest appropriate time requires sentencing courts to ensure that the child does not unnecessarily spend a good 'chunk' of their time serving prison terms. Although a strictly punitive approach to youth crime is undoubtedly outlawed by the Constitution, these instruments do not necessarily bind courts to sacrifice proportionality and public safety on the altar of reintegration, rehabilitation and restoration. If the sentences that are ordained by the sentencing statute range from a very short to a very long period of imprisonment, the Constitution requires the sentencing judge to impose the shortest custodial period possible on the child offender.

4.9.3 The Right to Be Kept Separately from Detained Persons over the Age of 18 Years

International instruments provide for the right of every accused juvenile person to be separated from adults during pre-trial and post-conviction detention.[170] In line with international human rights instruments and standards, section 81(1)(i) of the Constitution also provides for the child's right to be kept separately from detained persons over the age of 18 years. This requirement is the basic floor, and the state is required to provide for separate custodial institutions for children and adults. More importantly, however, the separation of adult and youth offenders serves as a mandatory precondition for ensuring that youth offenders are later afforded treatment that takes their age and immaturity into account. When carrying out human rights reporting, states parties have the obligation to pay the necessary attention to this mandatory standard and to stipulate what measures have been taken to separate juvenile offenders from adult offenders.[171]

The principle that young offenders deprived of liberty should be separated from adults implies that such offenders should not be placed in an adult prison or other facility for adults. As the Committee on the Rights of the Child would have it, "[t]here is abundant evidence that the placement of children in adult prisons or jails compromises their basic safety, well-being, and their future ability to remain free of crime and to reintegrate … States parties should establish separate facilities for children deprived of their liberty, which include distinct, child-centred staff, personnel, policies and practices."[172] Section 63(2)(c) of the Prisons Act also stipulates youth offenders as a group of prisoners that should be kept separate from other categories

[169] *Ibid.*, p. 5.
[170] *See* Articles 37(c) of the CRC and 10(2)(b) of the ICCPR.
[171] HRC General Comment No. 21, para. 13.
[172] CRC General Comment No. 10, para. 85.

of offenders. There is sufficient evidence demonstrating that if child offenders are detained in the same facilities with their adult counterparts, the relevant places of institutional confinement serve as schools for crime, degrade young offenders' amenability to treatment and irreversibly psychologically damage innocent children.

4.9.4 The Right to Be Treated in a Manner and Kept in Conditions That Take Account of the Child's Age

If a child offender is committed to a custodial institution for any offence, they retain their right to be treated in a manner and kept in conditions that take into account the child's age. From the outset, the Constitution makes it clear that it would be unacceptable to keep child offenders in prison conditions that are similar to those under which adult offenders are kept.[173] The right to be treated in a manner and kept in conditions that take into account a child offender's age is a necessary result of the principle that children should be kept in separate institutions and not be mixed up with adult prisoners. The segregation of young offenders from adult offenders would not serve any purpose if the treatment accorded to them (young offenders) was not appropriate to their age and legal status with regards to conditions of detention. The right to be treated in a manner and kept in conditions that take account of the child has been partly interpreted to mean that youth offenders should have shorter working hours and have constant contact with the outside world, particularly relatives, with the aim of furthering their reformation and rehabilitation.[174]

International and regional instruments do not explicitly state the sort of treatment to be afforded to juvenile offenders of any particular age, but simply declare that such treatment should take the child's age into account.[175] This is a necessary flexibility device that allows states parties to accord very young offenders – especially those who are just a few years above the minimum age of criminal responsibility – treatment that resembles the kind of treatment they would be accorded in a normal family environment. The Zimbabwean Constitution also follows this route and reiterates the legal content enshrined in international instruments. The sort of treatment to be afforded to juvenile offenders of different ages "is to be determined by each State party in the light of relevant social, cultural and other conditions".[176] All persons under the age of 18 should be treated as juveniles, at least in matters relating to criminal justice and all forms of deprivation of liberty.

Mere separation of youth offenders from adult offenders does not in itself guarantee rehabilitation and is not sufficient to ensure that the child is prepared for eventual re-integration into the community. The treatment to which young offenders are subjected should be different from the treatment to which adult offenders are subjected. The conditions of confinement and the manner in which the child is treated should be age-appropriate, i.e. it should take into account not only the vulnerability and fragility of young offenders of different ages but also their amenability to

[173] *See* Articles 37(c) of the CRC and 10(3) of the ICCPR.
[174] HRC General Comment No. 21, para. 13.
[175] *See* Articles 37(c) of the CRC and 10(3) of the ICCPR.
[176] HRC General Comment No. 21, para. 13.

treatment, rehabilitation and re-integration into the community. Juveniles deprived of liberty should not be subjected to any hardship or constraint other than that resulting from the deprivation of liberty and should be kept in conditions that improve their readiness to reform and amenability to 'treatment'.

4.10 *The Right to Have One's Best Interests Considered as Paramount in Every Matter Concerning the Child*

The principle of best interests of the child is one of the four pillars of children's rights under international law. The Zimbabwean Constitution provides that "[a] child's best interests are paramount in every matter concerning the child".[177] What this exhortation means exactly remains a subject of continuous debate in many jurisdictions. Our legal system, like many others, elevates the best interests of the child to the status of a foundational principle of children's rights. This is demonstrated by the fact that decision-makers are required to promote not the overall but the 'best' interests of the child. At the practical level, the best interests principle applies to a broad range of judicial, administrative, legislative, policy and other measures that have a bearing on children's lives.[178] It also applies to family proceedings such as divorce, care and contact, deportation, education, health care, budgeting and many more.[179]

Arguably, the principle is related to the interest theory of rights as it is premised on the notion that children have interests that are so important that it will be wrong for the state to deny them access to goods and services which promote the realisation of these interests.[180] Raz observes that "a law creates a right if it is based on and expresses the view that someone has an interest which is sufficient ground for holding another to be subject to a duty", and that for a legal rule to confer a right, it should be motivated by the fact that "the right holder's interest should be protected by the imposition of duties on others".[181] Thus, an individual has a right if his or her interest is a ground for having rules which require others to behave in specific ways in relation to these rules.

Both international and domestic law revolve around the philosophy that the best interests of the child, not those of parents or caregivers, is the leading factor to be considered when decisions affecting the child are made. According to the Committee on the Rights of the Child, the phrase 'primary consideration' implies "that the child's

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[177] Section 81(2) of the Constitution.
[178] *See* Article 3(1) of the CRC, CRC General Comment No. 7, para. 13 and CRC General Comment No. 5, paras. 12 and 45–47.
[179] *See*, for instance, Committee on the Rights of the Child, C*oncluding Observations of the Committee on the Rights of the Child: United Kingdom,* CRC/C/15/Add.34 (1995), para. 11 and *Concluding Observations of the Committee on the Rights of the Child: Togo*, CRC/C/15/Add.83 (1997), paras. 34 and 50.
[180] *See* N. MacCormick, 'Children's Rights: A Test Case for Theories of Right', 62 *Archiv fur Rechts- und Sozialphilosophie* (1976) p. 305, at p. 311; S. Human, 'The Theory of Children's Rights', in T. Boezaart (ed.), *Child Law in South Africa* (2009) p. 243, at p. 249; and J. Raz, 'Legal Rights', 4:1 *Oxford Journal of Legal Studies* (1984) p. 1, at pp. 13–14.
[181] Raz, *ibid.*

best interests may not be considered on the same level as all other considerations. This strong position is justified by the special situation of the child: dependency, maturity, legal status and, often, voicelessness."[182] These characteristics revolve around the vulnerability of the child and underline the importance of extending protection to them.

Evaluating what is 'best' for the child is a difficult task and involves the consideration of many competing factors. Some of the relevant factors include the child's physical, emotional, social and educational needs, age, sex, relationship with parents and caregivers; their family and social background; the child's identity (sex, sexual orientation, national origin, religion and beliefs, cultural identity and personality);[183] the importance of stability in the child's upbringing; the need to preserve the family environment and to maintain family relations; the views and attitude of immediate family members; whether the decision to be made promotes the care, protection and safety of the child; the gravity of the child's vulnerability; the impact of a particular decision on the life, survival and development of the child; and the child's views, understanding and sense of direction.[184] Further, the interests of other children, parents and the state also play an important role in determining what is in the best interests of a particular child. Which factors are to be considered and the weight to be attached to each of them will depend on the circumstances of each case.[185]

Nonetheless, the fact that the best interests principle is a 'primary' consideration does not mean that it surpasses all other interests and factors. The adjective 'primary' simply means that when making decisions affecting children, persons and institutions should consider the effect such decisions will have on children. During the drafting of the CRC, it was emphasised that there are situations in which the competing interests of, among other things, "justice and society at large, should be of at least equal, if not greater, importance than the interests of the child".[186] Against this background, it has been suggested that "the child's best interests should be *the* primary consideration in matters directly affecting children and *a* primary consideration in matters in which children are affected only indirectly or in which others are also affected directly".[187] This approach recognises that the best interests principle should not be regarded as an overriding factor in every case as other parties involved may have equal or superior interests in certain contexts. Nonetheless, all actions affecting children should give high priority and greater weight to the best interests of the child.[188]

The best interests principle performs different functions. The first function, discussed by Parker, is that in all matters not regulated by positive rights in international or

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[182] *See* CRC General Comment No. 14, para. 37.
[183] *See* CRC General Comment No. 6, para. 20.
[184] CRC General comment No. 15, para. 12 and CRC General Comment No. 14, paras. 52–79.
[185] *See* CRC General Comment No. 14, para. 49.
[186] *See* UNCHR, *Technical Review of the Text of the Draft Convention on the Rights of the Child*, E/CN.4/1989/WG.1/CRP.1, 1989, p. 14.
[187] D. Chirwa, 'Children's Rights', in D. Chirwa, *Human Rights under the Malawian Constitution* (2011) p. 193, at p. 201.
[188] *See* CRC General Comment No. 14, paras. 39–40.

domestic instruments, the best interest standard "will be the basis for evaluating the laws and practices of States Parties".[189] Second, the principle may be used to justify, support or clarify a certain approach to matters arising under provisions protecting children's rights. Thus, the best interests principle is not just one of the factors to be considered when implementing children's rights but also an aid to meaning construction and interpretation. In this way, section 81(2) of the Constitution should not be seen as an attempt to create specific obligations but instead to prescribe a general principle that should inform decision-making in connection with all actions concerning children. Third, the best interests principle (as a mediatory concept) can "assist in resolving conflicts where these arise within the overall framework of the Convention".[190] In other words, the best interests principle justifies the (in)correctness of the parent, society or the state in preferring one decision over another.

The last two functions are very important in the context of any attempt to balance the competing rights of parents, mature children and the state. The concept of protection intrinsic in the best interests of the child necessitates great levels of parental intrusion into the domain of child autonomy, especially when the child is immature and of tender age. Thus, the level of decisional autonomy to which a child is entitled or the amount of control which a parent and the state can lawfully exercise depends on which of the two better promotes the best interests of the child. If, by exercising relative autonomy rights, the child would endanger their basic interests in life and survival, such autonomy would not be in the best interests of the child and the state may limit the child's autonomy.[191] Accordingly, the best interests principle serves to ensure that children are not abandoned to their autonomy rights as this endangers their other basic rights.[192] More importantly, the principle may also serve to limit parental rights and to bring the state into the family home to defend the child's interests. This is because the state is permitted to intervene if parental care does not match the standards of care prescribed in international and domestic law.

4.11 *The Right to Adequate Protection by the Courts, Particularly the High Court as Upper Guardian of All Minors*

In terms of section 81(3) of the Constitution, children have the right to adequate protection by the courts, particularly the High Court as their upper guardian. The child's right to adequate protection by the courts arises from a number of separate but interrelated considerations: first, the immaturity or lack of capacity for rational action and, second, the vulnerability that arises from this immaturity. Besides the

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[189] S. Parker, 'The Best Interests of the Child – Principles and Problems', 8 *International Journal of Law and the Family* (1984) p. 26, at p. 27.

[190] P. Alston, 'The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights', in P. Alston (ed.), *The Best interests of the Child: Reconciling Culture and Human Rights* (1992) p. 1, at p. 16. *See also* CRC General Comment No. 14, para. 33.

[191] *See* Z. W. Falk, 'Rights and Autonomy – Or the Best Interest of the Child?', in G. Douglas and L. Sebba (eds.), *Children's Rights and Traditional Values* (1998) p. 111, at p. 113.

[192] *See generally* B. C. Hafen, 'Individualism and Autonomy in Family Law: The Waning of Belonging' *Brigham Young University Law Review* (1991) p. 1.

vulnerability related to the general lack of capacity for rational action, the frailty and fragility of many children, particularly the very young, means that the majority of them are not able to physically defend themselves or take steps that are necessary to defend their legal rights. Even after acquiring the capacity to distinguish between right and wrong or to sense that their rights might have been unjustifiably infringed, the complexities of the legal processes to be followed to claim or enforce these rights often require that an adult enforce these rights on behalf of the affected child or children. Ultimately, the duty to stand on the side of the child to make a determination that the child's rights have been violated vests in the judiciary as the branch of the state empowered to make decisions that bind both the state and private persons.

Another compelling factor for vesting the protection of children in the courts is that the persons or institutions often entrusted with parental responsibility over children sometimes grossly violate children's rights. The legal framework governing the parent-child relationship "assigns child care responsibilities to parents, and thereby avoids public responsibility for children".[193] Since parents are legally presumed to know what is best for their children and bear the obligation to determine and to do what is good for them,[194] there is no need for the state to enter into the private family home except in cases of extreme exploitation, abuse or neglect.[195] Conferring the ultimate responsibility for protecting children on the courts, especially the High Court, is tantamount to making a claim that the state is aware that there are instances when the child's immediate caregivers – whether parents or relatives – violate the rights of the very children they are meant to protect. In such cases, it is important to allow the state through the courts to intervene in the family to protect the best interests and enumerated constitutional rights of the child.

The protection of children's rights, parental responsibility and family values does not imply that the state should abdicate its role as the protector of all children within its territorial boarders. Generally, the concept of state intervention through the courts arises from four strands: first, from the need to prevent the child from exercising autonomy rights in ways that threaten the very child's other basic rights and interests. This strand recognises that children are not the best persons to be entrusted with their own protection and may exercise autonomy rights in ways that are detrimental to their best interests, sometimes with the full blessing of their parents. Second, state intervention arises from the need to protect children against the unreasonable exercise of the responsibilities and powers that attach to the office of parenthood. The abuse of these responsibilities and powers may be perpetrated by parents, guardians, caregivers, family members or anyone holding parental responsibilities and rights. Thus, state intervention through judicial decision-making is primarily intended to ensure that the state protects and promotes children's rights at the family and other social levels.

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[193] M. Minnow, 'Rights for the Next Generation: A Feminist Approach to Children's Rights', *Harvard Women's Law Journal* (1986) p. 1, at p. 9.

[194] *See* J. J. Rousseau, *His Educational Theories Selected from Emile, Julie and Other Writings* (1964) p. 92.

[195] *See generally* J. Goldstein, 'Medical Care for the Child at Risk: On State Supervision of Parental Autonomy', 86 *Yale Law Journal* (1977) p. 645.

The child's right to adequate protection by the courts has been invoked in a number of local cases and reference is made to some of these cases. In *Mudzuru and Another v. Minister of Justice and Others*,[196] the Constitutional Court held that children are entitled to effective protection by the Court which is the upper guardian of the rights of children and whose duty it is to enforce the fundamental rights designed for their protection. It also held that the history of the struggle against child marriage sadly shows that there has been, for a long time, lack of common social consciousness on the problems of girls who became victims of early marriages.[197] Ultimately, the apex court would abolish child marriages on the basis that it violated sections 81(1) and 78(1) of the Constitution which, read together, stipulated that persons below the age of majority cannot found a family. In the process, the Court declared certain provisions of the Marriage Act, particularly section 22(1) thereof, to be invalid and unconstitutional.

Apart from declaring child marriage to be a violation of children's rights, domestic courts have also invoked their power to adequately protect children from sexual exploitation. In *S v. Banda, S v. Chakamoga*,[198] both accused were married mature adults, more than 30 years old, who had sexual intercourse with young girls aged 15 years, about half the accused persons' ages. They both impregnated the young girls. Both accused were charged with contravening section 70 of the Criminal Law Code, having sexual intercourse with a young person. Both were tried by the same magistrate, and sentenced to two years imprisonment of which one year was suspended for five years on the usual conditions for such cases, each remaining with one year effective imprisonment. On review, the High Court took the opportunity to narrate, in broad terms, the role of judges in protecting children from sexual exploitation and advancing their best interests. The Court explicitly relied on, among others, section 81(3) of the Constitution in coming to the conclusion that the decision of the court *aquo* trivialised the rights of the child. Charehwa J, for the Court, held as follows:

> More particularly, the specific obligation placed on the courts, and the High Court in particular, by s 81 (3) made me consider that it may be high time that the courts had a serious relook at the sentencing regime for sexual offences so that the message is clearly sent that the courts, in the discharge of their protective mandate for young persons, find that it is totally unacceptable to sexually exploit young persons. This is especially pertinent for offences committed against those young victims aged between 12 and 16 who were directly or impliedly assumed to have "consented" to the sexual violations. The courts must be seen to apply the law in a manner that achieves the intended aim of the legislature in these cases: that is, to effectively protect children from predatory older persons and ensure the eradication, or seriously attempt to eradicate the problem.[199]

The Court further underlined that sentencing an old man over 30 years of age to an effective 12 months imprisonment for having sexual intercourse with a young person of 15 years of age can hardly be aimed at deterring other older men from preying on

[196] Judgement No. CCZ 12/2015.
[197] *Ibid.*, p.53.
[198] HH 47-16.
[199] *Ibid.*, p. 3.

young and immature persons, who are swayed by the offer of one or two dollars in these harsh economic times.[200] In the Court's view, the very fact that a young person 'agrees' to sexual intercourse with a much older men for such a paltry amount is clear evidence of her immaturity and incapacity to make an informed choice or decision. The age difference and the unequal power dynamics attendant would be considered as aggravating factors.[201] A promise to marry, or even eventual marriage of the child would, in the Court's view, not be mitigatory as it would effectively deny the child an opportunity for optimal development.[202] Charehwa J was at pains to reiterate that judicial officers should never look with favour on much older men who 'marry' or intend to marry these children for purposes of sentencing as this attitude from the bench would seem to be promoting child marriages, which the Constitution and international instruments to which Zimbabwe is a party clearly frown on.[203] Finally, the Court held that:

> It is up to judicial officers to show that the courts will not tolerate predatory older men who prey on young persons by handing down appropriately severe sentences. The prevalence of these types of offences, the consequential incalculable damage they cause in preventing young persons from attaining their full potential, the damage to the social fabric, coupled with its impact on national development and the need to conform to international standards in the protection of children ought to be additional grounds for handing down deterrent sentences.[204]

The cases discussed above revolve around the role of the courts in ensuring adequate protection of children from child marriages and sexual exploitation. However, the child's right to adequate protection by the courts covers all aspects of life, including protection from violence in the family home (this could require the abolition of corporal punishment in the family); protection from personal decisions that threaten the child's life; survival and development; protection in the child justice context; protection in the schools and health care facilities; protection from recruitment into the armed forces of a particular country; protection from harmful social and cultural practices; protection from maltreatment, neglect or any form of abuse; and many other contexts. Like the principle of the best interests of the child, the child's right to adequate protection by the courts is implicated in all of the issues pertaining to the enjoyment by children of their rights.

5 COVID-19 and Children's Rights

Zimbabwe, like many other countries, was forced to take drastic and urgent measures in order to control the spread of COVID-19. Such measures included extended lockdowns which meant school and business closures as well as restrictions on freedom of movement. These measures were necessary as they had the effect of limiting rights of citizens including children. In a policy brief issued a few

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[200] *Ibid.*, p. 5.
[201] *Ibid.*, p. 5. *See also S v. Nare*, 1983 (2) ZLR 135 (H) and *S v. Ivhurinosara Ncube*, HH 335-13, p. 3.
[202] *Ibid*., p. 5. *See also S v. Peter Chigogo*, HH 943-15, p. 2.
[203] *S v. Banda, S v. Chakamoga,* p. 6. In *S v. Onismo Girandi*, HB 55/12, the need to send a signal to society that courts will descend heavily on child sexual abusers was emphasised, with the Court exhorting that a sentence of not less than two years should be imposed.
[204] *S v. Banda, S v. Chakamoga,* pp. 6–7.

months after the pandemic had started, UNICEF warned that the effects of COVID-19 on children's rights would potentially be "catastrophic".[205] This section briefly considers the impact that COVID-19, in particular the measures that were taken to curb its spread, had on the rights of children in Zimbabwe.

One of the rights that were severely affected by the measures taken to minimise the spread of COVID-19 was the right to education.[206] In the shadow of the pandemic, a silent intellectual or cognitive genocide is being committed against billions of school children across the globe. Schools have been forced to close so as to ensure the protection of learners as well as teachers and parents from possible infection. In the current crisis, 191 countries have compulsory school closures and approximately 1.5 billion children are out of school.[207] The pandemic has driven about 297 million children out of school across Africa and about 75 per cent of learners have limited or no access to interactive and internet-based learning materials, with the digital divide exacerbating the exclusion of many children from poor families, especially in Sub-Saharan Africa.[208] This includes more than 120 million girls who have been affected by school closures across the continent.[209] This presents serious challenges for girls from the poorest households who are likely to be the hardest hit and their education severely set back, unless immediate and comprehensive measures are taken to push back the current crisis.

Currently, more than two-thirds of African countries have introduced national distance learning platforms, although the learning materials placed on these platforms are only accessible in one or two major languages, thereby excluding the vast majority of learners.[210] Only 15 countries are offering distance instruction in more than one language.[211] Most of these distance learning platforms also use digital and online media. Increased digitalisation of schooling is likely to widen inequalities between children as those from poor economic backgrounds are least likely to have access to smartphones, television and the internet.[212] This is particularly disadvantageous to children, especially given that almost one third of the world's young people, most of them in sub-Saharan Africa, are already digitally excluded.

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[205] UNICEF, *Policy Brief: The Impact of COVID-19 on Children's Rights,* <https://www.unicef.org/zimbabwe/media/2631/file/Policy%20Brief:%20The%20Impact%20of%20COVID19%20on%20children.pdf>, p. 4.

[206] *See* Zimbabwe Education Cluster Humanitarian Response & COVID-19, accessed at <https://www.humanitarianresponse.info/sites/www.humanitarianresponse.info/files/documents/files/zimbabwe_education_cluster_situation_report_8_06.08.2020.pdf>, p.1, where it is stated that 3.5 million learners were affected by the closure of schools due to COVID-19 during the period ranging from 10 July 2020 to 6 August 2020.

[207] A. B. Albrectsen and S. Giannini, 'COVID-19 School Closures Around the World Will Hit Girls Hardest', UNESCO, 31 March, available at <https://en.unesco.org/news/covid-19-school-closuresaround-world-will-hit-girls-hardest>.

[208] J. Sloth-Nielsen, 'Children's Rights and Digital Technology: Focus on African perspectives', 2020, PowerPoint presentation on file with the author.

[209] UNESCO, 'Education: From Disruption to Recovery' available at https://en.unesco.org/covid19/education response>.

[210] African Child Policy Forum, *Under siege: Impact of COVID-19 on girls in Africa*, 2020, 18.

[211] UN, *The Impact of COVID-19 on Children: Policy Brief*, 2020.

[212] OECD, *Combatting COVID 19's Effect on Children*, 2020.

The usefulness of current Edtech initiatives to replace face-to-face schooling depends on open access materials, connectivity and resources to cover data costs. Zimbabwe has not moved an inch towards broadening access to internet enabled devices, access to energy especially in the rural context, or distribution of resources for data costs, thereby further marginalising children from poor families in the educational context.

In the urban areas, some of the schools have, however, been able to mitigate the effects of the indefinite closure of schools by continuing teaching through online platforms. As such, even though they were also deprived of access to the resources in their schools as well as physical learning, learners from these schools were able to continue learning. Children with disabilities and those from poor homes and remote rural areas were disproportionally affected, for them learning has been completely paused for the entire period during which schools have been closed.[213] This affects not only access to education, but slows the intellectual, emotional and social development of children.

Restrictions on movement also had the effect of limiting the child's right to healthcare. The deployment of security forces to enforce the lockdown made it difficult for people including children to get access to healthcare as it was required that one should have a document that shows that they are exempted from restrictions on freedom of movement.[214] Even when one makes it to the healthcare facility, health care practitioners often required that they should submit negative COVID-19 test results before they could receive medical attention. For most, this was an insurmountable barrier to healthcare as the COVID-19 tests are too expensive for the majority of the parents.[215]

Another aspect of children's right to health affected by the lockdown relates to "mental health and social development".[216] Being forced to stay at home for protracted periods with no access to friends and communal environments negatively affects the psychological well-being of children. This is made worse by the lack of dissemination of age-sensitive and gender sensitive medical information explaining how the virus is spread as well as how to protect oneself. Most of the information is not packaged in such a manner as to be understood by children of varying ages. Restrictions are often imposed on children's rights without there being made

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213 *See* Zimbabwe Education Cluster Humanitarian Response & COVID-19, accessed at <https://www.humanitarianresponse.info/sites/www.humanitarianresponse.info/files/documents/files/zimbabwe_education_cluster_situation_report_8_06.08.2020.pdf>, p. 1.

214 G. Murewanhema and R. Makurumidze, 'Essential Health Services Delivery in Zimbabwe during the COVID-19 Pandemic: Perspectives and Recommendations, *Pan African Medical Journal* (2020), available at <https://www. panafrican-med-journal.com/content/series/35/2/143/full/>.

215 C. D Chikwari, 'Coronavirus in Zimbabwe', 11 August 2020, available at <https://www.thinkglobalhealth.org/ article/coronavirus-zimbabwe>, shows how expensive this test was by comparing it to the salary that was received by a nurse during that period; the COVID-19 test was approximately USD 60 whereas the salary of a nurse was less than USD 30.

216 UNICEF, *Policy Brief: The Impact of COVID-19 on Children's Rights*, accessed at <https://www.unicef.org/zimbabwe/media/2631/file/Policy%20Brief:%20The%20Impact%20of%20COVID19%20on%20children.pdf>, p. 4.

available “age-appropriate, accurate, regular and accessible information in a language that they were able to understand”.[217] The constant use of terms such as ‘quarantine, social distancing, sanitiser’ and many others create a language barrier that excludes young children from taking part in curbing the pandemic.

Measures taken to curb the spread of COVID-19 affected various other children’s rights. The closure of schools had the effect of removing children from the protection of the school environment and thereby exposed them to abuses such as child labour as well as physical, emotional and sexual abuse and violence. With parents forced to stay at home, the child’s rights to adequate food and shelter were also affected.[218] This has been particularly worsened by the fact that the country has a very high unemployment rate and the majority of caregivers rely on the informal sector for livelihoods. The urban poor – living from hand to mouth and relying on informal sector activities that require them to be out of their homes – have been hard hit by the pandemic and stay at home orders.

Lengthy lockdowns and restrictions on freedom of movement have prohibited commercial activities in the informal sector and made them ‘illegal’. This has led to loss of livelihoods in a country where around 90 per cent are employed in the informal sector. These factors drive children from poor families to the margins of society, especially in a country with no social safety nets or unemployment benefits. Even in the context of COVID-driven unemployment, the majority of those affected by lockdown restrictions belong to groups that are already vulnerable – women, PWDs, the poor and the like. Mention should also be made that PWDs and the urban poor – many of whom are vendors who sell their wares in the streets – also have had their livelihoods severely affected. By the same token, children born of or cared for by families or individuals belonging to these categories of persons confront pronounced challenges in every aspect of life.

6 Conclusion

By entrenching a mini-Declaration of Rights for children, the Constitution follows developments at both the international plane and in other foreign jurisdictions. The insertion into the Constitution of a separate section entrenching children’s rights echoes the adoption at the international level of separate instruments – such as the CRC and the African Children’s Charter – protecting children’s rights. At a deeper level, the constitutional protection of children’s rights embodies a paradigm shift from

[217] UNICEF, *COVID-19 and the Impact on Children’s Rights: The Imperative for a Human-Rights Based Approach*, accessed at <https://d3n8a8pro7vhmx.cloudfront.net/childrightsconnect/mailings/851/attachments/original/UNICEF__COVID-19_and_Child_Rights_Imperative_for_a_Human_Rights_Approach__Final_April _2020.pdf?1588854658>, p. 4.

[218] *See* United Nations in Zimbabwe, *Immediate Socio-Economic Response to COVID-19 in Zimbabwe: Framework for Integrated Policy Analysis and Support*, 2020, pp. 10 and 13, where it is stated that about 2.2 million of Zimbabweans are employed in the informal sector, with such a large population having been most affected by lockdown measures, this had an impact on the food security of quite a number of Zimbabwean households.

social perceptions of children as dependent persons with no rights to the legal status of children as holders of rights. The strength of the CRC and the Zimbabwean Constitution arises from the fact that these instruments offer special protection to children *qua* children, not just as members of the family or the societies in which they live. They all portray the child as a separate person entitled to rights emanating not from their relationships with others but from their separate personhood as an individual. This means that the child is entitled to assert their rights against other persons, parents and the state.

This chapter discussed different categories of children's rights. It was demonstrated that international and national human rights law divide children's rights into three broad categories. These include provision or socio-economic rights, protection rights and participation or empowerment rights. These categories of rights should be read holistically as they are indivisible, interrelated and mutually reinforcing. Each set of rights largely represents specific interests of children, with provision rights broadening the child's interest in developing optimally, participation rights promoting the child's interest in making decisions once competent to do so and protection rights emphasising the child's interest in being protected from harm, neglect, violence, degradation and all forms of exploitation. Protection in the decision-making context largely comes in the form of parental duties and the responsibility of the state in ensuring that parental duties are exercised in the best interests of the child.

Apart from discussing children's rights to provision, participation and protection in different contexts, this chapter also investigated the scope of children's rights in the criminal justice system. These rights include, among others, the child's right not to be detained except as a means of last resort. Whilst the general rule is that no child offender should be caged, the law foresees instances when the demands of justice and fairness may call for the imprisonment of the child offender. However, when it becomes necessary to cage a child for committing a serious crime, the Court should ensure that the conditions of detention comply with at least three explicitly stipulated constitutional requirements or standards. These requirements include the idea that the child offender should be detained for the shortest appropriate period, kept separately from adult offenders and treated in a manner and kept in conditions that take account of the child's age. These rights were discussed in some detail, and it was shown that the courts do refer to the relevant provisions when they make decisions.

The constitutional protection of children's rights paves way for the present and future enforcement of children's rights in this country. It is patent that the legal regulatory framework for children's rights is more than adequate and protects all categories of children's rights. Like at the international level, the best interests of the child remains the paramount consideration under our law and enables the courts to make decisions in whatever way they consider 'best' for children. In addition, the Constitution emphasises that children are entitled to adequate protection by the courts, in particular by the High Court as the upper guardian of all minors. However, it remains to be seen whether the courts will actively perform their duty to protect children from the harm that is often occasioned by strangers, parents, caregivers and the state. To perform their functions adequately, parents, courts and the state

should make joint efforts towards promoting children's rights in line with international and domestic law. As has been suggested above, the enforcement of the concept of the evolving capacities of the child enables decision-makers, including parents, courts and the state, to promote all sets of children's rights.

10 Constitutional Framework for the Protection of Language Rights of Linguistic Minorities in Zimbabwe

Innocent Maja*

1 Introduction

Language rights relate to an individual's, entity's and or state authority's right to choose or prefer the language(s) to use for communication in private or public spheres. This chapter examines the extent to which the 2013 Zimbabwean Constitution protects the language rights of linguistic minorities. The chapter is divided into three sections. Section 2 deals with why language right are important linguistic minorities. Section 3 sets out the normative content of language rights of linguistic minorities in international law. Section 4 analyses the extent to which the Zimbabwean Constitution protects the language rights of linguistic minorities.

2 Why Are Language Rights Important to Linguistic Minorities?

Language rights are particularly important for linguistic minorities for a myriad of reasons. First, the intrinsic value of language affirms the need to protect language rights. Language is a mirror of one's cultural identity,[1] a vehicle of culture,[2] a medium of expression,[3] a means of transfer of knowledge[4] and a source of power, social mobility and opportunities.[5] The constitutional protection of language rights recognises, affirms and accommodates linguistic diversity.

Second, linguistic minorities have historically suffered discrimination based on language where one language was favoured and other minority languages were

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[1] V. Webb and Kembo-Sure (eds.), *African voices* (2000) p. 5 contend that in Africa "people are often identified culturally primarily (and even solely) on the basis of the language they speak".

[2] K. K. Prah, in his 2006 report commissioned by Foundation for Human Rights in South Africa, *Challenges to the Promotion of Indigenous Languages in South Africa* (2006) pp. 3–4, argues that language is a central feature used to transmit, interpret and configure culture.

[3] In *Malawi African Association and Others v. Mauritania* (2000), AHRLR 149 (ACHPR 2000), para. 136, the African Commission on Human and Peoples' Rights established that "[l]anguage is an integral part of the structure of culture; it in fact constitutes its pillar and means of expression par excellence. Its usage enriches the individual and enables him to take an active part in the community and its activities. To deprive a man of such participation amounts to depriving him of his identit".

[4] K. L. Dooley and L. B. Maruska ('Language Rights as Civil Rights: Linguistic Protection in the Post-Colonial Democratic Development of Canada and South Africa', 3 *Journal of Global Change and Governance* (2010) pp. 1–2) argue that: "Language is the means by which knowledge is transferred between individuals, between individuals and the state (and vice versa), and between individuals and subsequent generations through educational practices and various forms of culture left as nationalistic directives for each new generation to carry on the traditional 'mother tongue' of their particular national group."

[5] S. Makoni and B. Trudell, 'Complementary and Conflicting Discourses of Linguistic Diversity: Implications for Language Planning', 22:2 *Per Linguam* (2006) pp. 14–28, at p. 21.

restricted.[6] This led to linguistic assimilation,[7] linguistic loss and discrimination against linguistic minorities.[8] Language right help address this problem by making any linguistic discrimination visible and problematic, and abolishing such discrimination.[9]

Third, most linguistic minorities are numerically inferior, politically non-dominant, poor and socially vulnerable. They require the assistance of the law to protect their language rights in a functioning ethnolinguistic democracy. *S v. Makwanyane and Another* established that democracy demands that the law protects vulnerable minorities who are unable to protect themselves due to their numerical inferiority.[10]

Fourth, the legal protection of language rights contributes towards the preservation of the identity of linguistic minorities. In Africa, identity is linked to language. Webb and Kembo-Sure argue that in Africa, "people are often identified culturally primarily (and even solely) on the basis of the language they speak".[11] Examples include the Tonga, Ndebele and Shona in Zimbabwe. Constitutional recognition of language rights therefore aids the preservation of the identity of linguistic minorities. This is especially significant in view of the contention that the right to identity has been

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[6] It is interesting to note that A. Bamgbose, *Language and the Nation: The Language Question in Sub Saharan Africa* (1991) identifies two approaches to minority language rights. The first is the language-as-a-problem orientation and it favours a single language and attempts to restrict (and sometimes annihilate) the role of minority languages. The second is the language-as-a-resource orientation that sees all languages as useful cultural and identity resources that need to be accommodated to foster strong, representative and sustainable unity. This chapter supports the latter orientation.

[7] S. May ('Uncommon Languages: The Challenges and Possibilities of Minority Language Rights', 21:5 *Journal of Multilingual and Multicultural Development* (2000) pp. 366–369) describes the process of linguistic assimilation as involving a. introduction of majority language that replaces the functions of a minority language, b. linguistic minorities shifting to speak the majority language. This shift has three processes that include i) pressure to speak a majority language in the formal domain, ii) lesser use of minority language and ii) the replacement of a minority language with a majority over two or three generations.

[8] *See* J. Blommaert, 'Language Policy and National Identity', in T. Ricento (ed.), *An Introduction to Language Policy: Theory and Method* (2006) p. 10.

9T. Skutnabb-Kangas ('Linguistic Human Rights, Past and Present', in T. Skutnabb-Kangas and R. Phillipson (eds.), *Linguistic Human Rights: Overcoming Linguistic Discrimination* (1994) pp. 98–99) summarised linguistic human rights as follows: a. Every social group has the right to identify positively with one or more languages and to have such an identification accepted and respected by others. b. Every child has the right to learn fully the language(s) of his/her group. c. Every person has the right to use language(s) of his/her group in any official situation. d. Every person has the right to learn fully at least one of the official languages in the country where s/he is a resident, according to her/his own choice.

[10] *State v. T. Makwanyane and M. Mchunu,* 1995 3 SA 391 (CC), argues that "[t]he very reason for … vesting the power of judicial review of all legislation in the courts was to protect the rights of minorities and others who cannot protect their rights adequately through the democratic process. Those who are entitled to claim this protection include the social outcasts and marginalised people of our society. It is only if there is a willingness to protect the worst and the weakest amongst us, that all of us can be secure that our own rights will be protected."

[11] Webb and Kembo-Sure, *supra* note 2, p. 5.

regarded as part of the "peremptory norms of general international law"[12] used to protect minorities.[13]

Fifth, the legal protection of the language rights of linguistic minorities creates a platform for linguistic minorities to communicate effectively with government authorities and access public services like public health, public education, court proceedings, employment, social services, etc.

3 Language Rights of Linguistic Minorities in International Law

International law has a myriad of provisions that protect the language rights of linguistic minorities under the following broad categories:

3.1 *Equality and Non-discrimination*

International law provides that everyone is entitled to equal and effective protection against discrimination on grounds such as language. Paragraph 7 of the United Nations Human Rights Committee (UNHRC) General Comment [18] defines discrimination (on the basis of language) as "[a]ny distinction, exclusion, restriction or preference which is based on any ground such as … language … and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms".[14]

This essentially means that language preferences either between official languages,[15] or between and an official and a minority language[16] (in areas like administrative services,[17] access to the judiciary,[18] regulation of banking services by

[12] K. Henrard (Devising an Adequate System of Minority Protection: Individual Human Rights, Minority Rights and the Right to Self-Determination (2000) p. 12) argues that the Badinter Arbitration Commission, established in 1991 by the European union in the wake of the break up of Yugoslavia (Council of Ministers, EU, Joint Declaration on Yugoslavia, 27 August 1991. Opinion no. 2, 20 November 1991) explicitly recognised that the right to identity of minorities is part of the "peremptory norms of general international law".

[13] P. Thornberry ('The UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities: Background, Analysis, Observations and an Update, in A. Phillips and A. Rosas (eds.), *Universal Minority Rights* (1995) p. 392) argues that the right to identity is sometimes regarded as constituting the whole of "minority rights."

[14] This definition is in line with Article 1 of the CERD that defines racial discrimination as "any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of pubic life". A substantially similar definition is also contained in the International Labor Organisation (ILO) Convention No. 111 Concerning Discrimination in Respect of Employment and Occupation (1958) and Article 1 of the UNESCO Convention Against Discrimination in Education (1966).

[15] *Gunme v. Cameroon* (Communication No. 266/2003) [2009] ACHPR 99 (27 May 2009).

[16] *Diergaardt v. Namibia*.

[17] *Ibid*.

[18] *Bickel and Franz v. Italy* [1998] ECR I-7637.

authorities,[19] public education,[20] and even citizenship acquisition)[21] which unreasonably or arbitrarily disadvantage or exclude individuals would be a form of prohibited discrimination. States are guided by the principle of proportionality in designing their language legislation, policies and practices. Proportionality demands that states be guided by principles of disadvantage, exclusion and reasonableness in their language preferences. This human rights approach focuses on the differences of treatment between individuals, not languages. It is therefore the impacts – such as disadvantages or exclusion – on individuals rather than between languages that are considered in the reasonableness of any language preference in the policies, support or services provided by all levels of state authorities and actions.[22]

The equality principle is formulated in different ways in international human rights instruments such as prohibition of discrimination, equality before the law,[23] equal protection of the law, etc.[24] Prohibition of discrimination on the basis of language is enshrined in Articles 1 and 55 of the United Nations Charter, Article 2 of the Universal Declaration of Human Rights, Articles 2, 24 and 26 of the International Covenant on Civil and Political Rights, Article 2 of the International Covenant on Economic, Social and Cultural Rights, Articles 1 and 7 of the Convention on the Rights of Migrant Workers and Members of their Families and preamble of Convention on the Elimination of All Forms of Racial Discrimination. More specifically, Article 26 of the International Covenant on Civil and Political Rights prohibits the use of language as a basis for discrimination. Article 4(1) of the International Covenant on Civil and Political Rights further proscribes discrimination on the basis of language even in emergency situations. Article 24(1) of the International Covenant on Civil and Political Rights prohibits the state from discriminating against a child on the basis of language whenever the state takes measures to protect minors. Interestingly, Skutnabb Kangas and Dunbar argue that the principle of non-discrimination is so fundamental that it is considered to be *jus cogens*.[25]

Equality sometimes demands that states undertake affirmative action to correct a historic situation of discrimination on the basis of language.[26] Eide defines affirmative

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[19] *Gunme v. Cameroon*.
[20] *Belgian Linguistics Case No.* (1968) 1 EHRR 252.
[21] *Costa Rica Naturalistion Case,* Advisory Opinion OC-4/84, IACHR Series A no 4, IHRL 3442 (IACHR 1984), 19 January 1984.
[22]<http://www.ohchr.org/Documents.Issues.IEMinorities/LanguageRightsLinguisticMinoritiesHandbook.docx>, accessed on 31 January 2021.
[23] *See* Article 3(1) of the African Charter on Human and Peoples Rights and Article 24 of the American Convention on Human Rights.
[24] Equality before the law would refer to the formulation of legal texts while equal protection by the law is rather understood in terms of procedures of implementation and enforcement.
[25] T. Skutnabb Kangas and R. Dunbar, *Indigenous Children's Education as Linguistic Genocide and a Crime Against Humanity? A Global View* (2010) p. 22.
[26] Affirmative action can be traced back to Aristotle's formula that unequal or different things should be treated differently to the extent of the difference. Paragraph 10 of General Comment 18 states that: "The Committee also wishes to point out that the principle of equality sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant. For example, in a State where the general conditions of a

action as "preference, by way of special measures, for certain groups or members of such groups (typically identified by race, ethnic identity or sex) for the purposes of securing adequate advancement of such groups or their individual members in order to ensure equal enjoyment of human rights and fundamental freedoms". [27] Affirmative action measures for linguistic minorities may include measures necessary for the development of minority languages, and where necessary, quotas designed to reach proportional group representation.[28] Affirmative action does not include separate legal status because it is only aimed at rectifying past discrimination.[29] Affirmative action aims at eliminating the enduring effects of past discrimination and reducing the vulnerability of linguistic minorities.[30] It is differential treatment aimed at substantive equality between members of linguistic minorities and the rest of the population.[31] Generally, affirmative action measures should only be allowed on a temporary basis and should be ended once the goal of substantive equality is reached.[32] Affirmative action is ultimately aimed at realising substantive or real equality between linguistic minorities and linguistic majorities.

3.2 *Identity*

Language is a marker of the identity of linguistic minorities as communities.[33]

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certain part of the population prevent or impair their enjoyment of human rights, the State should take specific action to correct those conditions. Such action may involve granting for a time to the part of the population concerned certain preferential treatment in specific matters as compared with the rest of the population. However, as long as such action is needed to correct discrimination in fact, it is a case of legitimate differentiation under the Covenant."

[27] A. Eide, *Protection of Minorities: Possible Ways and Means of Facilitating the Peaceful and Constructive Solutions of Problems Involving Minorities*, UN Doc, E/CN.4/Sub.2/1993/34, 172.

[28] W. Mc Kean (*Equality and Discrimination under International Law* (1985) p. 100) summarises the debate around quotas as follows: "According to one view, reservations and quotas were a fundamental means of promoting equality in law and in fact for persons who have been victims of discrimination but others believed that it would be preferable to make special facilities available to backward groups in order to enable them to meet the general standards of merit."

[29] A. Eide ('Minorities and Indigenous Peoples: Equality and Pluralism', in L. A. Sicilianos (ed.), *Nouvelles Formes de Discrimination – New forms of discrimination* (1995) pp. 229–239) argues that affirmative action may include differential legal systems and concomitant status.

[30] W. Kymlicka, 'Individual and Community Right', in J. Baker, (ed.), *Group Rights* (1994) pp. 17–20.

[31] A. Eide ('Minority Situations: in Search of Peaceful and Constructive Solutions', 66 *Notre Dame Law Review* (1996) pp. 1311–1346, at pp. 1341–1342) argues that "the concept of special assistance or status should, therefore, refer only to measures made for minorities without the provision of corresponding measures for majorities. The only justification for doing so would be to restore equality where, in the past, there had been inequality, or where structural factors make equality difficult to preserve … Where the general conditions of some groups prevent or impair their enjoyment of human rights, the Committee points out that specific action should be taken even if it might amount to preferential treatment. … [A]s long as such action is needed to correct discrimination in fact, it is a case of legitimate differentiation under the Covenant."

[32] K. Henrard, 'The Right to Equality and Non-Discrimination and the Protection of Minorities in Africa', in S. Dersso (ed.), *Perspectives on the Rights of Minorities and Indigenous Peoples in Africa* (2010) p. 148.

[33] According to the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities UN Doc E/CN.4/52 Section V (Sub-commission, 1st session 1947), "[p]revention of discrimination is the prevention of any action which denies to individuals or groups of people equality of treatment which they may wish … Protection of minorities is the protection of non-dominant groups

International law protects a person's identity in the form of one's own name or surname in a minority language. The centrality of identity is emphasised in Article 1 of the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities.

Article 27 of the ICCPR is regarded as the *grundnorm* regarding minority rights.[34] It protects the right to linguistic identity. According to Thornberry "Article 27 is concerned with the right to identity of minorities even if this right is not named".[35] Article 27 of the ICCPR also enshrines the qualified right to non-state interference in the use of minority languages in private and in public. For lingustic minorities, this right would include qualified use of minority languages in names, education,36 public media, courts, communication with public officials and recognition of minority languages as official languages. Suffice to mention that the rights contained in Article 27 of the ICCPR are not absolute but can be limited. In *Lovelace v. Canada*[37] and *Kitok v. Sweden*,[38] the UN Human Rights Committee established that state parties can validly limit rights provided for in Article 27 if the limitation has a reasonable and objective justification[39] and is consistent with other provisions of the ICCPR particularly prohibition of discrimination. The regulation of the right to use a minority language in communication with public authorities is evaluated against the principle of substantive equality.[40] This evaluation uses the proportionality principle to balance between state interests in achieving national unity on one hand and the accommodation of linguistic diversity on the other hand.[41] Some relevant factors, none of which should be given absolute precedence, include: a) the number of language speakers, b) their territorial concentration, c) whether they are citizens, permanent residents or aliens, d) the extent of disadvantage, e) individual preference, f) the desirability of a common national language, g) available human and financial state resources and practicality,[42] h) the state's goal in favouring one

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which, while wishing in general for equality of treatment with the majority, wish for a measure of differential treatment in order to preserve basic characteristics which they possess and which distinguish them from the majority of the population." *See also The Minority Schools in Albania*, Advisory Opinion 6 of the Permanent Court of International Justice Publication Series A-B No 64 17.

[34] Henrard, *supra* note 32, p. 156.

[35] Thornberry, *supra* note 13, p. 20.

[36] This right includes mother-tongue education, participation in curriculum development and the right to establish private educational institutions. These rights are explored in detail in this chapter.

[37] Communication 24/1977 *Lovelace v. Canada*, UNHR Committee (14 August 1979), UN Doc. CCPR/C/OP/1 at 10 (1984) (Lovelace case).

[38] Communication 197/1985 *Kitok v. Sweden*, UNHR Committee (27 July 1988), UN Doc. Supplement No 40 (A/43/40) at 221–230 (*Kitok case)*.

[39] Paragraph 9.8 of the UNHRC General Comment 23 states that "the Committee has been guided by the ratio decidendi in the Lovelace case … that a restriction upon the right of an individual member of a minority must be shown to have a reasonable and objective justification and to be necessary for the continued viability and welfare of the minority as a whole".

[40] It can be argued that a flexible application of the non-discrimination principle could be beneficial to minorities in two ways. The first is that it can be used to identify discrimination of linguistic minorities based on language use patterns. The second is that affirmative action could then be taken to address historic structural discrimination and try to place linguistic minorities on a substantively equal footing with linguistic majorities.

[41] Henrard, *supra* note 32, p. 248.

[42] This requirement should be looked at in terms of political will and budgetary priorities.

language over the other, i) the history of discrimination of language speakers, and j) the extent to which the language has developed in written form.[43] The proportionality principle demands that there be a proportional relation between the goals of a certain language policy and the means used to achieve them.

The right to linguistic identity is also provided for in Article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination, Articles 2 and 7 of the Convention on the Rights of the Child, Article 10 of the European Human Rights Convention, Article 11 of the Framework Convention for the Protection of National Minorities, Article 10 of the European Charter for Regional or Minority Languages, Article 2 of the United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities and Recommendation 13, Guidance Note of the UN Secretary General on Racial Discrimination and the Protection of Minorities (2013).

It is clear from the above that protecting, respecting and fulfilling language rights of linguistic minorities creates a conducive environment for the maintenance of the identity of linguistic minorities.

3.3 *Use of Language in the Private Sphere*

International law provides for linguistic freedom to use one's language in the private spheres of commercial activity, private access to information,[44] civil society and private organisation,[45] private education,[46] private media, private family,[47] religion, etc. This significantly protects the dignity[48] of linguistic minorities, preserves their languages and facilitates the development of their languages.

3.4 *Use of Language in the Public Sphere*

International law predominantly uses the proportionality principles to determine language use in the public sphere. For example, public education services (from kindergarten to university) must be provided to the appropriate degree in a minority language taking into account the number and concentration of speakers of the language, the level of demand, prior use of language as medium of instruction and

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[43] De Varennes, *Language, Minorities and Human Rights* (1996) pp. 87, 93, 95, 99, 121 and 127.

[44] *Ballantyne v. Canada*, UN Doc. CCPR/C/47/D/359/1989, UN Doc. CCPR/C/47/D/385/1989, Communication No. 359/1989, Communication No. 385/1989, (1993) 1-1 IHRR 145, IHRL 1687 (UNHRC 1993), 31 March 1993, United Nations [UN]; Human Rights Committee [CCPR].

[45] *Ouranio Toxo and Others v. Greece*, App No. 74989/01, ECHR 2005-X, (2007) 45 EHRR 8, IHRL 2806 (ECHR 2005), 20 October 2005, European Court of Human Rights [ECHR].

46 *See* Article 30 of the Convention on the Rights of the Child.

[47] *Raihman v. Latvia*, UN Doc. CCPR/C/100/D/1621/2007, IHRL 3747 (UNHRC 2010), 28 October 2010, United Nations [UN]; Human Rights Committee [CCPR].

[48] *See* Article 1 of the Universal Declaration of Human Rights and Minorities and the United Nations: The UN Working Group on Minorities, Pamphlet No. 2. Human dignity encapsulates those characteristics of a person that distinguishes them from other creatures and inanimate things. It advocates that persons must be treated in a manner befitting of human beings and not in a sub-human manner. Human dignity is one of South Africa's constitutional values and is protected in section 10 of the Constitution. It inhuman for a human being to be discriminated on the basis of language

therefore availability of resources.[49] The same considerations are used when determining the use of minority languages to access health, social, administrative and other public services.[50]

The proportionality principle is also used in determining language use in courts.[51] A person can be charged and tried in a language they understand. Clause 5.3 of the United Nations Human Rights Committee General Comment 23 makes it clear that "Article 14(3)(f) of the CCPR does not, in any other circumstances, confer on accused persons the right to use or speak the language of their choice in court proceedings". However, there are times when a language that one understands is different from the language that one speaks. In *Guesdon v. France*,[52] the UNHRC established that the notion of fair trial does not imply that the accused be afforded the possibility to express himself in the language which he normally speaks or speaks with a maximum of ease. If a court is certain that the accused is sufficiently proficient in the court's language, it is not required to find out if he would prefer to use another language. In *Harward v. Norway*[53] the UNHRC held that an essential element of the concept of a fair trial under Article 1 is to have adequate time and facilities to prepare a defence. However, this does not entail that an accused who does not understand the language used in court has the right to be furnished with translations of all relevant documents in a criminal investigation, provided that the relevant documents are made available to his counsel. An accused person is entitled to the free assistance of an interpreter if he cannot understand or speak the language used in court. The state has the duty to pay for the interpreter in criminal proceedings. The state cannot refuse to provide it even for economic or any other justifications. Qualified minority language rights can therefore be impliedly protected through the general right of language in criminal proceedings.

4 Language Rights of Linguistic Minorities in the Zimbabwean Constitution

There are a number of provisions that provide for the protection of minority language rights in the Zimbabwean Constitution. This section will analyse these legal provisions and assess the extent to which they protect minority languages both in principle and in practice.

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[49] *See* Articles 2(2) and 13 of the International Covenant on Economic, Social and Cultural Rights, Article 26 of the International Covenant on Civil and Political Rights, and Articles 2, 28, 29 and 30 of the Convention on the Rights of the Child.

[50] *Diergaardt v. Namibia*. *See also* Articles 2(2), 9, 10, 12 and 15 of the International Covenant on Economic, Social and Cultural Rights; Articles 5(a) and 5(e)(4) of the International Convention on the Elimination of All Forms of Racial Discrimination; Article 26 of the International Covenant on Civil and Political Rights; Articles 24, 25 and 30 of the Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries.

[51] *See* Articles 14 and 26 of the International Covenant on Civil and Political Rights, Article 40 of the Convention on the Rights of the Child, Article 9 of the European Charter for Regional or Minority Languages and Article 10(2) and (3) of the Framework Convention for the Protection of National Minorities.

[52] Communication 219/1986 *Guesdon v. France*, UNHR Committee (23 August 1990), UN Doc. CCPR/C/39/D/219/(1986).

[53] Communication 451/1991 *Harward v. Norway,* UNHR Committee (16 August 1994), UN Doc. CCPR/C/51/D/451/(1991).

4.1 *Founding Provisions*

Founding provisions embody the Constitutional values of a democratic Zimbabwe. Some of the values applicable to the minority language rights discourse are the principles of accommodation of diversity, fundamental human rights[54] and freedom, equality of all human beings, peace, justice, tolerance, fairness and the rule of law.[55] The Zimbabwean Constitutional Court has not yet made any pronouncements on the implications of constitutional values. However, the South African Constitutional Court jurisprudence has established that constitutional values are mutually interdependent and that collectively they form a unified, coherent whole.[56] It has also been established that the constitutional values are used to interpret constitutional provisions in order to preserve the Constitution's normative unity or value coherence.[57] In light of this jurisprudence, this chapter analyses and interprets all constitutional provisions that relate to minority language rights in light of the said constitutional values.

There are three key provisions that relate to minority language rights that are found in the founding provisions of the constitution. These are sections 3(2)(h), 3(2)(i) and 6 of the Constitution, which will now be discussed.

4.1.1 Multilingualism

One of the principles of good governance binding the state is recognition of multilingualism in fostering national unity, peace and stability. Section 3(2)(h) of the Constitution provides for "the fostering of national unity, peace and stability, with due regard to diversity of languages, customary practices and traditions". This section obliges the state to consider diversity of languages in fostering national unity. This is a departure from the nation state approach to nation building that Zimbabwe adopted during independence. The inclusive linguistic diversity constitutional approach accommodates different linguistic diversity in nation building. Minority languages are not sacrificed at the altar of national unity, peace and stability. This is a complete departure from colonial Africa's perception that multilingualism was a problem that threatened national unity, peace and stability. Section 3(2)(h) arguably introduces ethnolinguistic democracy in Zimbabwe

[54] Section 44 of the Constitution places an obligation on the state to respect, protect, promote and fulfill rights enshrined in the Constitution. It provides that: "The State and every person, including juristic persons, and every institution and agency at every level must respect, protect, promote and fulfil the rights and freedoms set out in this Chapter."

[55] *See* the Preamble and sections 3 and 6 of the Constitution.

[56] *See* MEC for Education, *KwaZulu-Natal v. Pillay*, 2008 1 SA 474 (CC), paras. 63–64 and *De Reuck v. Director of Public Prosecutions, Witwatersrand Local Division*, 2004 1 SA 406 (CC), para. 55.

[57] Executive Council of the *Western Cape Legislature v. President of the RSA*, 1995 4 SA 877 (CC), para. 204 and *S v. Mhlungu*, 1995 3 SA 867 (CC), paras. 45 and 105.

4.1.2 Rights of Linguistic Groups

Section 3(2)(i) of the Constitution recognises as one of Zimbabwe's foundations of good governance the "recognition of the rights of … linguistic … groups". Key to the rights of linguistic groups is the issue of language rights of linguistic minorities. For linguistic minorities, this would mean the constitutional recognition of their language rights. The protection of minority language rights under this provision is further strengthened by section 46 of the Constitution which makes it clear that in interpreting fundamental human rights, regard should be had to the value of equality and also international law must be taken into account. Section 46 empowers the courts to read into section 3(2)(i) the international language rights norms discussed above. One of these international language rights norms is the right of members of a linguistic minority group's right to use their language in private and in public as stipulated by Article 27 of the ICCPR. This can potentially protect the use of minority languages in the private domain and to a degree the public domain.

4.2 *Protection and Promotion of Official and Other Languages*

Section 6 of the Zimbabwean Constitution is the main language rights section in the Constitution in that it provides for the protection and promotion of official and non-official languages in Zimbabwe. Like the European Languages Charter, the focus is on the protection and promotion of minority languages and not linguistic minorities *per se.* The following areas are key:

4.2.1 Official Language Status

Section 6(1) of the Zimbabwean Constitution accords official language status to 16 languages, namely: Chewa, Chibarwe, English, Kalanga, Koisan, Nambya, Ndau, Ndebele, Shangani, Shona, sign language, Sotho, Tonga, Tswana, Venda and Xhosa. This reveals a complete shift from the previous language policy that saw only English as the official language. An official language is a language used in the business of government (executive, legislature and judiciary).[58] Each state has the discretion to choose an official language.[59] It would appear from the Zimbabwean context that the state discretion would have to be guided by the principle of multiculturalism and recognition of rights of linguistic groups discussed above.

Even though international law does not clarify whether official language status guarantees use of that language there is a strong implication that an official language should be proportionally used in government business. Official language status should therefore not be symbolic but should guarantee the proportional use of that language in accordance with international law discussed above.

Unlike the South African Constitution, section 6(1) of the Zimbabwean Constitution does not expressly mention anything about the use of the 16 languages in the

[58] UNESCO Report entitled: *The Use of Vernacular Languages in Education* (1953) 46; Malan, *infra* note 64, p. 387.
[59] *Diergaardt* case; *Ballantyne* case, *supra* note 44.

business of government. Neither is there any criteria set for determination of how official languages ought to be used in Zimbabwe. In practice, the current reality is that English language is the one used for government purposes. This limits the functional load of the other 15 official languages thereby making the other 15 official languages minority languages. The lack of use of the 15 official languages in government business also makes the granting of official language status to them merely symbolic. Until such a time the 15 languages are actually used in the public domain, the legal consequences of official language status of the 15 languages will not be fulfilled.

However, if section 6 of the Zimbabwean Constitution is to be interpreted using the values of multiculturalism, inclusive linguistic diversity, equality, human dignity and the section 46(1)(c) obligation to take into account international law and all the treaties and conventions to which Zimbabwe is a party, it would place an obligation on Zimbabwe to use officially recognised languages. This may mean that Zimbabwe would need to promulgate an Act of Parliament to specifically regulate the use of official languages in Zimbabwe. Such an Act would need to specify the criteria to be used to determine which language should be used where. The sliding scale approach may be useful to establish that an official language should be used in areas where the speakers are mainly concentrated.

A worrying observation is that there is no constitutional commitment to promulgate an Act of Parliament to regulate the use of official languages in government business and the accommodation of language rights concerns of majority and minority language speakers. The only constitutional commitment in section 6(2) is the possibility of the promulgation of an Act of Parliament to prescribe other languages as officially recognised and to prescribe languages of record. The Constitution does not give any guidelines on how such choices will be made and leaves the process entirely to the discretion of the state. This may indicate that the official constitutional recognition of the 16 languages was merely meant to be symbolic.

Yet, the protection of minority languages through national laws is very important to address the language problems that a country is facing.[60] According to Turi, "the fundamental goal of all legislation about language is to resolve the linguistic problems which stem from … language conflicts and inequalities by legally establishing and determining the status and use of the concerned languages".[61]

Language legislation should eliminate discrimination based on language, enable minority language speakers to conserve their linguistic characteristics, and allow it to remain in peaceful interaction with the majority. Language legislation must give members of the minority group the opportunity to deal on unequal basis with the majority in a way that conserves their linguistic distinction.

[60] The need for language specific detailed legislation is even more necessary in Zimbabwe where there is currently no case that has been decided on language rights in the new constitution.
[61] J. G. Turi, 'Typology of Language Legislation', in T. S. Kangas *et al.* (eds.), *Linguistic Human Rights: Overcoming Linguistic Discrimination* (1994) pp. 111–120.

The absence of such legislation deprives content to the exact scope of official language status and robs speakers of official minority languages of practical measures for the implementation of their rights. Zimbabwe needs to come up with a specific piece of legislation that gives content to the scope of official language status, regulates the use of these languages in government and provide specific mechanisms and measures to be taken in the event of violation of official minority language rights.

A textual reading of section 6 of the Zimbabwean Constitution reveals that the 16 official languages are official languages of the entire country. If it is to be accepted that affording official language status obliges states to use the designated official language to some degree, practicality and financial considerations may need to be taken into account to determine which languages are used where. It would be impossible to use all the 16 languages in government business in all the 10 provinces in Zimbabwe.

There are a number of practical challenges that could arise in implementing section 6(1) of the Constitution. First, some of the 16 languages (like Koisan, Nambya, sign language, Chibarwe, etc.) are not developed enough for them to be used for government purposes. Second, there is a huge financial cost associated with using all the 16 recognised languages as the languages of record. The cost lies in the development of the languages and translation of all official records into the 16 languages. The state would need to progressively develop some of the undeveloped official languages before they can be effectively used in government business.

There are a number of practical ways that Zimbabwe can approach the challenge of implementing section 6 of the Constitution. The first approach may entail Zimbabwe adopting the Ethiopian model. The Ethiopian model has one language (Amharic) as the official language of the whole country through the medium of which federal services are provided and regional governments are given the discretion to confer official language status to the one or more languages spoken in that region.[62]

Using the Ethiopian model, Zimbabwe could use English as its official language of record (as is currently obtaining) and have other languages used concurrently with English at a provincial level taking into account the number of the speakers of that language in each particular province and other practicality considerations. For example, Shona can be the official language for Harare, Manicaland province and all the Mashonaland provinces. Ndebele can be an official language for Bulawayo and all the Matabeleland provinces. This approach is very possible given the demographic and political structure established by the Zimbabwean Constitution. Section 264 of the Constitution allows for devolution of powers and responsibilities to provincial councils. Given that most linguistic minorities are concentrated in specific areas across Zimbabwe, it would be easy for provincial councils to use an official language that is mainly spoken in that province or town.[63]

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[62] Section 5 of the Ethiopian Constitution. *See also* Fessha, 'A Tale of Two Federations: Comparing Language Rights Regime in South Africa and Ethiopia, in *African Journal of Human Rights* (2009) p. 501.

[63] *See* S. J. Hachipola, A Survey of the Minority Languages of Zimbabwe (1998) p. 25.

The challenge with this approach though is that out of the 16 official languages, only English, Shona and Ndebele will be afforded official language status and would be used for government business in Zimbabwe's ten provinces. Such an approach would be in violation of section 6(1) of the Constitution in that it would reduce the other 13 official minority languages to symbolic official languages. Speakers of the other 13 languages could legitimately allege discrimination on the basis of language.

There is a need to vary the approach in order for it to accommodate the other13 official minority languages in a way that complies with section 6(1) of the Zimbabwean Constitution. These variations may include use of the other 13 languages in the cities and or towns when they are predominantly spoken. This territorial approach to minority language rights minimises the cost of implementing section 6(1) of the Constitution and reasonably protects minority languages and linguistic minorities in areas where they are concentrated.

The second approach may be for Zimbabwe to adopt the Belgian model where official language status is afforded to languages spoken in regions. For instance, Belgium is divided into three regions, namely: Flanders where Dutch is official language, Wallonia where French and German are official languages, and Brussels where Dutch and French are official languages.[64] The idea would then be to use multiple official languages in the areas where they are mainly spoken. This ensures that all the 16 official languages are used to some degree in areas where their speakers are concentrated. This can arguably be in substantial compliance with section 6(1) of the Constitution.

A third approach may be to combine national official language status with regional and municipal (or metropolitan) official language status.[65] In this approach, all the 16 languages will be official languages as prescribed by section 6(1) of the Constitution, but they will be mainly used where the majority of the speakers are concentrated. A specific language law can therefore provide for the declaration of the 16 languages as languages of record along with English in the areas where they are mainly spoken up until they are developed enough to carry a huge functional load at the national level. This can easily be possible given the devolution provision cited above and also Zimbabwe's language demography.[66] Based on this classification, official languages can be conferred with official language status as well as official language of record in the areas where they are mainly spoken. This would go a long way in protecting the language rights of linguistic minorities.

4.2.2 Language of Record

Section 6(2) of the Constitution provides that "[a]n Act of Parliament may prescribe other languages as officially recognised languages and may prescribe languages of

[64] K. Malan, 'The Discretionary Nature of the Official Language Clause of the Constitution', *26 South African Public Law* (2011) pp. 381–403.
[65] More along the lines of Canada. *See* Malan, *supra* note 64, pp. 400–403.
[66] S. J. Hachipola and I. Mumpande, *Silent Voices: Indigenous Languages in Zimbabwe* (Sable Press, Harare, 2006) pp. 7–9.

record". This subsection has two effects. The first positive effect is that it allows Parliament to declare official other languages that are not stated in section 6(1) of the Constitution. The major weakness though is that the section does not set out the criteria that Parliament has to use in order to determine official language status. This therefore gives Parliament a wide discretion in considering which language to declare official.

The Constitution should have provided some sort of criteria for determining the choice of a language as official. In the absence of such provision in the Constitution, the thesis suggests the promulgation of an Act of Parliament setting out the broad criteria for prescribing official language status. Some useful criteria could include the number of people that speak the language, the level of development of the language, the extent of use of the language, the functional load of the language in government business and the areas where the language is dominantly used.

The second effect is that it empowers Parliament to prescribe a language of record in Zimbabwe. A language of record is one used in the official records of a country. The weakness of this clause is that it does not give a timeline on when this Act of Parliament should be promulgated. Again, the provision does not stipulate the criteria that Parliament should use to determine language of record status. This gives Parliament a wide discretion in determining language of record status. It is also not clear how many languages should be prescribed languages of record.

There is also no clarity regarding whether languages of record will cover government business throughout Zimbabwe or in certain provinces or municipalities in Zimbabwe. Examples of the latter approach are that Ndebele can be a language of record in Bulawayo, Tonga can be a language of record in Binga, Shona can be a language of record in Harare, etc., either alone or in conjunction with English. Perhaps these are the issues that the proposed Act of Parliament should capture whenever it will be promulgated.

Section 6(2) does not also reveal whether or not the Constitution aspires to have all 16 official languages to be developed to be languages of record. If this is the aspiration, then provision should have been made for specific timelines expected to ensure that all 16 official languages become languages of record. To this end, the drafters of the Zimbabwean Constitution should have borrowed a leaf from section 4(5) of the Law Society of Zimbabwe (LSZ) Model Constitution that provides that: "An Act of Parliament must provide that— (a) within ten years from the commencement of this Constitution, every official language is a language of record, alongside English, where it is predominantly spoken and has been predominantly spoken for the past one hundred years; and (b) within twenty-five years from the commencement of this Constitution, all official languages must be recognised as languages of record alongside English."

Such a provision would give the state sufficient time to progressively develop all the 16 official languages to be languages of record. As the functional load of these languages increase in government business, such languages would move from official minority languages to official majority languages.

A final remark on this point is that there is currently no Act of Parliament prescribing any language to be Zimbabwe's language of record. However, in practice English is the *de facto* language of record. This elevates English above other official and non-official minority languages and discriminates against speakers of these languages.

4.2.3 Equitable Treatment of Languages

Section 6 (3) of the Constitution makes it clear that "[t]he State and all institutions and agencies of government at every level must— (a) ensure that all officially recognised languages are treated equitably; and (b) take into account the language preferences of people affected by governmental measures or communications".
This section confirms the language history of Zimbabwe where there has never been equal treatment of official and non-official languages. The Constitution establishes equitable treatment of official language. It does not go as far as the South African Constitution to provide for *'parity of esteem'* of official languages. It is important to note that equitable treatment is different from equal treatment of language. According to Currie, equitable treatment is treating all official languages in a just and fair manner in the circumstances.[67] Applied in the Zimbabwean context, these circumstances will include language preferences of people affected by governmental measures or communication.

This has two implications. The first implication is what Malan meant when he said "[e]quitability may mean precisely that English, being one language that is understood by all or at least most citizens and inhabitants, be used as the anchor language".[68]

The second implication is that the section acknowledges that not all the officially recognised languages can be used equally and practical steps should therefore be taken to avoid a scenario where one language dominates and others are diminished. Equitable treatment therefore affords the state and government institutions and agencies a broad discretion on the content of the considerations to be made when deciding how to treat official languages. The reality on the ground though is that English has taken a prominent role in the business of government with some official languages not being used at all. This makes the official language status afforded to the other 15 languages merely symbolic.

The glaring weakness of this provision is that it ignores the history of discrimination of minority language speakers, the diminished use and status of the minority languages and the need for positive, affirmative action measures to redress such history. This history of discrimination coupled with affirmative action, practicality and financial considerations could be useful tools to achieve equitable treatment of languages.

[67] I. Currie and J. De Waal, *The Bill of Rights Handbook*, 6th edition (Juta & Company Limited, Cape Town 2014).
[68] K. Malan, *supra* note 64, p. 392.

4.2.4 Promotion of Use and Development of All Languages

Section 6 (4) of the Constitution provides that "[t]he State must promote and advance the use of all languages used in Zimbabwe, including sign language, and must create conditions for the development of those languages".

It is interesting to note that this provision obliges the state to promote the use of all languages in Zimbabwe and not to actually use all languages in Zimbabwe. As argued before, there is a vast difference between promotion of use of language and actual use of language. According to De Varennes,[69] there are five distinctions between promotion of the use of an official language and the use of an official language. The first distinction is that in the promotion of the use of an official language, the state may or may not use the language concerned whereas use of an official language obliges authorities to actually use the language as prescribed. The second distinction is that in the promotion of the use of an official language, the actual use is decided by administrative or political branches of state apparatus. What is sufficient in terms of promotion is largely permissive, with the usual exception of public education, and determined politically. On the other hand, use of an official language is mandatory, and it is usually required by the constitution or legislation. The third distinction is that with promotion of the use of an official language, the remedies are usually political or administrative whilst use of an official language attracts legal, political and administrative remedies. Fourth, with the promotion of the use of an official language individuals cannot generally claim a breach before a court of law since they have no right to use an official language. On the other hand, use of an official language empowers individuals to claim a breach of a right to use an official language before a court of law.[70] Finally, with promotion of the use of an official language, the extent of obligations as to what is sufficient to promote the use of an official language is left to the discretion at the political level, as in language schemes approved by a minister or a parliamentary-approved commissioner. Conversely, with use of an official language, the extent of obligations as to what is involved in the use of an official language is largely determined by legislation and regulations. It is therefore clear that the promotion of use of language is weaker than the use of an official language in terms of the protection afforded to the language and its speakers.

Turning to section 6(4) of the Zimbabwean Constitution, it is noteworthy that the obligation to promote the use of all languages is mandatory as shown by the use of the word 'must', and the obligation lies with the state – executive, legislature and judiciary. This is different from the South African scenario where promotion of use of languages lies with the state and the PANSALB. Perhaps an adoption of a similar board with defined mechanisms to use to promote use of official and non-official languages could help implement this provision.

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[69] De Varennes *supra* note 43, p. 55.

[70] *See* for example *English Medium Students Parents v. State of Karnataka*, 1994 AIR 1702, 1994 SCC (1) 550, *State of Kerala v. Mother Provisional*, 1970 AIR SCC 2079, and more generally *L. M. Wakhare v. The State of Madhya Pradesh*, AIR 1959 MP 208.

The state obligation to promote the use of all languages in Zimbabwe is not confined to official languages only but to non-official languages also. There is however no clarity regarding the nature of measures that the state should take to promote the use of all languages. There is no clear provision of affirmative action in section 6(4). This chapter advocates for reasonable, practical and positive measures that take into consideration Zimbabwe's language history.

The last part of section 6(4) of the Zimbabwean Constitution obliges the state to create conditions for the development of all languages. The lack of clarity regarding the nature of conditions the state is obliged to create leaves room for divergent interpretations in respect to the nature of the state measures to be taken. It gives the state a wide margin of interpretation that could be exercised with check-and-balances if it is guided by a language specific Act of Parliament.

Perhaps before rounding off the section 6 discussion, it may be prudent to assess whether the section 6 minority language rights are subject to the general limitation clause in section 86 of the Zimbabwean Constitution. There are two possible approaches that could be taken in this regard. The first approach is a restrictive one that strictly interprets section 6 as a provision falling outside the Bill of Rights and therefore not subject to the limitation clause that limits rights in the Bill of Rights.[71] The second approach is a generous one that purposively interprets section 6 in the context of Zimbabwe's constitutional values and other rights[72] in the Bill of Rights that are inevitably used when implementing section 6. This approach will then see the application of the limitation clause in section 86 to section 6.[73] This would see the application of the proportionality principle used in international law as discussed above.

4.2.5. Section Summary

The preceding discussion reveals that even though section 6 textually promises to protect minority languages, there is no jurisprudence from Zimbabwe's Constitutional Court to clarify the content of minority language rights enshrined in section 6. Worse still, the practical implementation of section 6 has seen English emerging as the *lingua franca* and minority languages have been used very little in government business, afforded very limited protection and experiencing very little development in Zimbabwe. There is still a need for an Act of Parliament to be promulgated to regulate the use of the 16 officially recognised languages and for a statutory language body to be established to monitor the development, use and promotion of use of official and non-official minority languages in Zimbabwe.

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[71] This approach was followed in the SA case of *Van Rooyen v. S (General Council of the Bar of South Africa Intervening)*, 2002 5 SA 246 (CC) [35], where the Constitutional Court held that judicial independence was outside the Bill of rights and was therefore not subject to the general limitation in section 36(1).

[72] Examples include equality, non-discrimination, dignity and freedom of expression that require the application of the limitation clause.

[73] *See* J. L. Pretorius, 'The Use of Official Languages Act: Diversity Affirmed?', 16:1 *PER / PELJ* (2013) p. 281, at p. 295.

4.3 *Equality and Non-discrimination*

Section 56 (1) of the Constitution provides that "[a]ll persons are equal before the law and have the right to equal protection and benefit of the law". This provision coupled with section 56(3) of the Constitution, which proscribes discrimination on the basis of language, constitute the usual equality and non-discrimination provisions. This is in line with international law discussed above to the effect that language preferences either between official languages, or between and an official and a minority language (in areas like administrative services, access to the judiciary, regulation of banking services by authorities, public education, and even citizenship acquisition), which unreasonably or arbitrarily disadvantage or exclude individuals would be a form of prohibited discrimination. States are guided by the principle of proportionality in designing their language legislation, policies and practices. Proportionality demands that states be guided by principles of disadvantage, exclusion and reasonableness in their language preferences.

Equality and non-discrimination on the basis of language aim to place linguistic minorities in a substantially similar position with linguistic majorities or the rest of the population.

4.4 *Freedom of Expression*

Section 61 of the Constitution provides for freedom of expression. Even though this section does not specify the right to freedom of linguistic expression, the right to freedom of expression impliedly includes the right to linguistic expression.[74] Language is a means of expression par excellence. Once can best express themselves in a language they speak. There are some things that can only be expressed in parables and idioms of certain languages. In terms of linguistic minorities, expression is done through their minority languages. This argument found favour in the Canadian case of *Ford v. Quebec (Attorney General)*,[75] where the Court held that "[l]anguage is so intimately linked to the form and content of expression that there can be no real freedom linguistic expression if one is forbidden to use the language of one's choice". A minority language speaker can therefore express himself in his minority language. This protects the rights of minority languages in as far as linguistic expression is concerned.

Varennes was therefore correct when he argued that under international law, freedom of expression includes the right to linguistic expression.[76] This argument finds support in Ballantyne, Davidson & McIntyre *v.* Canada where the UNHRC established that freedom of expression entails use of one's language as envisaged in Article 27 of the ICCPR.[77] Freedom of expression therefore includes use of one's minority language and by implication protects minority language rights. This would

[74] F. de Varennes, 'The Existing Rights of Minorities in International law', in Kontra *et al.* (eds.), *Language: A Right and a Resource: Approaching Linguistic Human Rights* (1999) p. 121.
[75] [1988] 2 S.C.R. 712.
[76] De Varennes, *supra* note 43, p. 121.
[77] *Ballantyne* case, *supra* note 44, paras. 11.3 and 11.4.

include the use of all the 16 official languages in media.

The Declaration of Principles of Freedom of Expression in Africa, a non-binding instrument developed by the African Commission, calls upon states to take positive measures to promote diversity, including through "the promotion of the use of local languages in public affairs, including in the courts".[78] Notwithstanding its non-binding status, this clearly goes beyond what is provided in most international instruments in addressing the most controversial component of minority language claims. It expresses an acknowledgement that without the promotion of the use of minority languages in public affairs most people cannot adequately participate in public life as they are not generally well versed in the official European languages.

It is interesting to note that UN treaties are silent on whether or not freedom of expression guarantees access to media[79] by minority language speakers in view of the fact that media is one of the important means of linguistic and cultural reproduction.[80] Access to media for minority language speakers helps in the maintenance of that language and enhances the accommodation of linguistic diversity. The state however has an obligation to ensure that minority language groups have access to media by allocating them frequencies.81 Again Zimbabwe could use the 'sliding-scale approach' and assess from the size and geographical concentration of the minority population, the capacity of the state concerned, and the needs and interests of language speakers to determine which frequencies to give to linguistic minorities. If the state grants one or several language groups a frequency and or an amount of airtime on radio or television, the same state should also allocate an equivalent grant to the other remaining language groups unless there is reasonable and objective justification for differential treatment.[82]

International law does not recognise the state's obligation to support linguistic minority media institutions.[83] It has been argued that Article 27 of the ICCPR can (on the basis of equality, non-discrimination and the right to identity) be interpreted as guaranteeing the right for members of linguistic minorities to establish their own media.[84] The state should not interfere with this right except to merely regulate the registration and licensing of media.

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[78] *See* Principle III Resolution on the Adoption of the Declaration on Principles of Freedom of Expression in Africa, adopted by the ACHPR at its 32nd Ordinary session held in Banjul, the Gambia on 17-23rd October 2002.
[79] Media in this context includes written press, radio and television.
[80] *See* D. Gomien, 'Pluralism and Minority Access to Media', in A. Rosas *et al.* (eds.), *The Strength of Diversity: Human Rights and Pluralist Democracy* (Nijhoff, 1992) p. 49.
[81] De Varennes, *supra* note 43, p. 223.
[82] Henrard, *supra* note 32, pp. 268–269.
[83] *See* de Varennes, *supra* note 43, pp. 217–225.
[84] *See* Henrard, *supra* note 32, p. 268.

4.5 *The Right to Use of a Language and to Participate in the Cultural Life of Choice*

Section 63 affords every person a right to participate in the cultural life of their choice. Within the African context, the right to culture implies cultural identity. Language is an integral part of culture and the protection of the right to culture for linguistic minorities implies the use of one's minority language. For example, Ngugi wa Thiongo referred to language as the soul of culture.[85] Makgoba argues that "language is a culture and in language we carry our identity…"[86] Webb and Kembo-Sure further note that in Africa "people are often identified culturally primarily (and even solely) on the basis of the language they speak".[87] Examples include the Tonga, Ndebele and Shona in Zimbabwe. Prah contends that[88] "[i]f culture is the main determinant of our attitudes, tastes and mores, language is the central feature of culture. It is in language that culture is transmitted, interpreted and configured. Language is also a register of culture." Section 63 to a degree protects linguistic identity[89] and to use one's minority language. It follows therefore that the protection of the right to culture therefore secures linguistic identity and qualified use of a minority language too for linguistic minorities.

Section 63(a) affords everyone the right to use a language of his or her choice. This section relates to all languages – majority and minority languages. It is important to note that section 30 does not specify whether the right to use a language relates to the private or public domains or both. In the absence of a specific contribution to the contrary, the right to use a language includes use in both the private and public domains just as culture is expressed privately and publicly. Such an approach is consistent with section 46 of the Constitution that provides that international law should be taken into account when interpreting the Constitution. As argued before, the right to use a language at international law includes both private use and qualified public use.

It has been established before that one of the concerns of linguistic minorities is the use of minority languages in communication with public authorities, in public media

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[85] N. wa Thiongo, *Decolonizing the Mind, the Politics of Language in African Literature* (1986); S. Wright (*Language Policy and Language Planning: From Nationalism to Globalization* (2004) p. 2) also argues that: "Communities exist because they have the linguistic means to do so. In other words, language is the means by which we conduct our social lives and is foremost among the factors that allow us to construct human communities."

[86] Makgoba, p. 34.

[87] Webb and Kembo-Sure, *supra* note 1.

[88] Prah, *supra* note 2.

[89] Such an approach is consistent with Clause 1.0 of the Cultural Policy of Zimbabwe which provides that: "People, unlike other living life on earth, have an identity and the main characteristic of this identity is language, which is a God given fit to mankind. Zimbabweans speak a variety of indigenous languages and to add to these languages they also use English. All these languages are important as a means of communication. The languages are a strong instrument of identity be it culturally or otherwise. With language, one has a powerful tool to communicate joy, love, fear, praise and other values. With language we are able to describe cultural issues, effect praise, values and norms. With language you can thwart conflicts, engage in fruitful discourse and foster growth on the spiritual, physical and social state of a being."

and in education. At international law, states do not generally have an obligation to provide all public services in every language that members of the public might speak given the multiplicity of languages spoken in most multilingual African states.

Zimbabwe could use the 'sliding-scale approach'[90] to determine from the size of a linguistic population, their territorial concentration, the capacity of the state, and the nature of the service to determine which minority languages should be used in public service. States are expected to provide public services and communication in minority languages in places where their speakers are found in significant numbers, the public services in question are of a very important nature, and the resources required to provide the public services can be made available without unduly compromising the distribution of resources in other areas of public demand as well.[91]

As regards the use of language in media, it has been established earlier that the state does not generally have an obligation to support linguistic minority media institutions.[92] The state however has an obligation to ensure that linguistic minorities have access to media by allocating linguistic minorities frequencies.[93] Again Zimbabwe could use the 'sliding-scale approach' and assess from the size and geographical concentration of the minority population, the capacity of the state concerned, and the needs and interests of minorities to determine which frequencies to give to linguistic minorities.

The caveat in section 63 is that the exercise of the right to use a language should be done in a manner consistent with the Bill of Rights, taking into account the proportionality principle discussed above.

4.6 *Language Use in Criminal Proceedings*

Section 70(1)(j) affords every accused person the right to have trial proceedings interpreted into a language that they understand. This right has a number of meanings. First, just like in international law, language rights in criminal proceedings are afforded to everyone and are not peculiar to minority language speakers. However, minority language speakers can access their minority language rights through general language rights in criminal proceedings. Second, this right imposes on the state the duty to provide an interpreter at its expense in criminal proceedings where a person cannot understand the language of the court. The state cannot refuse to provide it even for economic or any other justifications. Third, the rationale for affording language rights in criminal proceeding is to facilitate the participation of an accused person in a trial in Zimbabwe's adversarial legal system. If language rights are not afforded to an accused person, then justice will be denied. Fourth, section 70(1)(j) of the Constitution in particular does not confer a right to be tried in a language of choice or language of the accused or the accused's first language or the language that they speak but merely to be tried in a language that the accused

[90] De Varennes, *supra* note 43, p. 177.
[91] *Ibid.*, pp. 177–178.
[92] *Ibid.*, pp. 217–225.
[93] *Ibid.*, pp. 223.

person understands. A language that one understands is different from the language that one speaks. If for instance a person that primarily speaks Sena and also understands English has proceedings conducted in English, the court would have complied with section 70(1)(j) of the Constitution.

International law on this aspect has already been discussed above and applies to this provision by virtue of section 46 of the Constitution. Section 70(1)(j) of the Constitution therefore imposes on the state the duty to provide an interpreter at its expense in criminal proceedings where a person cannot understand the language of the court. The state cannot refuse to provide it even for economic or any other justifications. The rationale for affording language rights in criminal proceeding is to facilitate the participation of an accused person in a trial in Zimbabwe's adversarial legal system. If language rights are not afforded to an accused person, then justice will be denied.

Section 5 of the Magistrates Court Act,94 section 49 of the High Court Act[95] and section 31 of the Supreme Court Act[96] make it peremptory for proceedings in the Magistrates, High and Supreme Courts to be in the English language. It makes it difficult for minority language speakers who do not understand English to follow and participate in legal proceedings. With poor interpretation of minority languages, minority language speakers fail to adequately access justice in Zimbabwean courts.

4.7 *Language Rights in Education*

Section 75(1) of the Constitution affords everyone a right to state funded basic and progressively state funded further education. In international law, three issues are key when dealing with the right to language use in education, namely minority specific issues revolving around mother tongue education, curricular content and establishment of private minority educational institutions.

4.7.1 Mother Tongue Education

Article 18 of the Cultural Charter for Africa affords states the discretion to choose one or more African languages to introduce at all levels of education. This choice could be guided by the 'sliding-scale approach' where the state could provide mother tongue education in areas where linguistic minorities are concentrated[97] taking into account the number of minority students seeking education in their language and the extent of the burden this puts on public resources.[98] The right to education in section 75 arguably includes the right to be educated in the mother tongue. The right to education in UN treaties was not initially intended to include the right to education in

[94] [Chapter 7:10].
[95] [Chapter 7:13].
[96] [Chapter 7:13].
[97] Henrard, *supra* note 32, pp. 260–261.
[98] De Varennes, *supra* note 43, p. 33.

the mother tongue.[99] However, there was later a realisation that the right to education cannot be fully enjoyed without involvement of the mother tongue.[100]

Education involves the transfer of information and this can be effectively done when the recipient understands the language used in transmitting education.[101] Mother tongue education is also important for the preservation of the language and traditions of the culture conveyed through it to future generations.[102] Also, mother-tongue education impacts the emotional, cognitive and socio-cultural development of students.[103] In any event, substantive equality and equality of opportunity demand that education be offered in the mother tongue to facilitate equal access to education by marginalised, disadvantaged and vulnerable linguistic minorities. Unequal access to education has repercussions on access to jobs and political power. That is the reason why education in the mother tongue is a concept widely acceptable under international law. For instance, the right of migrant workers' children[104] and indigenous people to be educated in their mother tongue are vividly recognised under the International Labour Organisation Conventions (ILO) No. 107[105] and 169.[106] Policies like additive bilingualism have been developed to ensure that learning a second language should not be to the detriment of the mother tongue.[107] This approach seems to be the one adopted by Zimbabwe's Education Act.[108] Firstly, section 62(1) of the Education Act provides that[109] "[s]ubject to this section, all the 3 main languages of Zimbabwe, namely Shona, Ndebele and English, shall be taught on an equal-time basis in all schools up to form two level."

For those language speakers who use Shona and Ndebele as their mother tongue, this provision means education up to form two level in the mother tongue. The downside of this provision is that there is no guarantee of mother tongue education for Shona and Ndebele speakers beyond form two. Only English is the dominant language taught up to tertiary level. Again, this provision elevates English, Shona and Ndebele above all other official and non-official minority languages. It forces other minority language speakers to learn in English, Shona or Ndebele. It in

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[99] *See* Article 26 of the Universal Declaration, the *Travaux Preparatoires* of the Universal Declaration and the *Belgian Linguistic Case* 1 EHRR 252 (1965)

[100] *See* G. Sieminsky, Working Paper on the Education Rights of Minorities: The Hague Recommendation UN Doc. E/CN.4/Sub.2/AC.5/1997/ WP.3, 5 May 1997, p. 2.

[101] T. Skutnabb-Kangas, 'Human Rights and Language Policy in Education', in S. May and and N. Hornberger (eds.), *Language Policy and Political Issues in Education*, Volume 1 of *Encyclopedia of Language and Education*, 2nd edition (Springer, 2008).

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[103] *Ibid*., pp. 118–119.

[104] Articles 45(3) and (4) of the Convention on the Rights of Migrant Workers and Members of their Families.

[105] Article 23 of International Labour Organisation Conventions.

[106] Article 28(1) of International Labour Organisation Conventions.

[107] D. Young ('The Role and the Status of the First Language in Education in a Multilingual Society', in K. Heugh *et al.* (eds.), *Multilingual Education for South Africa* (Heinemann, 1995) pp. 63–68) argues that the mother tongue should continue to be used throughout various levels of education even when a second language is introduced.

[108] Zimbabwe education Act [Chapter 25:05].

[109] Clause 1.1 of the Cultural policy of Zimbabwe is even more stringent. It obliges government to: "Accord protection of mother tongue through usage during the first two years of formal schools."

essence discriminates against minority language speakers and contravenes section 6 of the Constitution. It potentially makes minority language speakers inferior to majority language speaker.

Minority language speakers do not seem to enjoy the equal protection of the law envisaged in section 56 (1) of the Constitution. Again, this clause is potentially discriminatory on the basis of language as envisaged by section 56 (3) of the Constitution. Finally, it can be argued that forcing a minority language speaker to learn in English, Shona or Ndebele may be regarded as inhuman, degrading and derogatory contrary to the provisions of section 53 of the Constitution. This is especially so in view of the fact that in Africa language is viewed as a form of identity and as a vehicle of culture. By learning in the three languages, minority language speakers lose their identity and culture. Accordingly, there ought to be a relook at section 62 of the Education Act to ensure that there is fairness and equity in the treatment of languages.

It is interesting to note that what has been happening in practice in respect to section 62(1) of the Education Act is that English language is given more learning time as compared to Shona and Ndebele. Again, literature in English is taught as a separate subject while Shona/Ndebele language and literature are regarded as one subject and allocated far lesser teaching/learning time than that allocated to English language alone notwithstanding the fact that there is sufficient Shona and Ndebele material to teach. This creates the impression that indigenous languages are not of any significance in terms of education.

It is interesting to note that section 62(2) of the Education Act provides that "[i]n areas where indigenous languages other than those mentioned in subsection (1) are spoken, the Minister may authorise the teaching of such languages in schools in addition to those specified in subsection (1)".

This subsection potentially opens room for mother tongue education in a minority language. However, the determination of which minority language should be used exclusively lies to the discretion of the minister of education[110] and is limited to areas where that language is spoken. The subsection does not specify the consideration that the minister has to take before authorising mother tongue education in an indigenous language. This gives the minister of education a wide discretion to choose which language should be taught.[111] A minister that is unfriendly to minority languages will not authorise the teaching of such languages. In the author's interview with the then Minister of Education, Sports and Culture, Senator David Coltart,[112] he

[110] The other sections that give the minister of Education a wide discretion are sections 62(3) and (4) of the Education Act. Section 62(3) of the Education Act states that: "The Minister may authorise the teaching of foreign languages in schools." In practice, French, Portuguese, Chinese, Arabic has been taught in schools. Similarly, Section 62(4) makes it clear that: "Prior to form 1, any one of the languages referred to in subsection (1) and (2) may be used as the medium of instruction, depending upon which language is more commonly spoken and better understood by the pupils."

[111] Section 62(5) limits the minister's discretion when it makes it peremptory for sign language to be taught as a medium of instruction for the deaf. It provides that: "Sign language shall be the priority medium of instruction for the deaf and hard of hearing."

[112] I interviewed him on telephone on 19 June 2012.

indicated that he supported the teaching of minority languages in school. His ministry had developed a number of policy directives authorising the teaching of some minority languages in schools. He however cautioned that the teaching of minority languages in schools was mainly dependent on the availability of teaching materials.

Section 62(2) of the Education Act should be amended to qualify the discretion on the minister and oblige the minister to authorise the teaching of minority languages in areas where they are predominantly spoken. Perhaps some of the factors that the minister should consider are the number of speakers of the language, the extent to which the language has been developed, the availability of textbooks and reading material, the availability of resource, the availability of teachers and examiners, etc. Hachipola makes interesting observations. First, he observes that Barwe, Chikunda, Doma, Sena and Tshwawo have never been taught in schools in Zimbabwe even during the colonial era. They have never been committed to writing in Zimbabwe, and there are no books on them. No orthography has yet been devised for this language. Second, Venda is taught in primary and secondary schools.[113] However, there is scarcity of teaching materials and shortage of Venda teachers. Third, Tswana has never been taught in Zimbabwe. Materials can be found in Botswana and South Africa should a decision be made to teach this language. Fourth, Tonga is currently being taught in primary and secondary schools.[114] Fifth, in the colonial era, Sotho was taught in schools as early as the 1920s, and by the 1960s Sotho was taught up to standard 6 in the Gwanda and Beitbridge Districts. It would appear though that no material was substantially developed and Sotho is no longer being taught in schools.[115] However, Sotho is taught in Lesotho and materials can be bought from Sotho for this language to begin to be taught in schools from primary school to tertiary level. Sixth, Shangani is taught in elementary education alongside English in the Chiredzi District. Seventh, Nambya is taught in primary schools in the Hwange District. The major challenge though is the shortage of materials and teachers. Eighth, The Fingo language has never been taught in schools in Zimbabwe. Materials for teaching can be obtained in South Africa should a decision be made that this language be taught in schools. Finally, Chewa was taught as a language during the colonial era. It is however not being currently taught in schools. No one can really explain how Chewa got out of Zimbabwe's education system. The materials for teaching Chewa even up to tertiary level are available in Malawi. This language can indeed be introduced in schools.

Isaac Mumpande[116] convincingly argued that all languages are equal and have equal richness. The only difference is that the richness of some languages has been explored more than others. For example, Shona and Tonga are equally rich languages. People have explored the richness of the Shona language but have not fully explored the richness of the Tonga language. The Tonga people have begun to develop teaching materials that will expose the richness of the Tonga language. Very

[113] Hachipola, *supra* note 63, pp. 32–33.
[114] *Ibid*., p. 41.
[115] *Ibid.,* pp. 18–19.
[116] Mumpande, *supra* note 66. He said this when I interviewed him on 19 June 2012 at Silveira House.

soon, Tonga will be taught in high school and tertiary institutions. Mumpande's argument is full of merit.

Zimbabwean language history shows that the people that wield political and economic power determine which language is elevated, with the rest of the languages marginalised. The fact that different languages were elevated at different times shows that any of those languages are capable of being developed and used in spheres of government, education, business, media and courts if there is political and economic will. In order to cure the discrimination perpetrated on most of the speakers of the 15 official languages, the state could introduce affirmative action measures in the form of remedial or restitutive measures[117] as provided for in section 56(6) of the Zimbabwean Constitution to ensure that the languages are used in education.

The remedial dimension of substantive equality (affirmative action) should be used to elevate the status of and advance the development and use of historically diminished languages.[118] Section 56(6)(a) of the Zimbabwean Constitution indicates that affirmative action should be used to redress circumstances of genuine need. These are yet to be defined by the Constitutional Court.

To this end, the Zimbabwean education system should lend political support and avail economic resources to develop teaching materials for sign language and other official languages that have not yet been developed to be taught in schools up to tertiary levels. Alternatively, teaching materials can be sourced from South Africa, Zambia, Mozambique, Botswana and Malawi where most of our minority languages are major languages that have developed teaching materials. This will see all the 16 languages being progressively taught even up to tertiary levels. In fact an Act of Parliament could provide for reasonable timelines on when the curriculum and teaching materials should be developed for all the 16 official languages should be progressively taught in public education.

4.7.2 Curriculum Content

Concerning the content of education, international law enjoins states to adopt a multicultural approach[119] where the education curricula should objectively reflect, among others the culture and language of historically disadvantaged language groups.[120]

Ideally, the text materials to be used should also be representative of the

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[117] *National Coalition for Gay and Lesbian Equality v. Minister of Justice*1999 1 SA 6 (CC) paras. 60–61; *Minister of Finance v. Van Heerden*2004 6 SA 121 (CC) para. 30.

[118] *Minister of Finance v. Van Heerden*2004 6 SA 121 (CC) para. 23. *See also* para. 31 which states that only by means of a positive commitment "progressively to eradicate socially constructed barriers to equality and to root out systematic or institutionalised under-privilege" can the constitutional promise of equality before the law and its equal protection and benefit be realised.

[119] *See* Article 4 of the 1992 UN Declaration on the Rights of Minorities and Article 12 of the Framework Convention.

[120] Henrard, *supra* note 32, pp. 262–265.

perspectives of members of different sections of society.[121] This aspect is not reflected in section 62 of the Education Act and could be included in an Act of Parliament to be promulgated.

4.7.3 Establishment of Independent Language Institutions

Mother tongue education could easily be effected where language groups are able to establish their own educational institutions at their cost subject to national standards of quality education. International human rights law does not oblige the state to establish educational institutions for all language groups (majority or minority) nor to financially support private linguistic minority educational institutions.[122] The state's obligation is to ensure that public education is accessible to all the 16 official language speakers. However, although the state does not generally have the obligation to fund such institutions, the obligation may arise where the minority lacks sufficient financial resources and public schools are not sufficiently pluralistic to give satisfaction to minority language education.[123]

Article 5(1)(c) of the UNESCO Convention against Discrimination in Education recognises the qualified right of minorities to establish schools where they use and teach in their own languages "depending on the educational policy of each state". The qualification allows state interference in private education. It has been argued that state interference should not go as far as eroding this right by making it impossible for linguistic minorities to establish their own educational institutions.[124] The proposed Languages Bill could provide that language speakers are free to establish their own educational institutions at their own expense.

4.8 *Implementation Mechanisms*

Before finalising this discussion, a look at the implementation mechanism for language rights of linguistic minorities warrants discussion. One of the major weaknesses of section 6 of the Zimbabwean Constitution is that there is no implementation mechanism put in place for the fulfilment of the language rights

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[121] It is interesting to note that Articles 18 and 19 of the African Cultural Renaissance provides that: "African states recognize the need to develop African languages in order to ensure their cultural advancement, and acceleration of their economic and social development. To this end, they should endeavor to formulate and implement appropriate language policies… African states should prepare and implement reforms for the introduction of African languages into the education curriculum.121 To this end, each state should extend the use of African languages taking into consideration the requirements of social cohesion and technological progress, as well as regional and African integration." This provision is likely going to promote minority language rights in curriculum development if the Charter comes into force.

[122] *See* Henrard, *supra* note 32, p. 266. Henrard argues that if a state gives financial aid to one private school, an equivalent amount should be granted to another private school as well, unless the differential treatment is reasonable and objectively justifiable. At p. 267, Henrard further argues that "states would be obliged to finance private schools for minorities if state schools are not sufficiently pluralistic, because of their obligation under international law to respect the ideological and philosophical convictions of parents in educational matters".

[123] *See* Article 5(1)(c) of the UNESCO Convention on the Elimination of Discrimination in Education.

[124] Henrard, *supra* note 32, p. 266.

protected in that section. This makes it very difficult for the language rights norms provided for in the Constitution to be effectively implemented. This could be an area where a language specific Act of Parliament can come in and address this key aspect.

De Varennes argues that a number of countries successfully using more than one official language at the national level have clear legislation regulating language use and have also put in place the necessary structures and institutions to effectively ensure authorities carry out their duties – and that individuals can expect authorities to respond in their official language of choice.[125]

He further argues that there are three basic mechanisms that should be in place for the effective implementation of language rights. The first alludes to legal mechanisms where constitutional provisions on the use of two or more official languages by authorities are elaborated upon through legislation, regulations, directives and guidelines. Courts also play a significant role in clarifying these provisions through interpretation. Zimbabwe currently needs a language specific piece of legislation to attend to this gap. The protection of minority languages through national laws is very important to address the language problems that a country is facing.[126] According to Turi, "the fundamental goal of all legislation about language is to resolve the linguistic problems which stem from … language conflicts and inequalities by legally establishing and determining the status and use of the concerned languages".[127]

Language legislation should eliminate discrimination based on language, enable minority language speakers to conserve their linguistic characteristics, and allow it to remain in peaceful interaction with the majority. Language legislation must give members of the minority group the opportunity to deal on unequal basis with the majority in a way that conserves their linguistic distinction. The absence of such legislation deprives content to the exact scope of official language status and robs speakers of official languages of practical measures for the implementation of their rights.

The second refers to administrative mechanisms where government sets up a number of institutions to guide, co-ordinate and oversee the implementation of the use of official and non-official languages in government and administration. Zimbabwe needs administrative institutions to help oversee the implementation of use of official and non-official languages in government and the development of all languages. Such institutions can be along the lines of the PANSALB or a specific language commission or a generic Arts and Culture Commission suggested by section 142 of the National Constitutional Assembly (NCA) Draft Constitution.[128]

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[125] De Varennes, *supra* note 43, p. 47.

[126] The need for language specific detailed legislation is even more necessary in Zimbabwe where there is currently no case that has been decided on language rights in the new constitution.

[127] Turi, *supra* note 61.

[128] Section 142 of the NCA Draft Constitution provides that: "An Act of parliament must provide for the establishment, powers and functions of an Arts and Cultural Commission."

The third relates to political mechanisms where language policy is formulated and mechanisms are put in place to monitor such policy. The monitoring mechanisms can provide for conduits for consultation, communication and responses involving Parliament, parliamentary committees, a department within a ministry, a specific ministry devoted to this issue, the government and other more political entities. There can also be a mechanism for resolving official and non-official language disputes by an institution answerable to Parliament, such as in the case (usually) of an official languages commissioner, language board, ombudsman/public protector or a human rights commission.[129] Such political mechanisms are required in Zimbabwe if minority language rights provided for in the Constitution are to be promoted, protected and fulfilled.

5 Conclusions

A few conclusions can be drawn from the Zimbabwean constitutional framework for the protection of minority languages. First, Zimbabwe's constitutional framework substantially complies with international law relating to the language rights of linguistic minorities discussed above. Second, it accommodates linguistic diversity by introducing 16 official languages and providing for their equitable treatment. Third, section 6 does not clarify whether a territorial or unitary approach should be used in implementing provisions of section 6(1) of the Constitution. Fourth, the implementation of section 6 of the constitution has seen English dominating both the official and non-official minority languages in Zimbabwe. Fifth, there is no implementation mechanism provided to facilitate the promotion, protection and fulfilment of minority language rights in Zimbabwe. The normative and implementation deficiencies beckon for an introduction of a language specific Act of Parliament that will clarify the constitutional provisions relating to minority language rights and also put in place implementation mechanisms for the fulfilment of minority language rights.

[129] R. Dunbar, 'Minority Language Legislation and Rights Regimes: A Typology of Enforcement Mechanisms', Unpublished Paper presented at World Congress on Language Policies, Barcelona 16–20 April 2002, p. 3.

Part IV - Emerging Issues under the 2013 Zimbabwean Constitution

11 Socio-Economic Rights under the 2013 Zimbabwean Constitution

Khulekani Moyo*

1 Introduction

In a watershed moment for the country, Zimbabwe adopted a new Constitution (hereinafter 'Constitution')[1] on 22 May 2013. The Constitution replaced the much-maligned 1980 Constitution negotiated at Lancaster House, London in 1979 (hereinafter 'Independence Constitution'). What is remarkable about the Constitution is that its Declaration of Rights contained in Chapter 4 includes a comprehensive set of economic, social and cultural rights,[2] alongside civil and political rights, which is a fundamental departure from the Independence Constitution. The Constitution follows the approach of the South African[3] and Kenyan constitutions[4] which have incorporated a litany of socio-economic rights. Significantly, the courts have the power to enforce the rights and a broad discretion to make any order that is just and equitable in the event of rights infringement.[5]

The world is reeling from the effects of the global pandemic known as COVID-19. At the end of 2019, the coronavirus known as SARS-CoV-2 broke out in Wuhan, China.[6] Since then, this virus, along with the disease it causes, COVID-19, has rapidly spread across the world virtually affecting every country. On 30 January 2020, the World Health Organisation (WHO) declared COVID-19, a Public Health Emergency of International Concern.[7] On 11 March 2020, WHO followed its earlier position by declaring COVID-19 a global pandemic. The Zimbabwean government, taking a cue from other countries and recommendations from the WHO, declared a State of Disaster[8] and consequently a National Lockdown to contain the spread of

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[1] *See* Constitution of Zimbabwe Amendment (No. 20) Act of 2013.

[2] For the purpose of this chapter socio-economic rights are defined as the rights that protect and improve the material living conditions of all human beings in their individual capacity and in groups. They include the rights to health, education, social security, adequate standard of living including water, food and housing.

[3] For a discussion of socio-economic rights under the 1996 Constitution of South Africa, *see* S. Liebenberg, *Socio-Economic Rights: Adjudication under a Transformative Constitution* (Juta & Co Ltd, Claremont, 2010).

[4] *See* J. Biegon and G. M. Musila (eds.), *Judicial Enforcement of Socio-Economic Rights Under the New Constitution*: *Challenges and Opportunities for Kenya* (Kenya Section of the International Commission of Jurists, Nairobi, 2011) for a comprehensive discussion of the constitutionalisation of socio-economic rights under the 2010 Kenyan Constitution.

[5] *See* section 175(6) of the Constitution. *See also* section 86 on the power of courts to grant any appropriate remedy.

[6] C. Huang *et al.,* 'Clinical Features of Patients Infected with 2019 Novel Coronavirus in Wuhan, China', 395 *The Lancet* (2020) p.497–506.

[7] <http//:www.who.int>.

[8] Civil Protection (Declaration of State of Disaster) Rural and Urban Areas of Zimbabwe (COVID 19) Notice 2020.

COVID-19.9 The coronavirus pandemic has illuminated the critical role of socio-economic rights in securing a dignified life for all and in countering social and economic inequalities laid bare by the consequences of restrictive measures to contain COVID-19. Zimbabwe, along with many countries across the world, are adopting far-reaching measures to address and mitigate the scourge wrought by the COVID-19 pandemic. Such mitigatory measures have entailed multiple restrictions to civil, economic, political and social rights and these have had a devastating effect especially on poor people's livelihoods. COVID-19's tragic consequences on livelihoods brings to the fore the role of the state in the respect, promotion, protection and provision of socio-economic rights such as the rights to the highest attainable standard of health, water, education, housing, food, social security and assistance. This is evidenced by measures that countries across the world have adopted in cushioning their populations from the socio-economic impacts of the COVID-19 pandemic.

The Constitution provides a wide range of socio-economic rights. These include the rights to freedom from arbitrary eviction,[10] access to health care,[11] sufficient food, clean water[12] and education.[13] The Declaration of Rights also protects select socio-economic rights of vulnerable groups such as children,[14] women,[15] the elderly,[16] persons with disabilities[17] and veterans of the 1970s liberation struggle.[18] Significantly, the Constitution also protects the rights of access to information[19] and administrative justice.[20] The rights of access to information and administrative justice no doubt play a fundamental role in facilitating people's right to be heard in decision-making processes that impact on their social, economic and political interests.[21] What is clear is that there has been a significant gap between the promise of housing, clean and safe water, medical care, basic infrastructure contained in the Constitution and the delivery thereof. This is reflected, for example, in the huge disparities in the quality of education between rich and poor, with many schools in rural areas lacking basic education infrastructure. The advancement of these rights through legal mechanisms is made more difficult by the fact that they are being enforced while the underlying conditions of poverty have not been addressed. These conditions include lack of access to basic necessities such as water, sanitation, food, social security and assistance, health care and housing.

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[9] Public Health (COVID-19 Prevention, Containment and Treatment (National Lockdown) Order, 2020 S.I 83/2020.
[10] Section 74.
[11] Section 76.
[12] Section 77.
[13] Section 75.
[14] Section 81.
[15] Section 80.
[16] Section 82.
[17] Section 83.
[18] Section 84.
[19] Section 62.
[20] Section 68.
[21] *See* Liebenberg, *supra* note 3, p. 53.

The recognition of these rights, however, is compatible with the constitutional vision to facilitate the transformation of Zimbabwe into a society that is based on the respect, protection and fulfilment of the human dignity of all persons who live in it.[22] Although the nature of socio-economic rights differs, each right contains entitlements relating to accessibility, availability, adequacy, quality or cultural appropriateness.[23] Due to space limitations, this chapter does not delve into the specific content of individual socio-economic rights. This chapter also does not trace the history of the recognition of socio-economic rights under the Zimbabwean Constitution due to similar concerns highlighted in the preceding sentence.

Despite the constitutionalisation of socio-economic rights, objections to the notion of justiciability of socio-economic rights still impact on the way such rights are enforced.[24] The constitutionalisation of socio-economic rights, in so many ways, gives renewed impetus to the philosophical debates in the human rights discourse on the legal status of socio-economic rights and whether such rights could be subjected to judicial enforcement. Malcolm Langford, in his landmark book that carries out a comprehensive analysis of the judicial enforcement of socio-economic rights under international and national jurisdictions, asserts that the debate on the legal status of socio-economic rights, and whether such rights are justiciable, has since been resolved.[25] Rather, the debate is increasingly focusing on the degree of justiciability of socio-economic rights and whether courts should engage in weak or strong forms of review in light of institutional concerns, as well as the choice of appropriate remedies in balancing individual and collective interests.[26]

From a Zimbabwean perspective, the protection of socio-economic rights in the Declaration of Rights fundamentally changes the question of whether socio-economic rights are justiciable to how to enforce them in a given case, which is the subject of this chapter. The adjudication of socio-economic rights also raises complex questions relating to the justiciability of these rights, in particular the legitimacy of thrusting courts into complex and often contentious fiscal and policy debates that are ordinarily presumed to fall under the exclusive remit of the other arms of the state. The judicial enforcement of socio-economic rights also puts into the spotlight the institutional competence of courts to craft appropriate remedies with potential polycentric implications that the executive and legislature will be in a position to implement.[27]

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[22] This vision is set out in both the preamble and section 3(1)(e) of the Constitution.

[23] J. Biegon, 'The Inclusion of Socio-Economic Rights in the 2010 Constitution: Conceptual and Practical Issues', in Biegon and Musila, *supra* note 4, p. 13, at p. 14. *See for example* Committee on Economic, Social and Cultural Rights *General Comment No. 14 The Right to the Highest Attainable Standard of Health* (2000) UN Doc. E/C.12/2000/4; Committee on Economic, Social and Cultural Rights, *Poverty and the International Covenant on Economic, Social and Cultural Rights* (2001) UN Doc. E/C.12/2001/10 and Committee on Economic, Social and Cultural Rights, *General Comment No. 15 The Right to Water* (2002) UN Doc. E/C.12/2002/11.

[24] Biegon, *supra* note 23, p. p. 14.

[25] M. Langford, 'The Justiciability of Social Rights: From Practice to Theory', in M. Langford (ed.), *Socio-Economic Rights Jurisprudence: Emerging Trends in Comparative and International Law* (Cambridge University Press, 2008) p. 30.

[26] *Ibid.*, p. 29.

[27] Biegon, *supra* note 23, p. 18.

Socio-economic rights enforcement, like civil and political rights, without doubt, invites judicial inquiry into state policies and programmes. While it may be correct that socio-economic rights may result in courts making orders that have a direct impact on the budget, the same problem arises with civil and political rights enforcement. For example, a court could require the government to provide legal aid or to facilitate prisoners' right to vote by providing ballot boxes to every detention centre in the country, an exercise that may be costly. It follows, therefore, that the power conferred on courts to interpret and apply socio-economic rights is not so different from the power to interpret and apply civil and political rights in that it amounts to an infringement of the separation of powers. The Constitution's explicit entrenchment of a broad range of socio-economic rights has undoubtedly resolved the justiciability objections in favour of legitimising judicial enforcement of such rights. It follows that if courts, in executing their judicial mandate, review the reasonableness of state measures in the realisation of socio-economic rights, they are acting within their constitutional remit.[28] This clearly calls into question any rigid interpretation of the separation of powers doctrine grounded on inflexible functional demarcations between the three arms of government. The latter approach would most likely emasculate the courts and prevent them from enquiring into the reasonableness of executive or legislative measures in the realisation of socio-economic rights.

The justiciability of socio-economic rights under the Constitution has largely been laid to bed given the burgeoning jurisprudence where Zimbabwean courts have enforced the rights, and in cases where socio-economic rights claims are dismissed, these are largely on technical grounds rather than on the justiciability question.[29] Nevertheless, concerns around the justiciability of socio-economic rights are likely to be raised given Zimbabwean courts' relative inexperience in the enforcement of socio-economic rights. Additionally, in a politically and economically fragile country like Zimbabwe where the independence of the judiciary is constantly under strain, granting courts wide powers with potentially far-reaching fiscal consequences risks putting them in the cross-hairs of the executive and legislature. This may further undermine the judiciary's independence.30 Nevertheless, the constitutionalisation of

[28] Langford, *supra* note 25, p. 32.

[29] *City of Harare v. Mushowe and Others* Case No. SC 228/14 (water); *Combined Harare Residents Association and Others v. The Minister of Health and Child Care NO and Others HC* 4070/20; *Makoka v. Minister of Health and Child Care and Others* HC 3003/20; *Markham and Another v. Minister of Health and Child Care and Others* HC 2168/20; *Stringer v. Minister of Health & Sakunda Holdings* HH 259-20; *The Trustees Of The Arda-Transau Relocation Development Trust v. Zimbabwe Electricity Transmission and Distribution Company (Zetdc) (Pvt) Ltd* HC 88/20; *Zimbabwe Homeless Peoples' Federation and Others v. Minister of Local Government and National Housing Judgment* No. SC 94/2020; *Zuze v. Trustees of Mlambo & Anor* SC 69-19; *City of Harare v. Mukunguretsi & Ors* SC 46-18; *Hopcik Investment (Pty Ltd) v. Minister of Environment Water and Climate and City of Harare* HH 137-16 & HC 1796/14.

[30] B. Ray, *Engaging with Social Rights: Procedure, Participation, and Democracy in South Africa's Second Wave* (Cambridge University Press, Cambridge, 2016) p. 2. The proposed Constitutional Amendment No. Bill 2 of 2019 which seeks to amend the provisions of the Constitution is a cause for considerable concern on the independence of the judiciary in the country by giving the president more powers in the appointment of judges. The draft constitutional amendment proposes to alter the judicial appointment mechanism under section 180 of the Constitution by removing public advertisements and

socio-economic rights serves to ensure governmental attention to important interests that might otherwise be neglected in ordinary debates.[31] Including socio-economic rights as justiciable rights demonstrates a concrete desire to ensure that the political process also focuses on assisting the poor and marginalised in accessing the basic needs to ensure a dignified livelihood.[32] The constitutionalisation of socio-economic rights is a clear demonstration that issues of poverty alleviation, social justice and access to social goods necessary for a dignified existence are not left to the uncertainties of the markets.[33] Significantly, socio-economic rights are also considered a precondition for public participation and successful democracy because effective political participation, to a large extent, also depends on the existence of an informed and a healthy society.[34] In any case, all human rights should be regarded as interdependent, interrelated and indivisible from each other and that socio-economic rights and civil and political rights are indispensable to the realisation of the other. It follows that no hierarchical categorisation should be made between them given rights' mutual interdependence.[35] Such relationship of interdependence and indivisibility of all human rights is recognised in section 46 of the Constitution, which governs how the Declaration of Rights must be interpreted. Section 46(1)(a) and (b) states that, when interpreting the rights enshrined in the Declaration of Rights, the court "must give full effect" to the rights concerned and "must promote the values and principles that underlie a democratic society" and these values include human dignity. The effect of section 46 (1)(a) and (b) is therefore that courts must interpret all the constitutionally guaranteed human rights in a manner which ensures that those rights and the underlying constitutional values are protected effectively. In its recent judgment in the case of *Zimbabwe Homeless Peoples' Federation and Others v. Minister of Local Government and National Housing Judgment*, the Zimbabwean Supreme Court emphatically stated that "the Constitution must be interpreted in an holistic and seamless fashion. Each provision is to be interpreted … in a manner that is consistent and accords with every other relevant provision, so as to achieve the underlying purpose of those provisions. They must be construed as being mutually complementary rather than as being contradictory to one another. In short, the Constitution must be construed as a unified

interviews in the context of sitting judges of the Supreme and High Courts. It does so by permitting the president to appoint judges sitting in the High Court or the Supreme Court to a higher court on the recommendation of the Judicial Services Commission. *See* Clauses 13 and 14 of the Bill 2 Constitution of Zimbabwe Amendment (No. 2) Bill, 2019.

[31] C. R. Sunstein, 'Against Positive Rights: Why Social and Economic Rights Don't Belong in the New Constitutions of Post-Communist Europe', 2 *East European Constitutional Re*view (1993) p. 35, at p. 131.

[32] Ray, *supra* note 31, p. 11.

[33] D. M. Chirwa and L. Chenwi, 'Protection of Economic, Social and Cultural Rights in Africa', in D. M. Chirwa and L. Chenwi (eds.), *The Protection of Economic, Social and Cultural Rights in Africa: International, Regional and National Perspectives* (Cambridge University Press, New York, 2016) p. 17.

[34] *Ibid.*, p. 15.

[35] C. Scott, 'The Interdependence and Permeability of Human Rights Norms: Towards a Partial Fusion of the International Covenants on Human Rights', 27 *Osgoode Hall Law Journal* (1989) p. 769, at pp. 779–786.

whole."[36] It follows that effective protection of constitutionally-guaranteed rights and values can only be achieved if courts and other adjudicative mechanisms apply the principle of indivisibility and interdependence of all human rights when they enforce such rights.

Zimbabwean courts, in executing their interpretive mandate, will have to develop a conceptual understanding of the proper role of courts in enforcing socio-economic rights and how the enforcement role can be performed without usurping the powers of the other arms of government. In addition, and given the abstract nature of the rights, the courts will have to give normative content to the socio-economic rights enshrined in the Declaration of Rights; develop a standard for assessing state compliance with the positive duties imposed by such rights; as well as advance appropriate remedies for any infringement of socio-economic rights without upsetting the separation of powers between the different arms of the state.[37]

This chapter is divided into three parts. The first part provides an overview of the protected socio-economic rights in sections 74 to 84 of the Constitution. The second part is divided into six sections. The first section discusses and evaluates the role of international and comparative law as interpretive guides in giving meaning to the rights protected in the Declaration of Rights. This is followed by a discussion of the institutional competence concerns and their impact in the judicial enforcement of socio-economic rights. The third section focuses on the horizontal application of the Declaration of Rights, especially with regard to its meaning and impact in the enforcement of socio-economic rights. The fourth section analyses the models of reviewing the positive duties imposed by socio-economic rights, namely the reasonableness approach and the minimum core approaches. The fifth section focuses on the role of concepts impacting the enforcement of socio-economic rights, namely the 'progressive realisation' and 'availability of resources' and a recommendation on the proper interpretation of such concepts in enforcing socio-economic rights. The sixth section discusses and evaluates the framework provided for under the Constitution for remedying human rights infringements and the role of the courts in crafting appropriate remedies. Part three concludes the discussion.

2 Interpretation of Socio-Economic Rights in the Declaration of Rights

The socio-economic rights in the Constitution have different formulations and this impacts on how the courts should interpret them. Section 74 is formulated in the negative and provides that "no person may be evicted from their home, or have their home demolished, without an order of court made after considering all relevant circumstances". The right to education (section 75) and the right to the right to health care services (section 76) provide for 'basic' entitlements limited to citizens and permanent residents. Significantly, these rights are subjected to an internal limitation, the 'availability of resources' and 'progressive realisation' qualification. Section 77 provides for the rights to water and food, while sections 82(c) and (b)

[36] *Zimbabwe Homeless Peoples' Federation and Others v Minister of Local Government and National Housing* Judgment No. SC 94/2020, p.22.
[37] Biegon, *supra* note 23, p. 14.

provides for the rights to social security and health of the elderly, respectively. Of particular note is that these rights are also qualified by the availability of resources and progressive realisation internal limitation. Section 81(1)(f) provides for children's socio-economic rights, while section 84 provides for the rights of veterans of the liberation struggle to social security and access to basic health care. These rights are not subject to the 'availability of resources' and 'progressive realisation' qualification. Section 83(d) and (e) provides for the rights to health and education of persons with disabilities. However, these rights are subject to the 'availability of resources' qualification.

A question arises as to whether section 81(1)(f) on social security for children and section 84 on the rights of war veterans to social security and basic health impose direct obligations on the state to ensure the provision of a basic level of socio-economic rights without the qualifications relating to reasonable measures, progressive realisation and resource constraints. The proper interpretation would be to subject these rights to the general limitation clause contained in section 86 of the Constitution. Such a limitation is only justifiable in terms of the requirements of the general limitations clause which provides for a limitation through a law of general application. However, it is important to bear in mind that, although some rights are formulated as unqualified rights, all the rights in the Declaration of Rights are subject to the general limitations clause provided under section 86 of the Constitution. Such a limitation is only justifiable in terms of the stringent requirements of the general limitations clause.[38] It is important to note that the purpose of the limitation of the protected rights must be consistent with an open and democratic society based on a list of factors enumerated in section 86(2) such as openness, justice, human dignity, equality and freedom.[39] Such an interpretive approach was confirmed by the Supreme Court in the *Zimbabwe Homeless Peoples* case.[40] The Court, however, rightly pointed out that the list of these relevant factors is not exhaustive.[41]

The Constitution also contains provisions that are important for the enforcement of socio-economic rights. Section 85 confers standing on various categories of persons who may approach a court for appropriate relief alleging that a right in the Declaration of Rights has been infringed or threatened. This includes anyone acting in their own interests; a person acting on behalf of another person who cannot act for themselves; a person acting as a member or in the interests of a group or class of persons; a person acting in the public interest; and any association acting in the interests of its members.[42] Such a generous approach to standing in constitutional litigation should be distinguished from the narrow and restrictive traditional common law approach where a litigant has *locus standi* where the party can establish that it has a direct and substantial interest in the subject matter of the litigation and the outcome.[43]

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[38] Section 86 of the Constitution.
[39] Section 86 of the Constitution.
[40] *See Zimbabwe Homeless Peoples' Federation and Others v. Minister of Local Government and National Housing* Judgment No. SC 94/2020, p26.
[41] *Ibid.*
[42] *See* section 85(1)(a)–(e) of the Constitution.
[43] *Combined Harare Residents Association and Others v. The Minister of Health and Child Care NO and Others HC* 4070/20.

Section 85 of the Constitution should also be interpreted to enable individuals and organisations to participate in human rights litigation through the submission of *amicus curiae* (friend of the court) briefs on issues directly impacting on the public interest. Insights could be drawn from the South African judicial practice where applicants need only show that their submissions will be useful to the court and are different from those of the parties to the litigation in order to be admitted as *amici*.[44] Admitting *amici* interventions are important especially in constitutional litigation as it provides an opportunity for civil society formations and individuals with expertise or experience on issues being adjudicated on to contribute to the development of Zimbabwe's economic and social rights jurisprudence.

Furthermore, the Constitution also confers broad remedial powers on the courts, including the powers to invalidate any law or conduct that is inconsistent with the Constitution, and to grant any just and equitable remedy in the event of an infringement of any constitutionally protected right.[45] In addition, the Declaration of Rights envisages both vertical application of constitutional rights against organs of state, as well as the horizontal application of human rights against non-state entities to the extent that the right in question is applicable.[46]

3 Socio-Economic Rights and the Constitution

3.1 *The Values of Openness, Justice, Human Dignity, Equality and Freedom*

Section 46(1)(a) of the Constitution provides that when interpreting the provisions under the Declaration of Rights, a court, tribunal or forum "must promote the values and principles that underlie a democratic society based on openness, justice, human dignity, equality, [and] freedom".[47] This provision is similar to section 39(1)(a) of the South African Constitution which provides that that when interpreting the Bill of Rights, a court, tribunal or forum "must promote the values that underlie an open and democratic society based on human dignity, equality and freedom". The interpretive approach of courts and tribunals in that country will thus be useful as Zimbabwean adjudicative organs engage with providing content to the rights protected in the Declaration of Rights.

Each of these values offer valuable insights on the purposes which socio-economic rights advance in a polity such as ours which aspires to be a constitutional democracy. Significantly, different values will be implicated depending on the nature and context of particular cases. Courts and other tribunals are thus under a constitutional obligation, in their adjudicative function, to safeguard and promote the values underpinning society.[48] Giving content to the socio-economic rights protected

[44] Rules of the Constitutional Court, Government Notice R1675, Government Gazette 25726, 31 October 2003, Rule 10.
[45] Section 175(6) of the Constitution.
[46] Section 45(2) of the Constitution.
[47] Section 46(1)(b) of the Constitution.
[48] Liebenberg has also commented on a similar provision enshrined in the South African Constitution. *See* Liebenberg, *supra* note 3, p. 97.

under the Constitution entails engagement with the values and principles which these rights seek to promote and protect.[49] Such an approach, as argued by Liebenberg, "represents a fundamental departure from a formalist interpretation of these rights premised on 'neutral', 'value free' adjudication of the relevant legal texts".[50] In the case *Sidumo v. Rustenburg Platinum Mines Ltd*,[51] the South African Constitutional Court elaborated on the role of these values in constitutional interpretation, explaining that:

The values of the Constitution are strong, explicit and clearly intended to be considered part of the very texture of the constitutional project. They are implicit in the very structure and design of the new democratic order. The letter and the spirit of the Constitution cannot be separated; just as the values are not free-floating, ready to alight as mere adornments on this or that provision, so is the text not self-supporting, awaiting occasional evocative enhancement. The role of constitutional values is certainly not to provide a patina of virtue to otherwise bald, neutral and discrete legal propositions. Text and values work together in integral fashion to provide the protections promised by the Constitution.[52]

As noted by Liebenberg, developing the legal and institutional meaning of socio-economic rights requires a theoretical inquiry and engagement with the values and purposes which these rights protect and promote.[53] In that regard, it is imperative that, in executing its adjudicative mandate, the judiciary must be sensitive to the historical and current social and economic context as well as the range of impacts which poverty, inequality and marginalisation of certain groups has had on their lives.[54] Judicial engagement with the theoretical underpinnings of socio-economic rights and the social contexts is imperative if the constitutional meanings which such rights acquire over time are to be maximally responsive to marginalisation, inequality and poverty experienced by various groups in Zimbabwe.[55] An adjudicative approach anchored on an understanding and engagement with the purposes and values undergirding socio-economic rights, it is argued, creates propitious conditions for developing a socio-economic rights jurisprudence which is responsive to people's lived experiences of poverty and social and economic deprivation.

The following sections discuss and evaluate some of the interpretive guides important for giving meaning to the protected rights, as well as having a proper understanding of the nature of state obligations in the realisation of socio-economic rights.

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[49] *Ibid*., p. 50.
[50] *Ibid*., p. 48.
[51] *Sidumo v. Rustenburg Platinum Mines Ltd*, 2008 (2) SA 24 (CC), 2008 (2) BCLR 158 (CC).
[52] *Ibid*., para. 149.
[53] Liebenberg, *supra* note 3, p. 47.
[54] *Ibid.*
[55] *Ibid*., p. 48.

3.2 *International and Comparative Law as Interpretive Guides*

Section 46(1)(c) of the Constitution provides that when interpreting the Declaration of Rights, the courts must take into account international law. This provision doubtlessly signals the Constitution's openness to the norms and values of the international community as enshrined in international treaties and customary international law and general principles of international law. The question of the municipal application of international treaties is particularly relevant for a country like Zimbabwe which ratifies international and regional human rights treaties, but in various instances, fails to translate these agreements into national legislation. International judicial dialogues can strengthen the rule of law and assist domestic adjudicators to arrive at the best responses to shared problems.[56]

Section 46(1)(e) of the Constitution permits the courts to consider foreign law when interpreting the Declaration of Rights. The difficulties of drawing on comparative constitutional law for the interpretation of a national constitution are well known. There is a greater risk of such sources being misunderstood, misconstrued or interpreted out of context. Importantly, "the subtleties of foreign jurisdictions, their practices and terminology require more intensive study",[57] and this renders "analogies dangerous without a thorough understanding of the foreign systems".[58] Nevertheless, comparative law is generally valuable when dealing with problems that are new to our jurisprudence but well developed in comparative jurisdictions.[59]

Interpreters of the socio-economic rights contained in the Declaration of Rights therefore have to seek guidance from international and comparative law in understanding the scope and content of some of these rights. Interpretation and application of the socio-economic rights in the Constitution would entail defining the nature of state obligations imposed by such rights, defining the normative content as well as developing appropriate and effective remedies to address the infringement of these rights. Due to the relative inexperience of the Zimbabwean courts in adjudicating such rights, the paucity of local jurisprudence and inadequate literature, Zimbabwean courts and other bodies may have to draw from international and comparative standards and jurisprudence for guidance.[60]

Judicial and quasi-judicial institutions in comparative jurisdictions such as South Africa and Kenya are already engaging with socio-economic rights cases, and these are sources to which Zimbabwe could look to tap for both model laws on the implementation of socio-economic rights as well as the existing jurisprudence for a proper understanding of the content and nature of state obligations engendered by such rights.[61] Significantly, international and regional treaties and other quasi-judicial

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[56] M. Kirby, 'Constitutional Law and International Law: National Exceptionalism and the Democratic Deficit?', 98 *Georgetown Law Journal* (2009) p. 433, at p. 442.
[57] *Ibid.*
[58] *Ibid.*
[59] *Sanderson v. Attorney-General*, Eastern Cape 1998 (2) SA 38 (CC) para. 26.
[60] G. L. Neuman, 'International Law as a Resource in Constitutional Interpretation', 30 *Harvard Journal of Law & Public Policy* (2006) p. 176, at p. 177.
[61] Langford, *supra* note 25.

mechanisms have adopted useful standards such as general comments and guidelines on socio-economic rights.[62]

Important socio-economic jurisprudence has emerged from the interpretive work of the United Nations Committee on Economic, Social and Cultural Rights (CESCR)[63] and the African Commission on Human and Peoples' Rights (African Commission) and other thematic human rights treaty bodies under their complaints mechanisms. The CESCR, in particular, has developed a comprehensive template for understanding the normative content of socio-economic rights through the adoption of general comments. It is noteworthy that although general comments adopted by the CESCR are not themselves legally binding, they nevertheless constitute an authoritative interpretation of the socio-economic rights provisions of the International Covenant on Economic, Social and Cultural Rights (ICESCR), which is legally binding on states that have ratified or acceded to it. General comments are used by the CESCR to elaborate on the normative content and nature of the obligations imposed by the ICESCR, and these are valuable sources of guidance for national adjudicative mechanisms. The socio-economic rights provisions under the Zimbabwean Constitution are substantially similar to those protected under the ICESCR. This makes the CESCR's general comments, concluding observations on state reports and recommendations under its complaints mechanism important resources in giving meaning to the socio-economic rights provisions under the Declaration of Rights. In the *Zimbabwe Peoples' Homeless* case, the Supreme Court relied both on international standards[64] as well as comparative law sources[65] as interpretive guides in interpreting section 74 which protects against arbitrary eviction arbitrary from one's home and section 81(1)(f) which provides for children's the right to shelter. In the *City of Harare v. Mushowe*, a case relating to the enforcement of the right to safe, clean and potable water protected in section 77(a) of the Constitution, the Supreme Court utilised South African socio-economic rights jurisprudence as interpretive guides.[66] In the case of *Hopcik Investment (Pty Ltd) v.*

[62] *See* Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights (1986) UN Doc. E/CN.4/1987/17. *See* the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (1998) 20 *Human Rights Quarterly* 691. *See also* Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights (adopted at the 47th Ordinary Session held in Banjul, The Gambia, from 12 to 26 May 2010 and formally launched at the Commission's 50th Ordinary Session held in Banjul, The Gambia from 24 October to 7 November 2011).

[63] The Committee on Economic, Social and Cultural Rights is the treaty body that monitors state compliance with the International Covenant on Economic, Social and Cultural Rights.

[64] The Supreme Court relied on the following international instruments as interpretive guides relating to the rights of children, namely, Convention on the Rights of the Child (1989) and the African Charter on the Rights and Welfare of the Child (1990).

[65] Some of the foreign case law the court relied on include *People's Union for Democratic Rights & Ors v. Union of India & Ors1983* (1) SCR 456; *Soobramoney v. Minister of Health (Kwazulu Natal) 1998* (1) SA 765 (CC); *Government of the Republic of South Africa v. Grootboom* 2001 (1) SA 46 (CC) and *Port Elizabeth Municipality v. Various Occupiers* 2005 (1) SA 217 (CC).

[66] The court extensively cited the South African Constitutional Court decision in *Mazibuko & Others v. City of Johannesburg & Others* [2010] (4) SA 1.

Minister of Environment Water and Climate and City of Harare[67] on the right to water protected under section 77 of the Constitution, the High Court recognised the right to water declared by the United Nations in its General Assembly through Resolution 64/292,[68] as well as international treaties such the Convention on the Elimination of Discrimination Against Women (1979), the Convention on the Rights of the Child (1989) and the International Covenant on Economic, Social and Cultural Rights (1966) as interpretive guides. In the case of *Mudzuru & Another v. Ministry of Justice, Legal and Parliamentary Affairs (NO) & Others*, the Constitutional Court also noted that it was common cause that when interpreting the Declaration of Rights, a court must seek guidance from international jurisprudence and international instruments, particularly those ratified by Zimbabwe.[69] In its findings, the Court extensively referred to and relied on a number of international treaties on children and women's rights and proceeded to declare the practice of child marriage unconstitutional.[70] International and comparative law and jurisprudence provide useful normative insights on which constitutional and human rights adjudication can draw.

3.3 *The Institutional Competence Question*

Section 3 of the Constitution enshrines certain values and principles underpinning the Zimbabwean society.[71] One of the principles binding on the state and all institutions is the principle of good governance, which encompasses among others, observance of the principle of separation of powers.[72] Clearly, the Constitution requires a separation of powers between the legislative, executive and judicial arms of the state, though it does not prescribe what form that separation should take. Practically, this entails that the legislative branch is responsible for enacting legislation, the executive branch is responsible for developing and implementing policy and legislation, and the judiciary is responsible for interpreting the law. Importantly, mutual control and accountability is established through a system of checks and balances of which judicial review of legislative or executive action is an important component.[73]

In socio-economic rights litigation, the courts are often called upon to adjudicate on highly contentious matters with significant political and policy implications. In the cases of *Markham and Another v. Minister of Health and Child Care and Others*[74] and *Makoka v. Minister of Health and Child Care and Others*,[75] the applicants unsuccessfully sought an order for the government to be compelled to provide safety

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[67] *Hopcik Investment (Pty Ltd) v. Minister of Environment Water and Climate and City of Harare* HH 137-16 & HC 1796/14.
[68] United Nations General Assembly through Resolution 64/292 of 28 July 2010, UN DocA/64/L 63/Rev 1.
[69] *Mudzuru & Another v. Ministry of Justice, Legal and Parliamentary Affairs (NO) & Others* (Const. Application 79/14) [2015] ZWCC p.42.
[70] *Ibid.*
[71] *See* section 3 of the Constitution.
[72] *See* section 3(2)(e) of the Constitution.
[73] Liebenberg, *supra* note 3, p. 66.
[74] *Markham and Another v. Minister of Health and Child Care and Others* HC 2168/20.
[75] *Makoka v. Minister of Health and Child Care and Others* HC 3003/20.

nets in the form of cash handouts, food and portable water to cushion citizens from the effects of restrictive measures wrought by the COVID-19 pandemic. In the case of *The Trustees of The Arda-Transau Relocation Development Trust v. Zimbabwe Electricity Transmission and Distribution Company (Zetdc) (Pvt) Ltd*,[76] the applicants successfully obtained a court order that compelled the Zimbabwe Electricity Transmission and Distribution Company (ZESA) to provide electricity supply services to the Zimbabwe National Water Authority (ZINWA) water pumps within Arda – Transau community for the duration of the state of disaster subject to the load shedding schedule. The applicants were faced with COVID-19 outbreak and threat without running tap water due to ZESA power cut to the ZINWA outlet which supplied them with water. In the case of *Hopcik Investment (Pty Ltd) v. Minister of Environment Water and Climate and City of Harare*,[77] the applicant sought and successfully obtained an order compelling the respondents, the Minister of Environment, Water and Climate and the City of Harare, to supply 15,000 litres of potable water per week to its premises bases on section 77 of the Constitution which provides for the right to safe and potable water. The High Court ruled that the respondents had both failed to take reasonable steps to address the water challenges faced by the applicant and therefore were in breach of section 77 of the Constitution.[78]

An important issue in constitutional adjudication is normally the question of appropriate interpretation and application of the doctrine of separation of powers, particularly in cases that have significant political and policy implications. The adjudication of socio-economic rights is an example where all sorts of polycentric concerns tend to arise – the so-called polycentric dilemma.[79] In his famous essay published in 1978, Lon Fuller argued that the judiciary could not and should not deal with situations in which there are complex repercussions beyond the parties and factual situation before the court.[80] Lon Fuller described polycentric disputes as disputes arising in litigation which give rise to many diverging issues, each of which is linked to the other in a complex web of interdependent relationships. For example, an adjudicative decision in one area generates unforeseen policy and budgetary implications impacting on parties not represented in the particular litigation.[81] The argument is that judicial adjudication of socio-economic rights would compel the judiciary "to encroach upon the proper terrain of the legislature and executive", particularly by "dictating to the government how the budget should be allocated".[82] Matters of policy, it was vociferously argued, are the domain of the executive and the legislature. Since policy is political, goes the argument, it should be addressed

[76] *The Trustees Of The Arda-Transau Relocation Development Trust v. Zimbabwe Electricity Transmission and Distribution Company (Zetdc) (Pvt) Ltd* HC 88/20

[77] *Hopcik Investment (Pty Ltd) v. Minister of Environment Water and Climate and City of Harare* HH 137-16 & HC 1796/14.

[78] *Ibid.,* pp. 6–7.

[79] *See Soobramoney v. Minister of Health (Kwazulu-Natal)*, 1997 (12) BCLR 1696 (1997) and *Mazibuko and Others v. City of Johannesburg and Others*, 2010 4 SA 1 (CC).

[80] L. Fuller, 'The Forms and Limits of Adjudication', *92 Harvard Law Review (1978–1979) pp. 353–409.*

[81] *Ibid.*

[82] *See Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*, 1996 (4) SA 744 (CC).

by the more directly accountable branches of governments, by those representatives who can easily be removed by popular vote, and not by 'unelected' courts.[83]

Concerns on the separation of powers debate reflects a broader discussion over the legitimacy and effectiveness of entrenching economic and social rights provisions in constitutions. Significantly, such concerns are predicated on the need to guard against judicial usurpation of legislative and executive power over budgets and core policy priorities while still enforcing these rights.[84]

Socio-economic rights enforcement, like civil and political rights, invites judicial inquiry into state policies and programmes. The Constitution's explicit entrenchment of a broad range of socio-economic rights has undoubtedly resolved the justiciability objections in favour of legitimising judicial enforcement of such rights. It follows that if courts have been constitutionally empowered to review the realisation of economic and social rights, then they are simply executing their constitutional mandate.[85] This clearly calls into question any interpretation of the separation of powers doctrine predicated on inflexible functional demarcations between the three arms of government and precludes courts from enquiring into executive or legislative action or inaction. In any case, the Constitution should never be interpreted in a manner that envisages bright-line boundaries between the three arms of government. If the judicial enforcement of socio-economic rights is understood as placing the burden on the government to justify its current lack of action on the realisation of the rights in breach of its obligations, then the separation of powers doctrine should not be used as a bar against judicial inquiry on such state inaction.[86]

3.4 *Horizontal Application of the Declaration of Rights*

The horizontal application of human rights is a metaphor used to describe the application of human rights between private individuals *inter se*.1 Liebenberg has defined 'horizontal application of the Bill of Rights' as referring to the applicability of human rights in relations between private parties.[87] The Constitution is also remarkable for its express provisions providing for both the vertical and horizontal application of the Declaration of Rights. Section 45(1) states that the Declaration of Rights "binds the State and all executive, legislative and judicial institutions and agencies of government at every level". Section 45(2) of the Constitution provides that a provision in the Declaration of Rights "binds a natural and juristic person if, and to the extent that, it is applicable taking into account the nature of the right or freedom concerned and any duty imposed by it". The above provisions create the possibility for socio-economic rights to apply in legal relations between private parties. In order to give effect to the horizontal application of a right in the Declaration

[83] Langford, *supra* note 25, p. 31.
[84] Ray, *supra* note 30, p. 16. *See also* M. Pieterse, 'Possibilities and Pitfalls in the Domestic Enforcement of Social Rights: Contemplating the South African Experience', 26 *Human Rights Quarterly* (2004) p. 882.
[85] Langford, *supra* note 25, p. 32.
[86] *Ibid.*, p. 36.
[87] S. Liebenberg, 'Adjudicating Socio-Economic Rights under a Transformative Constitution', in Langford, *supra* note 25, p. 75, at p. 78.

of Rights, the above constitutional provisions require the law to be developed so that private entities are accountable to the rights and values protected in the Declaration of Rights. The inadequacy of solely relying on the state's protective obligation under international human rights law has been highlighted by scholars.[88] Strange, for instance, has emphasised the significance of conceptualising power beyond political power to include economic power embedded in markets.[89] Non-state actors are increasingly influencing government policies concerning the provision of social services due to their immense power and influence. The limitations and obstacles attendant on the state's duty to protect means that other efforts aimed at fostering the accountability of non-state actors such as developing the horizontal applications of the Declaration of Rights should be developed further.[90]

Socio-economic rights should be understood as more than public commodities and services delivered by the state. Private corporations are increasingly influencing government policies in the provision of social goods such as health care, education and water provision. If human rights are to have an egalitarian influence, their reach should infuse the entire legal system, including private relationships such as family law, property law and contract law. The limitations and obstacles attendant on a state's duty to protect means that other efforts aimed at fostering the accountability of non-state actors such as through the horizontal application of the Declaration of Rights should be developed further.[91] The application of constitutionalised human rights norms in private relations is thus an important accountability tool as it provides a mechanism to enforce individuals' and groups' rights against other private entities such as corporations.[92]

3.5 *Enforcing the Positive Duties Imposed by Socio-Economic Rights*

The Constitution imposes obligations on the state to "respect, protect, promote and fulfil the rights in the Declaration of Rights".[93] The obligation to respect requires the state to refrain from carrying out any measure or act that infringes on individuals' or groups' enjoyment of their rights. The obligation to protect imposes a positive obligation on the state to protect rights beneficiaries from having their rights interfered with by non-state actors. The CESCR has conceptualised the obligation to protect as entailing measures by the state to ensure that enterprises or individuals do not deprive individuals of their access to the relevant right.[94]

The state's duty to promote entails the adoption of educational programmes designed to enhance awareness of human rights. The duty to fulfil requires the state to adopt appropriate legislative, administrative and other measures towards the

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[88] K. Moyo, *Water as a Human Right under International Human Rights Law: Implications for the Privatisation of Water Services*, LLD thesis Stellenbosch (2012), ch. 5.
[89] S. Strange, *The Retreat of the State* (Cambridge University Press, Cambridge, 1996) pp. 16–43.
[90] D. M. Chirwa, 'The Doctrine of State Responsibility as a Potential means of Holding Private Actors Accountable for Human Rights', 5 *Melbourne Journal of International Law* (2004) pp.1–28. 28.
[91] *Ibid*.
[92] Liebenberg, *supra* note 3, p. 61.
[93] *See* section 44 of the Constitution.
[94] *See* General Comment No. 12, para. 15.

enjoyment of rights by those who cannot afford on their own.[95] The idea that courts could involve themselves in questions concerning the fulfilment of economic and social rights has been, from a philosophical standpoint, the most controversial issue.[96] The issue is fully addressed below where the chapter at hand engages with the enforcement of positive duties imposed by socio-economic rights.

It must however be noted that slotting claims into one or more of these categories of duties should not be determinative of the appropriate interpretative approach in any particular case. The adjudication of socio-economic rights claims should always be a contextual inquiry guided by the nature of the interests and values at stake.[97] The degree of emphasis on any particular duty ultimately depends on the type of rights under consideration as well as the relevant contextual situation. The need to meaningfully enjoy some of the rights in a particular context may, for example, demand positive action from the state in terms of more than one of the duties.

One of the major issues in the adjudication of socio-economic rights relates to the standard or review the courts should utilise in assessing state compliance with the positive duties engendered by the socio-economic rights entrenched in the Declaration of Rights. The CESCR's General Comment No. 3[98] has proved significant in providing clarity on the justiciability of socio-economic rights. General Comment No. 3 divides the key state obligations into a duty to take steps to progressively realise the protected rights and a "minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights".[99] The CESCR asserted that "a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, *prima facie*, failing to discharge its obligations under the Covenant".[100] It justifies this position by positing that "if the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its *raison d'ˆetre*".[101] The two standards developed by international and comparative courts and tribunals for reviewing state compliance with the positive duties imposed by socio-economic rights are fully discussed below.

Two major approaches for the enforcement of positive obligations imposed by socio-economic rights have arisen. These include the minimum core obligations approach developed by the CESCR as explained above and the reasonableness approach developed by the South African Constitutional Court in its socio-economic rights jurisprudence. It is important to note that most of the socio-economic rights enshrined under the Declaration of Rights impose a duty on the state to undertake "reasonable legislative and other measures" within the limits of available resources to ensure the

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[95] *See* Committee on Economic, Social and Cultural Rights, General Comment No. 3 The Nature of States Parties' Obligations, (1990) UN Doc. E/1991/23**,** paras. 20–26.
[96] Langford, *supra* note 25, p. 21.
[97] Liebenberg, *supra* note 87, p. 78.
[98] General Comment No. 3.
[99] General Comment No.3, para. 10.
[100] *Ibid.*
[101] *Ibid.*

progressive realisation of the protected rights.[102] An exception is section 74 of the Constitution which is negatively formulated as it guarantees the freedom from arbitrary eviction from one's home or have their home demolished, without an order of court made after considering all the relevant circumstances.

3.5.1 The Reasonableness Approach

The South African Constitutional Court, in its landmark judgment in *Grootboom v. Government of the Republic of South Africa* (*Grootboom*),[103] developed a model of reasonableness review for adjudicating the positive duties imposed by socio-economic rights protected under sections 26 and 27 of the South African Constitution. The Court declared that the decision whether the measures the state has taken to implement socio-economic rights meet the standards envisaged by the Constitution depends on the reasonableness of those measures. In reviewing the positive duties imposed by the socio-economic rights provisions on the state, the key question that an adjudicator asks is whether the means chosen are reasonably capable of facilitating the realisation of the socio-economic rights in question.[104]

In its conceptualisation, the reasonableness has been interpreted in such a way that individuals cannot claim individualised remedies in relation to the state's positive duty to fulfil imposed by socio-economic rights. Rather, the individual is entitled only to a reasonable programme, the latter being a collective good to which no single individual can have a stronger claim than similarly-situated individuals. This approach, it was held, was designed to allow the government a margin of discretion relating to the specific policy choices adopted to give effect to socio-economic rights.[105] Significantly, the Court pointed out that it will assess the reasonableness of the state's conduct in light of the social, economic and historical context, including the capacity of institutions responsible for implementing social rights programmes.[106] What is clear is that the reasonableness approach has synergies with the CESCR's enunciation that states parties to the ICESCR are under an obligation to take steps that are "deliberate, concrete and targeted as clearly as possible towards meeting the obligation recognised in the Covenant".[107]

A further important requirement which has emerged in the context of the South African courts' evictions jurisprudence is that a reasonable programme should entail 'meaningful engagement' with the intended beneficiaries of the programme. This introduces a significant aspect of participatory democracy as a key factor in assessing the reasonableness of how executive organs adopt and implement social policy.[108] The reasonableness approach has been criticised for its failure to define the content of the relevant socio-economic rights in the adjudication process. In

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[102] *See* sections 75(4), 76(4), 77, 82 and 83 of the Constitution.
[103] *Grootboom and Others v. Government of the Republic of South Africa and Others* 2001 SA 46 (CC).
[104] *Ibid.*, para. 41.
[105] *Ibid.*
[106] *Ibid.*, para. 43.
[107] General Comment No. 3, para. 2.
[108] *See Occupiers of 51 Olivia Road v. City of Johannesburg* 2008 (3) SA 208 (CC) paras. 10, 16–18.

particular, it has been questioned whether it is capable of protecting those who are experiencing severe deprivation of minimum essential levels of basic socio-economic goods and services.[109] Often, such a category of vulnerable groups is in danger of suffering irreparable harm to their lives, health and human dignity if they do not receive urgent assistance.

The reasonableness review approach does not clearly distinguish between determining the scope of the right, whether it has been breached, and justifications for possible infringements. Bilchitz has also pointed out that until some understanding is developed on the content of socio-economic rights, the assessment of whether the measures adopted by the state are reasonably capable of facilitating the realisation of a particular socio-economic right takes place in a normative vacuum.[110]

It must however be noted that the model of reasonableness review gives the adjudicator a flexible and context-sensitive model for interpreting socio-economic rights claims. It allows government the space to design and formulate appropriate policies to fulfil its socio-economic rights obligations. It also simultaneously subjects government's choices to the requirements of reasonableness, inclusiveness and, in particular, the requirement that government initiatives aimed at meeting its socio-economic rights obligations must provide for short-term relief for those in crisis situations.[111] The South African Constitutional Court's jurisprudence suggests that the government's justifications will be subject to water-tight scrutiny when a disadvantaged sector of society is deprived of access to essential services and resources.[112] In the *Mushoriwa* case, the Supreme Court explicitly embraced the reasonableness approach developed by the South African courts in enforcing the positive obligations imposed by socio-economic rights, noting that:

> What the State is enjoined to do is to take reasonable legislative and other measures to achieve the progressive realisation of the rights to sufficient food and potable water. Moreover, its obligations in this regard are confined to measures within the limits of the resources available to it.[113]

Given the dearth of jurisprudence particularly enforcing the positive duties imposed by socio-economic rights guaranteed in the Constitution, there is likely to be sometime before Zimbabwean courts can lay down an adjudicative approach sensitive to the realities of destitution and deprivation confronting most Zimbabweans on one hand, and on the other, the importance of holding the government to account on how it uses public funds.

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[109] D. Bilchitz, 'Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio- Economic Rights Jurisprudence', 19 *South African Journal on Human Rights* (2003) p. 1, at pp. 9–10.
[110] *Ibid.*
[111] Liebenberg, *supra* note 87, p. 89.
[112] *See Grootboom*, para. 79.
[113] *City of Harare v. Mushoriwa* (SC 54/18, Case No. SC 228/14) [2018] ZWSC 54.

3.5.2 Minimum Core Approach

The idea of minimum core obligations 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.[114] Bilchitz interpreted minimum core obligations as arising from the very basic interest people have in survival and the socio-economic goods required to survive.[115]

As noted above, the minimum core content approach was developed by the CECSR in its General Comment No. 3 with the aim of providing clarity on the normative content of entitlements embodied in socio-economic rights. The CESCR explained that:

> [A] minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party ... [A] State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, prima facie, failing to discharge its obligations under the Covenant.[116]

Over and above the minimum core entitlements, the state is obliged to adopt legislative measures to progressively achieve the full spectrum of the socio-economic rights guaranteed in the ICESCR.[117] In the South African cases of *Grootboom*, *Treatment Action Campaign*[118] and *Mazibuko*,[119] the South African Constitutional Court declined to adopt the minimum core approach as a model of review in assessing state compliance with the positive obligations imposed by sections 26 and 27 of the South African Constitution. The Court's reasoning ranged from textual, institutional and feasibility considerations.[120] In *Grootboom*, for instance, it pointed out that the determination of the minimum core in the context of the right to have access to adequate housing presents difficulties because there are people who need land, others need both land and houses, yet others need financial assistance.[121] Furthermore, the Court said that, unlike the CESCR which developed the notion of the minimum core obligations based on its extensive experience in reviewing state reports under the ICESCR, it lacked adequate information on which the content of the minimum core obligations could be based.[122] It must however be noted that despite dismissing the minimum core approach, the Court in *Grootboom* left the door open for the minimum core approach to play a role in the assessment

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[114] Bilchitz, *supra* note 109, p. 11.
[115] *Ibid.*
[116] General Comment No. 3, para. 10.
[117] *Ibid.*
[118] *Minister of Health and Others v. Treatment Action Campaign and Others (No 2)*, 2002 (5) SA 721 (CC) (TAC).
[119] *Mazibuko and Others v. City of Johannesburg and Others*, 2010 (4) SA 1 (CC) (Mazibuko).
[120] *See Grootboom*, paras. 23–33; *TAC*, paras. 26–39; *Mazibuko*, paras. 51–62. The Court pointed to the difficulty of defining the content of minimum core obligations; a concern that any definition would not reflect the diversity of needs of differently placed groups; and an incompatibility with the institutional roles and competencies of the courts.
[121] *Grootboom*, para. 33.
[122] *Ibid.*, para. 31.

of the reasonableness of state conduct provided that sufficient evidence of the content of such a core obligation is placed before the court.[123]

The minimum core concept and reasonableness review are not necessarily either/or concepts as the minimum core concept can be incorporated within the reasonableness model of review. Some scholars have argued for a hybrid model that enables the full realisation of the promise of socio-economic rights.[124] As a model of review, the minimum core helps in defining the content of the rights, such as the right to water, and providing a principled basis for the evaluation of state measures in the implementation of such a right. On the other hand, the reasonableness test provides a model for analysing and evaluating the nature of the state's obligations imposed by a specific right. The combined model is a suitable one in that it combines both rights analysis and the evaluation of measures adopted by the state to realise socio-economic rights. The challenge for the Zimbabwean adjudicators enforcing the socio-economic rights protected under the Declaration of Rights is to adopt either the reasonableness approach or the minimum core or alternatively to develop their own adjudicative path altogether. It must however be noted that the assessment of the reasonableness of government programmes is influenced by two further criteria derived from sections 75(4), 76(4) and 77 of the Constitution. These are the concepts of 'progressive realisation' and 'availability of resources'. These are fully discussed below.

3.5.3 Progressive Realisation and Availability of Resources

Most of the socio-economic rights enshrined under Chapter 4 of the Constitution are meant to be realised progressively. For instance, whilst section 76 read together with section 44 obliges the state to ensure the fulfilment of the right to health care, section 76(4) imposes a special limitation to the enjoyment of this right by providing that the state must take reasonable legislative and other measures "within the limits of the resources available to it" to achieve the "progressive realisation of the rights set out under this section". Section 75(4) obliges the state to take reasonable legislative and other measures "within the limits of the resources available" to achieve the progressive realisation of the right to education. Section 77 obliges the state to take reasonable legislative and other measures within the limits of the available resources to progressively realise the rights to food and water.

Progressive realisation constitutes an acknowledgement that the full enjoyment of socio-economic rights will generally not be achieved in a short period of time.[125] The concept of progressive realisation is key to an understanding of the nature of states' obligations. If not carefully construed, however, progressive realisation in the fulfilment of socio-economic rights is capable of depriving state obligations of any

[123] *Ibid.*, para. 33.
[124] G. M. Musila, 'Testing Two Standards of Compliance: A Modest Proposal on the Adjudication of Positive Socio-Economic Rights under the New Constitution', in Biegon and Musila, *supra* note 4, p. 55, at p. 87.
[125] General Comment No. 3, para. 9.

normative significance.[126] Admittedly, some dimensions of socio-economic rights may involve progressive realisation to a greater extent than civil and political rights. This is because in most democratic systems the state has already invested in the infrastructure such as judicial institutions and electoral systems necessary to guarantee and protect civil and political rights.[127] The concept of progressive realisation must therefore be understood in light of the objective of the Declaration of Rights, which is to establish clear obligations for the state to take steps towards full realisation of socio-economic rights. This also entails the dismantling of a range of legal, administrative, operational and financial obstacles which may impede access to such rights.

The availability of resources for the fulfilment of socio-economic rights is one of the contentious issues pervading the judicial enforcement of socio-economic rights.[128] A challenge in enforcing socio-economic rights claims is where the resource implications of the claim are extensive and provision has not been made for such expenditure within existing budgetary provisions.[129]

Jurisprudence and standards from international and comparative jurisdictions could be helpful in the interpretation of the phrase 'to the maximum of available resources'. The CESCR has interpreted the phrase 'to the maximum available resources' as entailing resources existing within a state as well as those available from the international community.[130] The CESCR explained that the considerations that it will take into account in its evaluation of justifiability of resource constraints include whether the state party's decision not to allocate available resources is in accordance with international human rights standards.[131]

The South African Constitutional Court case has pronounced itself on the issue, starting with the case of *Soobramoney*,[132] which was the first case in which the Court was asked to find a violation of socio-economic rights. The major question which the Court was called upon to decide was whether the health rights in section 27 of the Constitution entitled a chronically ill man in the final stages of renal failure to an order enjoining a public hospital to admit him to the renal dialysis programme of the hospital. The Court thus had to deliberate whether and under what conditions limited resources constitute a valid basis for limiting access to medical treatment for patients. The Court noted that the scarcity of resources meant that the need for access to kidney dialysis treatment greatly exceeded the number of available dialysis

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[126] P. Alston and G. Quinn, 'The Nature and Scope of State Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights', 9 *Human Rights Quarterly* (1987) p. 156, at p. 172.
[127] Liebenberg, *supra* note 3, p. 191.
[128] E. Riedel, 'Economic, Social and Cultural Rights', in C. Krause and M. Scheinin, *International Protection of Human Rights: A Textbook* (Åbo Akademi University Institute for Human Rights, Turku, 2009) p. 129, at p. 137.
[129] Liebenberg, *supra* note 3, p. 192
[130] *See* United Nations Committee on Economic, Social and Cultural Rights, *An Evaluation of the Obligations to Take Steps to the Maximum of Available Resources under an Optional Protocol to the Covenant* (2007), UN Doc. E/C.12/2007/1, para. 5.
[131] *Ibid*., para. 8.
[132] *Soobramoney v. Minister of Health, Province of KwaZulu-Natal*, 1998 (1) SA 765 (CC).

machines. The Court further noted that this was a national problem extending to all renal clinics.[133] According to the Court, the diversion of additional resources to the renal dialysis programme and related tertiary health care interventions from within the health budget would negatively impact on other important health programmes.[134] Additionally, the Court pointed out that if the overall health budget was to be substantially increased to fund all health care programmes, this would diminish the resources available to the state to meet other socio-economic needs such as housing, food, water, employment opportunities and social security.[135] Accordingly, the Court held that there was no breach of section 27(1)(a) read with (2) of the South African Constitution.

In the case of *Blue Moonlight Properties 39 (Pty) Ltd and Another*,[136] the South African Constitutional Court rejected resource arguments where the claimed shortfall resulted from a flawed budgeting process. The Court explained that "it is not good enough for the City [of Johannesburg] to state that it has not budgeted for something, if it should indeed have planned and budgeted for it in the fulfilment of its obligations".[137] What is significant about the above approach is that it asserts the principle that a state's resource-limitation arguments are irrelevant where those limitations are the result of its own lack of understanding of its constitutional or statutory obligations.[138] It is also important to note that where a state can show that it lacks the requisite resources to fulfil the elementary requirements of rights such as the provision of a minimum amount of socio-economic goods, it still remains under a duty to seek international cooperation and assistance under Article 2(1) of the ICESCR.

3.6 *Enforcing Negative Duties*

A handful of cases recently adjudicated by the courts have dealt with situations where individuals or groups have been deprived of existing access to socio-economic rights. [139] Most of the cases have involved disconnections of water services as well as forced evictions from peoples' homes without court orders authorising such evictions. In that regard, a body of jurisprudence is developing particularly in the context of the high courts and the Supreme Court's evictions jurisprudence. Unlike the South African courts' socio-economic rights jurisprudence, there does not appear to be a distinction when Zimbabwean courts adjudicate on positive or negative duties imposed socio-economic rights as evidenced by the Supreme Court's approach in the *City of Harare v. Mushoriwa* case. In that case, the

[133] *Ibid.*, para. 24.
[134] *Ibid.*, paras. 27–28.
[135] *Ibid.*, para. 28.
[136] *Blue Moonlight Properties 39 (Pty) Ltd and Another*, 2012 (2) BCLR 150 (CC) para. 61.
[137] *Ibid.*, para. 61.
[138] Ray, *supra* note 30, p. 157.
[139] *City of Harare v. Mushoriwa and Others* Case No. SC 228/14; *The Trustees Of The Arda-Transau Relocation Development Trust v. Zimbabwe Electricity Transmission and Distribution Company (Zetdc) (Pvt) Ltd* HC 88/20; *Zimbabwe Homeless Peoples' Federation and Others v. Minister of Local Government and National Housing Judgment* No. SC 94/2020; *Zuze v. Trustees of Mlambo & Anor* SC 69-19; and *City of Harare v. Mukunguretsi & Ors* SC 46- 18.

Court deployed the reasonableness approach which South African Courts have used to assess state compliance with the positive obligations imposed by socio-economic rights; yet what was at stake involved negative enforcement of the right to water since the City of Harare had disconnected the respondent's water supply without the requisite notice as per the applicable by-laws.

According to the Supreme Court:

> The first point to note about s 77 of the Constitution is that it is a fundamental human right enshrined in Part 2 of the Declaration of Rights. As such, it is directly enforceable in terms of s 85 of the Constitution if it has been, is being or is likely to be infringed. Nevertheless, being in the nature of a social right, I do not think that it is susceptible to unqualified application and enforcement. This emerges clearly from the wording of the section itself.[140]

The Supreme Court proceeded to embrace the reasonableness approach developed by the South African courts in enforcing the positive obligations imposed by socio-economic rights, noting that:

> What the State is enjoined to do is to take reasonable legislative and other measures to achieve the progressive realisation of the rights to sufficient food and potable water. Moreover, its obligations in this regard are confined to measures within the limits of the resources available to it.[141]

The Court proceeded to state that:

> the Constitution is that the possible violation of its provisions (s77 right to water) is only implicated where the State or a local authority fails to provide any or adequate water supply to any given community or locality. It might also arise where, as appears to have been recently admitted by the appellant itself, having afforded an adequate water supply to most inhabitants, it is then discovered that such supply is in fact contaminated and therefore only potable at great risk. In contrast, it is difficult to envisage how the broad import of s 77 might be invoked in the case of a consumer, who has full or adequate access to water supply, but is deprived thereof by being disconnected for having failed to pay for water consumed and after having received due notice and warning to settle his account.[142]

The Supreme Court misapplied the reasonableness approach by deploying it in a case that involved the breach of the negative duty, that is disconnection of water services. In a case involving the breach of a negative duty as in *Mushoriwa*, any justifications by the state must be evaluated in terms of the requirements of the general limitations clause provided in section 86 of the Constitution. In respect of the negative duties, the South African courts have deployed a two-stage analysis applicable to negative civil and political rights.[143] Where a claim is predicated on a rights violation, a court considers, at the first stage, whether a particular right is protected in the Constitution and whether the challenged law or conduct impairs that right. If a court finds that the challenged law or conduct does impair the right in question, at the second stage, the court must determine whether the infringement is

[140] *City of Harare v. Mushoriwa* (SC 54/18, Case No. SC 228/14) [2018] ZWSC 54 p.27.
[141] *Ibid.*
[142] *Ibid.*
[143] *Jaftha v. Schoeman*; *Van Rooyen v. Stoltz* 2005 (2) SA 140 (CC).

reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.[144]

In the case of *Jaftha v. Schoeman; Van Rooyen v. Stoltz*,[145] the South African Constitutional Court held that any measure that permits a person to be deprived of existing access to adequate housing constitutes a violation of the negative duty imposed by the right of access to housing protected under section 26 of the South African Constitution. According to the Court, the state must justify such a measure in terms of the requirements of the general limitations clause contained in section 36 of the South African Constitution.[146]

Jaftha involved a challenge to the constitutionality of provisions of the Magistrates' Court Act 32 of 1944 (Act) that permitted the sale in execution of people's homes in order to satisfy sometimes very small debts. Such sales-in-execution would result in the eviction of the applicants from their state-subsidised homes. The applicants would have no suitable alternative accommodation should they be evicted, and would not be eligible again for a housing subsidy from the state.[147] The South African Constitutional Court found that the impugned provisions of the Magistrates' Court Act constituted a negative violation of section 26(1) of the South African Constitution as they permitted a person to be deprived of existing access to adequate housing.[148] This negative duty, the Court held, was not subject to the qualifications in subsection (2) relating to reasonableness, resource constraints and progressive realisation. According to the Court, deprivations of existing access to housing (and by implication, other socio-economic rights) can be justified only in terms of the requirements of the general limitations clause in section 36 of the Constitution. In the *Jaftha* case, the Court, in carrying out the limitations analysis in terms of section 36 of the Constitution, closely scrutinised the purposes that the relevant provisions of the Act were designed to serve, and found them to be overbroad. It thus held that the relevant provisions were not justifiable

Jaftha shows that, as is the case with civil and political rights, socio-economic rights impose negative obligations on the state the breach of which can be the subject of litigation. Thus, where the state through its conduct or legislation deprives people of their existing access to socio-economic rights, such conduct or legislation will be regarded as a *prima facie* breach of sections 26 and 27 of the South African Constitution. The burden then shifts to the state to justify such conduct or legislation according to the general limitations clause. This shows that a stronger model of review applies to negative duties. In *Gundwana v. Steko Development CC91*,[149] the South African Constitutional Court extended the *Jaftha* principles to the execution of mortgage bonds secured against a debtor's home in circumstances where the debtor defaults on her home loan payments. It is clear that a more demanding standard of

[144] *Ibid.*
[145] *Ibid.*
[146] *Jaftha,* paras. 31–34
[147] *Ibid.,* para. 12.
[148] *Ibid.,* paras 31–34.
[149] *Gundwana v. Steko Development CC91* 2011 (3) SA 608 (CC).

review, incorporating a proportionality assessment, is thus applied when people are deprived of their existing access to socio-economic rights.[150]

It is quite clear from South Africa's socio-economic rights jurisprudence that the enforcement of negative duties are clearly regarded as less polycentric and cost-intensive within the context of separation of powers concerns than the enforcement of the positive duties imposed by progressively realisable socio-economic rights.[151] This possibly explains the courts' willingness to subject the state's conduct to a more demanding standard of scrutiny, and impose robust remedies where breaches are found.[152] Zimbabwean courts are recommended to embrace such an approach when enforcing socio-economic rights claims based on breach of negative duties imposed by such rights.

3.7 *Crafting Appropriate Remedies*

Judicial responses to socio-economic rights violations, to a large extent, may be dependent on the form of justice that the courts see themselves as dispensing.[153] Courts dispensing distributive justice will have to consider the needs and interests of the entire community beyond the immediate interests of the litigants before it.[154] In most cases, denial of socio-economic rights tends to be systemic and take place on a large scale, meaning such lack of access cannot feasibly be remedied by a once-and-for-all court order focusing on the claimant. A significant challenge thus is to strike the right balance between individual and systemic relief. Adjudicative institutions enforcing socio-economic rights will often be concerned with ensuring remedies that attempt to remedy not only the harms engendered by past rights infringements but also remedies that aim to ensure future compliance with constitutional dictates. This is perhaps the most important part of the judicial process because individuals and groups litigate human rights cases for the vindication of their rights not only for the present but also in the future.[155]

Section 85 of the Constitution provides courts with broad remedial powers in the case of breach or threat of breach of the guaranteed rights. A court has the power to "grant appropriate relief, including a declaration of rights and an award of compensation".[156] Under section 175(6) of the Constitution, courts have the power to enforce the rights with broad discretion to make any order that is just and equitable in the event of infringement.[157]

In the few socio-economic rights cases adjudicated by the Zimbabwean courts under the new Constitution, the orders issued have been limited to injunctions and

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[150] *Ibid.*
[151] *Ibid.*
[152] *Ibid.*
[153] Biegon, *supra* note 23, p. 49.
[154] *Ibid.*, p. 50.
[155] *Ibid.*, p. 49.
[156] *See* section 85 of the Constitution.
[157] *See* section 175(6) of the Constitution. *See also* section 86 on the power of courts to grant any appropriate remedy.

principled and no detailed analyses have focused on examining the appropriate remedy for positive socio-economic rights claims. For example, in *Makani and Others v. Epworth Local Board and Others*,[158] the Harare High Court interdicted a local authority from demolishing the applicants' homes and evicting them from municipal land without a court order in contravention of section 74 of the Constitution. In another socio-economic rights decision in *Mushoriwa v. City of Harare*,[159] the Harare High Court held that a by-law which permitted the City of Harare to disconnect a consumer's water supply without recourse to the courts was unlawful and unconstitutional. The High Court decision was however overturned on appeal to the Supreme Court in the case *City of Harare v. Mushoriwa*.[160] In the *Zimbabwe Peoples' Homeless* case, the Supreme Court enforced section 74 which protects against arbitrary eviction and section 81(1)(f) which provides for children's the right to shelter. The right against arbitrary evictions was further enforced in the cases of *Zimbabwe Homeless Peoples' Federation and Others v. Minister of Local Government and National Housing Judgment*[161] and *Zuze v. Trustees of Mlambo & Anor* SC 69-19.[162] In the case of *Hopcik Investment (Pty Ltd) v. Minister of Environment, Water and Climate and City of Harare*,[163] the High Court enforced the right to water protected under section 77 of the Constitution. The case of *Hopcik* was particularly important as it involved enforcing the positive obligations imposed by the right to water in which the government and the City of Harare were compelled to supply potable water to the applicant.

The broad powers of the courts to grant appropriate remedies and to make any order that is just and equitable in the event of infringement of the protected rights provides scope for adjudicative bodies to adopt innovative remedies to effectively address any breach or threatened breach of socio-economic rights. Adjudicative bodies, under the Constitution, are not restricted to a fixed list of potential remedies. Rather, they can grant any appropriate relief that is capable of securing the protection of the rights in question.

Zimbabwean courts thus have wide remedial powers to grant effective remedies in cases involving socio-economic rights infringements. However, the critical consideration is what would constitute an effective remedy in a given case. Mandatory orders may potentially play a crucial role in providing effective remedial relief for violations of socio-economic rights, especially a remedial framework where a court assumes supervisory jurisdiction over the implementation of the order. In terms of such an order, the state will usually be ordered to devise and present to court a plan of action to remedy the violation, and to report back to the court on its implementation at regular intervals.[164] Supervisory orders are particularly suited to

[158] *Makani and Others v. Epworth Local Board and Others*, HH 550/14.
[159] *Mushoriwa v. City of Harare*, HH 4266/13.
[160] *City of Harare v Mushoriwa* (SC 54/18, Case No. SC 228/14) [2018] ZWSC 54.
[161] *Zimbabwe Homeless Peoples' Federation and Others v. Minister of Local Government and National Housing* Judgment No. SC 94/2020.
[162] *Zuze v. Trustees of Mlambo & Anor* SC 69-19.
[163] *Hopcik Investment (Pty Ltd) v. Minister of Environment Water and Climate and City of Harare* HH 137-16 & HC 1796/14.
[164] Liebenberg, *supra* note 87, p. 98.

cases that seek to redress systemic violations of socio-economic rights that require far-reaching reforms over a period of time.[165] They provide an opportunity for an adjudicative body not only to monitor the implementation of such orders, but also to enhance the participation of both civil society and other state institutions such as the Zimbabwe Human Rights Commission.[166]

Supervisory orders require the state organ breaching its constitutional obligations to rectify the breach of a right under the supervision of the court through the submission of periodic reports to the court on predetermined dates describing in detail the action plan for remedying the challenged breaches. Significantly, and due to separation of powers concerns, the court order must also give the responsible state organ the opportunity to choose how best to comply with its constitutional obligations in question, as opposed to the court arrogating to itself the responsibility to design a solution to remedy the breach. On presentation of the report, the court evaluates whether the proposed plan sufficiently remedies the constitutional breach, and whether it brings the state organ in question into compliance with its constitutional obligations.

An abiding concern with supervisory orders is that they potentially infringe the separation of powers doctrine as courts are drawn into usurping the functions of executive and administrative organs of the state through intrusive court orders. It must however be noted that the nature of supervisory orders is that the order is often granted in general terms, leaving a margin of discretion to the executive and the applicants to devise a concrete plan to give effect to the constitutional obligations described in broad terms in the initial order.[167] Supervisory orders can in fact be more responsive to separation of powers concerns than the traditional final and specific court orders which can be both "inefficiently rigid and unnecessarily intrusive on executive authority".[168]

Socio-economic deprivations are systemic in nature, often reflecting underlying structural social and economic failures resulting in a significant number of people being deprived of rights.[169] Consequently, courts should be in a position to develop and adopt appropriate remedies that will have a wider impact, positively impacting on the lives of both the claimants before the court and similarly-situated individuals and groups not part of the litigation. Significantly, comparative experience from similarly-situated jurisdictions such as South Africa show that structural interdicts are the most effective remedies for violation of socio-economic rights.[170] Effective responses for violations of socio-economic rights reflect a society aspiring towards an equitable distribution of resources, social justice and the protection of marginalised groups.

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[165] W. Trengove, 'Judicial Remedies for Violations of Socioeconomic Rights', 4 *ESR Review* (1999) pp. 8–11.
[166] Liebenberg, *supra* note 87, p. 100.
[167] Liebenberg, *supra* note 3, p. 434.
[168] C. F. Sabel and W. H. Simon, 'Destabilization Rights: How Public Law Litigation Succeeds', 117 *Harvard Law Review* (2004) p. 1085.
[169] Biegon, *supra* note 23, p. 49.
[170] Liebenberg, *supra* note 3, pp. 424–434.

4 Conclusion

Socio-economic rights provide a framework for social engineering to achieve social justice for marginalised groups and an egalitarian society focused on substantive equality, and not just on formal equality. The Declaration of Rights contained in Chapter 4 includes a comprehensive set of economic, social and cultural rights, alongside civil and political rights, which is a fundamental departure from the Independence Constitution. The constitutionalisation of socio-economic rights, in so many ways, gives renewed impetus to the philosophical debates in the human rights discourse on the legal status of socio-economic rights and whether such rights could be subjected to judicial enforcement. The adjudication of socio-economic rights, nevertheless, raises complex questions relating to the justiciability of these rights, in particular the legitimacy of involving courts in complex and often contentious fiscal and policy debates. Such concerns are particularly more pronounced given Zimbabwean courts' relative inexperience in the enforcement of socio-economic rights. This chapter has argued that including socio-economic rights as justiciable rights demonstrates a concrete desire to ensure that the political process consistently works towards assisting the poor and marginalised in accessing the basic needs to ensure a dignified livelihood. Additionally, the constitutionalisation of socio-economic rights serves to ensure governmental attention to important interests that might otherwise be neglected in ordinary debates.

This chapter pointed out, however, that Zimbabwean courts will have to develop a conceptual understanding of the proper role of courts in enforcing socio-economic rights and how the enforcement role can be performed without usurping the powers of the other arms of government. Significantly, given the abstract nature of the rights, the courts and other adjudicative mechanisms will not only have to give normative content to the socio-economic rights enshrined in the Declaration of Rights but also develop a standard for assessing state compliance with the positive duties imposed by such rights. It was also noted that socio-economic deprivations are often systemic in nature, frequently reflecting underlying structural, social and economic failures resulting in a significant number of people being deprived of rights. Consequently, courts should be in a position to develop and adopt appropriate remedies that will have a wider impact, positively impacting on the lives of both the claimants before the court and similarly-situated individuals and groups not part of the litigation. The constitutionalisation of socio-economic rights means that the Constitution considers poverty as a human rights issue that not only requires the involvement of the political organs of the state for its resolution but also accords victims of poverty enforceable rights to demand an account from the state on the measures it has taken to enhance access to social goods and a dignified living.

12 Unpacking the Environmental Rights Clause in the Zimbabwean Constitution

James Tsabora*

1 Introduction

The protection of the environment has become a key feature of national legal frameworks. States have established comprehensive governance regimes for environmental conservation that not only seek to address prominent threats to environmental integrity but also to protect people's right to a clean environment that is not harmful to their health. The momentum for the comprehensive environmental conservation legal frameworks also prominently derives from the global movement for environmental protection,[1] traceable as far back as the 1972 Stockholm United Nations Conference on Human Environment 'the Earth Summit' to the 2015 Paris Agreement on Climate Change.[2] Thus, it is not in doubt that environmental regulation will continue being a significant governance system for states in the foreseeable future.

Zimbabwe's 2013 Constitution entrenches an environmental rights clause[3] that reflects comparative approaches to environmental conservation.[4] A cursory glance at the environmental rights clause illustrates that the structure and terminology used derives from several norms and best practises in environmental conservation that have cascaded from the international environmental law framework. For Zimbabwe, the environmental rights clause mirrors the state's aspirations in environmental governance. It also establishes a concrete foundation for framework environmental law whose aim is to "define overarching and generic principles in terms of which sectoral-specific legislation is embedded",[5] as well as to establish an integrated environmental governance framework.[6]

From a constitutionalism perspective, the constitutionalisation of environmental rights as a specie of human rights is now embraced as part and parcel of what is now known as the Environmental Rule of Law (EROL). In essence, this is a concept that is linked to the broader concept of the rule of law. The concept is defined as:

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[1] *See generally* P.W Birnie and A. E Boyle, *International Law and the Environment,* 2nd edition (OUP Oxford, 2002).

[2] For a discussion, *see* R. S. Dimitrov, 'The Paris Agreement on Climate Change: Behind Closed Doors', 16:3 *Global Environmental Politics* (August 2016).

[3] Section 73 of the Constitution.

[4] The environmental rights clause is curiously similar to the same right as enshrined in section 24 of the Constitution of the Republic of South Africa, 1996.

[5] *See* J. Nel and W. du Plessis, 'An Evaluation of NEMA Based on a Generic Framework for Environmental framework legislation', *South African Journal of Environmental Law and* Policy (2008) p. 1.

[6] *See* T. Murombo, 'Balancing Interests Through Framework Environmental Legislation in Zimbabwe', in M. Faure and W. du Plessis (ed.), *The Balancing of Interests Through Framework Environmental Legislation in Africa* (PULP, 2011) p. 566.

> Integrating the critical environmental needs with the essential elements of the rule of law, and provides the basis for reforming environmental governance. It prioritises environmental sustainability by connecting it with fundamental rights and obligations. It implicitly reflects universal moral values and ethical norms of behaviour, and it provides foundation for environmental rights and obligations. Without environmental rule of law and the enforcement of legal rights and obligations, environmental governance may be arbitrary, that is, discretionary, subjective and unpredictable.[7]

Through the EROL, environment conservation can be mainstreamed in socio-economic activities and natural resources can be managed sustainably, transparently and accountably, thereby contributing towards sustainable development.[8] The EROL was first recognised in 2013 when the United Nations Environmental Programme adopted Decision 27/9 on Advancing Justice, Governance and Law for Environmental Sustainability.[9] Through the Decision, member states recognised the growing importance of the rule of law in environmental management to reduce violations of environmental law and to achieve sustainable development.

Interrogating the constitutional environmental right clause is also necessitated by several reasons. Importantly, environmental conservation is an important policy area in Zimbabwe's policy-making landscape. The major basis for this is that Zimbabwe's social and economic development model is essentially based on agriculture and natural resources extraction as well as other forms of industrial activity critically dependant on the environment. Indeed, each key economic activity in Zimbabwe's prominent economic sectors, namely agriculture, mining, industry, energy and tourism, pose significantly adverse impacts on the environment in terms of demands for energy, water and materials as well as production of waste, effluent and emissions. It is also estimated that about 70 per cent of Zimbabweans live in rural areas and are directly dependent on the environment for the sustenance of their livelihoods.[10] The urban environments are not spared either; they are the most polluted, exploited and consequently highly exposed to environmental degradation of all kinds. Accordingly, the environmental governance framework aimed at responding to these issues becomes a central policy area worthy of research and analysis.

It is in view of this that the environmental rights clause enshrined in the Constitution must be interrogated. In this vein, the substance of this chapter is a critical appreciation of the meaning and scope of the constitutional environmental rights clause in Zimbabwe's 2013 Constitution. This chapter's primary aim is to: (1) provide a description and discussion of the constitutional environmental rights clause; (2) interpret the substantive norms, principles and concepts expressed in the

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[7] *See* Report of the Secretary-General on the Rule of law and Transitional Justice in Conflict and Post Conflict Societies (2004) p. 4.
[8] *Ibid.*, p. 2.
[9] United Nations Environmental Programme General Council Decision 29/9 (2013), p. 25.
[10] Government of the Republic of Zimbabwe. Ministry of Environment and Natural Resources Management. *Zimbabwe Environmental Outlook: Our Environment, Everybody's Responsibility. Executive Summary*, Unpublished (2016) p. 10.

constitutional environmental rights clause (these include the concept of sustainable development, the progressive realisation of environmental rights, the principle of intra-generational equity, among others); (3) illustrate the linkages between the norms embedded in the constitutional environmental rights clause and the standards in the framework legislation, the Environmental Management Act (EMA);[11] (4) and relay some final conclusions.

2 The Constitutional Environmental Rights Clause

Zimbabwe's 2013 Constitution has a constitutional environmental rights clause which is transfixed in its Declaration of Rights.[12] The relevant provision provides that every person has a right to:

> (a) an environment that is not harmful to their health or well-being; and
> (b) to have the environment protected for the benefit of present and future generations, through reasonable and legislative and other measures that –
> (i) prevent pollution and ecological degradation
> (ii) promote conservation
> (iii) secure ecologically sustainable development and use of natural resources while promoting economic and social development.[13]

As with various other socio-economic rights, the environmental clause ends with a clawback clause; the state is obligated to take reasonable legislative and other measures, *within the limits of the resources available to it*, to achieve the progressive realisation of the rights set out in the clause.[14]

It must be stated that various features characterise this constitutional environmental rights clause. Of the several features, two key features stand out for iteration. Firstly, the right is available to 'everyone' and this entails foreign persons and citizens alike, and these can be corporate entities, juristic and natural persons, and even government departments or state-owned companies.[15] In as much as the clause makes these persons 'right-holders', it also creates responsibilities and obligations for them. In essence, what this means is that the right does not only create entitlements to natural or juristic persons to enjoy, it also obliges them not to create conditions or circumstances that would negate other persons enjoyment of environmental rights. The appropriate description for this is the horizontal application of the right. By application, this means that the right addresses not only the relationship between the state and a person 'vertical relationship', but also addresses the relationship between private persons 'horizontal application' and prohibits these private persons from acting in a manner that adversely impacts on each other's environmental rights. In this way, the environmental rights clause, as a

[11] Chapter 20:22.
[12] The Declaration of Rights is embodied in Chapter 4 of the Constitution.
[13] Section 73(1).
[14] Section 73(2).
[15] Various governments have established state owned enterprises as players in the economic sector. For Zimbabwe, various of these state-owned companies are in the mining and other sectors that impact on the environment.

part of the Declaration of Rights, *directly protects individuals against abuses of their rights by other individuals*.[16]

Another feature is that the constitutional environmental rights are constituted by five sub-elements, which could be read as its key norms. These are: prevention of pollution, intra-generational equity, sustainable development, the principle of wise use of natural resources, and, finally, the progressive realisation of rights. Clearly, these critical norms or principles are specifically mentioned for purposes of guiding the content and outputs of environmental laws;[17] all environmental laws must incorporate these principles and make them central, instead of negating them.[18]

Despite predating the 2013 Constitution which houses the constitutional environmental rights clause, there are direct linkages between the norms in the environmental rights clause and those in Zimbabwe's framework environmental legislation passed in 2002. The provisions of this framework legislation, called the Environmental Management Act[19] are significant. Without doubt, the EMA goes a long way in incorporating contemporary norms and best standards of environmental protection.[20] Indeed, the constitutional environmental rights clause is a refinement of the environmental right enshrined in section 4(1) of EMA. Section 4 provides as follows:

> (1) Every person *shall*[21] have a right to—
> (a) a clean environment that is not harmful to health; and
> (b) access to environmental information, and protect the environment for
> (c) the benefit of present and future generations and to participate in the implementation of the promulgation of reasonable legislative, policy and other measures that—
> i) prevent pollution and environmental degradation; and
> ii) secure ecologically sustainable management and use of natural resources while promoting justifiable economic and social development.

The environmental rights in EMA fall under the title 'Environmental rights and principles of environmental management'. It must be observed that there are some differences in the aspects of the environmental rights in comparison to the key features in the constitutional environmental rights clause. This needs to be tidied possibly through amendment so that the legislative right is aligned to the constitutional right. The reason is that, in practice, a right that is recognised and granted by a Constitution needs to be given the same meaning and content by the implementing legislation. Confusion and ambiguity occur where the legislative right

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[16] *See* I. Currie and J. De Waal (eds), *The Declaration of Rights Handbook*, 6th edition (Butterworths, 2015) p. 41.

[17] *See generally* D. V. Cowen, 'Toward Distinctive Principles of South African Environmental Law: Some Jurisprudential Perspectives and a Role for Legislation', 52 *THRHR* (1989) p. 8.

[18] *See generally* UNEP, *Proposal for a Basic Law on Environmental Protection and the Promotion of Sustainable Development, Document Series on Environmental Law No. 1 (*1993), p. 6.

[19] Chapter 20:22.

[20] T. Madebwe, 'A Rights-Based Approach to Environmental Protection: The Zimbabwean Experience', 15 *African Human Rights Law Journal* (2015) p. 110; Murombo, *supra* note 6.

[21] The use of the term 'shall' appear rather out of sync with the phrasing of rights in the 2013 Constitution. It is however argued that this must not be read as requiring a different understanding of the clear provisions of the section.

goes further in scope, normative content and meaning that the constitutional right. Of course, this must not detract from the significant environmental norms and principles explicit in the legislative right. These include public participation, sustainable management of resources, sustainable development, pollution prevention, intra-generational equity and access to environmental information.[22] Without doubt, since EMA is a framework legislation aimed at defining "overarching and generic principles in terms of which sectoral-specific legislation is embedded",[23] the principles enshrined in the Act are sufficiently comprehensive to guide sector-specific environmental legislation in Zimbabwe.

3 Interpreting the Constitutional Environmental Right Clause

The environmental rights clause is novel in Zimbabwean constitutional framework, having been absent in the Lancaster House Constitution that came with political independence. Between 1980 and 2013, several developments occurred which gave momentum to the environmental movement. As a consequence, environmental standards kept evolving, and the international environmental law system grew stronger. Various states strengthened their environmental governance frameworks and granted recognition to a stand-alone environmental right in either their constitutional systems or their legislative frameworks. The scope of the constitutional environmental clause in the 2013 Constitution testifies to these and other developments in environmental law over the past three decades.

In substance, various features emerge from the environmental rights clause. It must be noted that the term 'environment' is not defined in the 2013 Constitution, and this is left to the Environmental Management Act. The Act defines 'environment" as referring to:[24]

> (a) the natural and man-made resources physical resources, both biotic and abiotic, occurring in the lithosphere and atmosphere, water, soil, minerals and living organisms whether indigenous or exotic, and the interaction between them;
> (b) ecosystems, habitats, spatial surroundings and their constituent parts whether natural or modified or constructed by people and communities, including urbanised areas, agricultural areas, rural landscapes, and places of cultural significance;
> (c) the economic, social, cultural or aesthetic conditions and qualities that contribute to the value of the matters set out in paragraphs (a) and (b);

There is no doubt that this definition is the one that must be adopted in understanding the constitutional environmental right.[25] There is nothing in the Constitution that suggests that the term 'environment' must be understood differently from how it is

[22] There was no right to access to information in the Constitution when EMA was passed into law in 2002. The Constitution now entrenches such right in section 62.
[23] *See* J. Nel and W. du Plessis, 'An Evaluation of NEMA Based on a Generic Framework for Environmental Framework Legislation', *South African Journal of Environmental Law and* Policy (2008) p. 2.
[24] Section 2 of EMA.
[25] *See* the approach used by the Constitutional Court in *Zimbabwe Law Officers Association & Anor v. National Prosecuting Authority & Four Ors* CCZ 1/2019.

defined in the Act. It is argued that the definition proffered by EMA is comprehensive and in tandem with regional[26] and global understanding of the environment.

On the scope of the right, it is clear that the clause creates a substantive right for everyone 'to an environment that is not harmful to their health or well-being'. An immediate element in this is the possible link of the environmental right to the right to health. According to Kidd, "the term health must be construed as going beyond 'physical health' and possibly encompass aspects such as complete physical, mental and social well-being".[27] This is because the environmental right recognises the need for the environment to be conserved in a manner that does not endanger people's health or well-being.[28] From this, environmental conservation is done to the benefit of people's health and well-being and not the environment itself. Other scholars[29] describe this phrasing of the environmental right as also recognising the *right of the environment* not to be degraded. It is however contended that such an understanding of the environmental right cannot be applied to Zimbabwe since its environmental and constitutional jurisprudence does not create or recognise rights of anything other than people. In fact, the Constitution is clear that the rights and freedoms in the Declaration of Rights are binding and apply only to natural and juristic persons as well as the State and all institutions of government.[30]

To what extent does the environmental right accrue to corporate entities, or juristic persons? Do these entities also enjoy the right to a clean environment that is not harmful to health and well-being or this was intended only for natural persons? The Constitution defines 'person' as referring to an "individual or a body of persons, whether incorporated or unincorporated".[31] Apart from this, the Constitution provides that both juristic persons and natural persons "are entitled to the rights and freedoms" in the Declaration of Rights, albeit "to the extent that those rights and freedoms can appropriately be extended to them".[32] From this, it is clear that the environmental right clause is available to juristic persons or corporate entities. The Constitution is alive to the fact that some constitutional rights cannot be enjoyed by juristic persons but are available to natural persons only; juristic persons can benefit from these rights only "to the extent that those rights and freedoms can be appropriately be extended to them".[33]

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[26] *See for instance* section 1 of South Africa's National Environmental Management Act.

[27] M. Kidd, 'Environment', in Currie and De Waal, *supra* note 16, p. 519. Kidd makes reference to, and seemingly endorses the approach by the World Health Organisation.

[28] *See* discussion on how the term 'well-being' may be construed in Kidd, *ibid.*, pp. 520–522.

[29] *See* the arguments by C. Stone, 'Should Trees Have Standing? Revisited Towards Legal Rights for Natural Objects', *Southern California Law Review* (1972) p. 450.

[30] *See* section 45 of the Constitution. It provides as follows:
(1) This Chapter binds the State and all executive, legislative and judicial institutions and agencies of government at every level.
(2) This Chapter binds natural and juristic persons to the extent that it is applicable to them, taking into account the nature of the right or freedom concerned and any duty imposed by it.
(3) Juristic persons as well as natural persons are entitled to the rights and freedoms set out in this Chapter to the extent that those rights and freedoms can appropriately be extended to them."

[31] *See* section 331.

[32] Section 45(3).

[33] Section 45(3) of the 2013 Constitution.

Another feature of the environmental right is that the right recognises environmental conservation as necessary to benefit not only present generations, but also future generations, a principle known as intra-generational equity. In essence, this means that every person expects the state to undertake environmental conservation for both short term and long-term purposes. A person can thus approach a court if s/he is currently not exposed to environmental harm, but where there is a likelihood that despite current environmental integrity future generations will be exposed to environmental risks. From a procedural perspective, this means that a person not facing any environmental threat or harm still has *locus standi* to enforce the environmental right for the benefit of future generations. The *locus standi* provisions in section 85 of the Constitution must thus be interpreted broadly to envisage this position. In fact, it is arguable that section 85 of the Constitution is broad enough and various sub provisions must be considered as applicable for this purpose. For instance, a person seeking to litigate on behalf of future generations may found *locus standi* on the basis that they are "acting on behalf of another person who cannot act for themselves"; or that they are acting in "the public interest", or finally that they seek to act "in the interests of a group, or class of persons".[34]

A third feature of the environmental rights clause is that it establishes the key normative content for the national environmental conservation legal framework. In other ways, it establishes the norms that must characterise the Zimbabwean environmental conservation framework. Thus, the national environmental legislative framework must achieve prevention of pollution and ecological degradation, promote conservation, secure ecologically sustainable development, and secure the use of natural resources whilst promoting economic and social development.

It is argued that these norms must be mainstreamed in national environmental laws and policies, strategies and action plans. Indeed, environmental laws and regulations must be assessed to determine whether they incorporate these norms. Further, environmental conservation laws must be scrutinised to determine whether their substantive norms and administrative procedures promote the norms built in the constitutional environmental clause.

Finally, the limitations of the environmental right in the Constitution and environmental laws must not erode these normative principles since this would negate the 'true objective' of the right. In *Re Munhumeso v. Ors*[35] the Supreme Court stated that in interpreting a fundamental constitutional right, a Court must adopt a broad approach and must principally depart from an interpretation that reneges on the freedom in question. The Supreme Court held:

> All provisions bearing upon a particular subject are to be considered together and construed as a whole in order to effect the true objective. Derogations from rights and freedoms which have been conferred should be given a strict and narrow, rather than a wide construction. Rights and

[34] *See* section 85 of the 2013 Constitution.

[35] *See In Re Munhumeso v. Ors*, 1994 (1) ZRL 49 (S); *Rattigan and Others v. Chief Immigration Officer of Zimbabwe*, [1994] Cases No 45/94, 92/94; and *Smyth v. Ushewokunze & Anor*, [1997] 2 ZLR 544 (S).

> freedoms are not to be diluted and diminished unless necessity or intractability of language dictates otherwise.[36]

Despite predating the 2013 Constitution, the *In Re Munhumeso* case defines Zimbabwe's constitutional jurisprudence on the enforcement and interpretation of rights and freedoms as well as their limitations. The legal position in the *In Re Munhumeso* case was further echoed in the case of *Chimakure v. Attorney-General of Zimbabwe,*[37] which clarified the position regards the interpretation of limitations in terms of section 86(2) of the 2013 Constitution. In the *Chimakure* case, the Constitutional Court remarked that "[t]o control the manner of exercising a right should not signify its denial or invalidation."[38]

4 The Concept of Sustainable Development

It is necessary to briefly delve on the concept of sustainable development as envisaged in the constitutional environmental right clause. In specific terms, the clause protects every person's right to have the environment protected for present and future generations through measures that, *inter alia,* secure ecologically sustainable development and use of natural resources while promoting economic and social development.

Importantly, the concept of sustainable development now characterises both international and domestic environmental law frameworks.[39] In 1987, the World Commission on Environment and Development defined the concept of sustainable development as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs".[40] Since then, the definition of the concept have evolved to be broader. Scholars now agree that sustainable development incorporates the important environmental law principles of inter- and intragenerational equity, as well as the principle of integration.[41]

In general, sustainable development is based on three pillars, namely economic, social and environmental.[42] It is described as "a conceptual framework for achieving economic development that is socially equitable and protective of the natural resource base on which human activity depends". [43] This understanding is echoed

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[36] *In Re Munhumeso v. Ors*, 1994 (1) ZRL 49 (S).
[37] *Chimakure v. Attorney-General of Zimbabwe*, Constitutional Application No. SC 247/09 (2014), 21.
[38] *Ibid.*, 21.
[39] *See* T. Murombo, 'From Crude Environmentalism to Sustainable Development Fuel Retailers', *South African Law Journal* (2008) pp. 491–492.
[40] WCED, *Our Common Future* (1987), at p. 43.
[41] *See* M. Kidd, 'Removing the Green-Tinted Spectacles: The Three Pillars of Sustainable Development in South African Environmental Law', *South African Journal of Environmental Law and Policy* (2008) p. 14.
[42] D. Hallowes and M. Butler, The GroundWork Report. The Balance of Rights – Constitutional Promises and Struggle for Environmental Justice (2004) p. 8.
[43] J. C. Dernbach, 'Sustainable Development as a Framework for National Governance', *Case Western Reserve Law* Library Number 1 (1998) p. 3.

in the South African jurisdiction. In the *Fuel Retailers* [44] case, the South African Constitutional Court expressed its views on the meaning of the concept in the South African environmental legal framework. The words of Ngcobo JCC are apposite. The Judge held:

> Sustainable development does not require the cessation of socio-economic development but seeks to regulate the manner in which it takes place. It recognises that socio-economic development invariably brings risk of environmental damage as it puts pressure on environmental resources. It envisages that decision-makers guided by the concept of sustainable development will ensure that socio-economic developments remain firmly attached to their ecological roots and that these roots are protected and nurtured so that they may support future socio-economic developments.[45]

The Zimbabwean framework environmental legislation does not define the term 'sustainable development'. The Act however focuses on 'sustainable utilization' which it defines as "the use or exploitation of the environment which guards against the extinction, depletion or degradation of any natural resource and permits the replenishment of natural resources by natural means or otherwise".[46] The South African National Environmental Management Act[47] defines sustainable development as "the integration of social, economic and environmental factors into planning, implementation and decision-making to ensure that development serves present and future generations".[48] Without doubt, this definition sheds much clarity and means that the South African jurisdiction has a settled position on this issue.

5 Progressive Realisation of Environment Rights

The environmental rights clause recognises that environmental rights in section 73 must be implemented in a manner that ensures the progressive realisation of the rights. Section 73(2) provides that the state must take "reasonable legislative and other measures, within the limits of the resources available to it, to achieve the progressive realization" of rights in the provision. It is now accepted that progressive realisation of rights depends on the availability of resources. This position is common for all socio-economic rights that are distinguished from civil and political rights whose realisation is regarded as immediate.[49]

There are several disconcerting issues with regards to the concept of progressive realisation of human rights. Importantly, the concept of the progressive realisation is based on the minimum core content principle, which guides the realisation of the right. There are some minimum presumptive legal entitlements, which should be

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[44] *Fuel Retailers Association of Southern Africa v. Director General Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others*, 2007 (6) SA 4 (CC). *See also HTF Developers (Pty) Ltd v. Minister of Environmental Affairs and Tourism and Others*, 2007 (5) SA 438 (SCA).
[45] *Ibid.*, para. 58.
[46] *See* section 2 of EMA.
[47] Act 107 of 1998.
[48] Section 1 of NEMA.
[49] Article 2 of the ICESCR.

non-derogable if the right is to be meaningful.[50] Further, the concept of progressive realisation does not mean inordinate delay by the government in taking steps. It requires the state to take steps expeditiously and such steps must be appropriate. These could either be legislative, provision of judicial remedies, policy and other administrative measures to make sure that the rights are implemented. The obligation to progressively realise does also not mean discretion on the state to defer indefinitely the full realisation of the rights. In fact, the state must set time limits and benchmarks, targets and indicators on the progressive implementation of the protected rights. In other words, the government must have a measurable plan for the implementation of the rights.[51]

The concern with most developing countries such as Zimbabwe is that governments may take advantage of the progressive realisation requirement to either indefinitely defer the realisation of the environmental right, or handle the fulfilment of the right without the required level of seriousness. This is very possible when one takes into account the economic challenges that the country is currently facing. There are several competing priorities and it is tempting for the government to regard environmental issues as peripheral when it comes to the allocation of resources despite the fact that they are now part and parcel of the Declaration of Rights.

Debate can be triggered on whether the environmental right should be understood as having both immediate and progressive realisation qualities. Can this debate be sustained? It is strongly contended that there is a basis to argue that the environmental rights clause has both immediate and progressive realisation qualities. This is supported by the concept of progressive realisation itself. The United Nations Committee on Economic, Social and Cultural Rights (CESCR) has described progressive realisation as requiring immediate and tangible progress towards the realisation of rights, and that consequently states cannot drag their feet. Indeed, states are required to begin immediately to take steps to fulfil their obligations.[52] Further, states have an immediate obligation not to pursue deliberate retrogressive measures.[53] From this context, it means that states have immediate obligations to fulfil and promote the realisation of the rights. This approach is in tandem with comparative approaches elsewhere and must therefore be followed in the interpretation and enforcement of the Zimbabwean environmental rights clause.[54]

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[50] K. G. Young, 'The Minimum Core of Economic and Social Rights: A Concept in Search of Content', *The Yale Journal of International Law* (2008) p. 115.

[51] *See ibid.*

[52] Limburg Principles on the Implementation of the ICESCR, UN doc. E/CN4/ 1987/17, Annex, para. 21; reproduced in 1987 *Human Rights Quarterly* pp. 122–135. The Limburg pPrinciples have been a source of authoritative interpretation of rights at both the international and national levels.

[53] Limburg Principles on the Implementation of the ICESCR, UN doc. E/CN4/ 1987/17, Annex, para. 21.

[54] *See for instance* General Comment No. 13, para 45; CESCR General Comment No. 15 – The Right to Water, UN Doc. E/C12/2002/11 (2003), para. 19; General Comment No. 18, para. 21. *See also* the African Commission on Human and Peoples' Rights Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights, para. 14 and *Government of the Republic of South Africa v. Grootboom*, 2001 1 SA 46 (CC), para. 45 (right to adequate housing in the context of an eviction).

It can also be argued that the value system of the 2013 Constitution supports an understanding of some of the socio-economic rights requiring both immediate and progressive realisation. Section 3 of the Constitution outlines the founding values and principles underpinning the Constitution. Relevant to this discussion is the principle of good governance, which encapsulates transparency, justice, accountability and *responsiveness*. Another equally important principle is the recognition of the inherent dignity and worth of each human being. In addition, principles of public administration specified in Chapter 9 of the Constitution supports timeous and expeditious actions by government and state institutions in discharging their functions. Under Chapter 9, the most relevant principle is the requirement for a timeous response to people's needs.[55] Finally, section 324 of the 2013 Constitution unambiguously is an injunction for implementation of all constitutional obligations "diligently and without delay".[56] To this extent, there is a clear inference that the implementation of rights must be expeditiously performed, rather than delayed.

In the same vein, it must be noted that the horizontal application of rights suggests that the state must swiftly move to protect people's rights against abuses by other private persons. To reiterate, this means that rights that are binding between private persons in their relationship with each other must not wait to be progressively realised, a state has an immediate obligation to ensure there is a law not only for the protection of persons' environmental rights, but also for the provision of appropriate remedies once such rights are violated. The absence of such a law cannot be justified on the basis of progressive realisation.

6 The Duty to Take Reasonable Legislative and Other Measures

In terms of the environmental rights clause, the state must take reasonable legislative and other measures to ensure the realisation of the environmental rights in section 73. Passing laws for environmental conservation is one important measure envisaged by this provision. In this vein, the Zimbabwean government has passed several laws for environmental conservation, and these include the Environmental Management Act, the Water Act,[57] the Forests Act,[58] the Rural District Council Act,59 the Traditional Leaders Act,[60] the Communal Lands Act,[61] among others. Apart from these strictly, environmental law statutes, this duty also entails legislation on non-environmental, but environmental impacting activities, such as laws on agricultural settlement, water catchment, disposal of effluent and industrial waste, among other such activities. It is further contended that other non-legislative measures include the formulation of policies, action plans, strategies, guidelines and establishment of

[55] Section 194(1)(e).
[56] The provision states: "All constitutional obligations to be performed diligently and without delay."
[57] Chapter 20:24.
[58] Chapter 19:05.
[59] Chapter 29:13.
[60] Chapter 29:17.
[61] Chapter 20:04.

monitoring and enforcement mechanisms for purposes of environmental conservation.

It is important to note that these measures must be reasonable. This means that a court scrutinising the 'reasonableness' of these measures has to delve beyond the law; the court must assess choices and decisions, as well as decisions about the allocation of the budget. In essence, this qualifying term 'reasonable' implies that there should be some standard against which government's socio-economic programmes can be measured. In the South African jurisdiction, this issue has been given much clarity. In the *Grootboom*[62] case, the Court held that the question to resolve this inquiry is whether the means chosen by the government are reasonably possible of facilitating the realisation of the constitutional right in question. The Court agreed that it is the prerogative of the legislature and the executive to decide on the precise contours of the measures that had to be adopted to fulfil the constitutional rights.[63] In summary, the Court stated that a reasonable programme must be comprehensive and coordinated in the sense that it clearly allocates responsibilities and tasks to all the spheres of government and ensures that appropriate financial and human resources are available;[64] it must be capable of facilitating the realisation of the right;[65] the measures must be reasonable both in their conception and its implementation;[66] they must be balanced and flexible in the sense that it makes provision for short, medium and long term needs;[67] and finally they must include a component that answers to the exigencies of those in desperate need.[68]

Various other cases and scholarly analyses have more or less endorsed this reasoning.[69] For instance, the in the *Soobramoney* case, the Constitutional Court stated that it is essential that for them to be reasonable:

> measures cannot leave out of account the degree and extent of the denial of the right they endeavour to realise. Those whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril, must not be ignored by the measures aimed at achieving realisation of the right. It may not be sufficient to meet the test of reasonableness to show that the measures are capable of achieving a statistical advantage in the realisation of the right. Furthermore, the Constitution requires that everyone must be treated with care and concern. If the measures, though statistically successful, fail to respond to the needs of those most desperate, they may not pass the test[70]

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[62] *Government of the Republic of South Africa & Others v. Grootboom & Others* 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC).
[63] *Grootboom*, paras. 32–33.
[64] *Ibid.*, paras. 39–40.
[65] *Ibid.*, para. 41.
[66] *Ibid.*, para. 42.
[67] *Ibid.,* para. 43.
[68] *Ibid.*, para. 44.
[69] *See* K. Lehman, 'In Defense of the Constitutional Court: Litigating Socioeconomic Rights and the Myth of the Minimum Core', 22 *American University International Law Review* (2006) pp. 163–197; M. Wesson, '*Grootboom* and Beyond: Reassessing the Socio-economic Rights Jurisprudence on the South African Constitutional Court', 20 *SAJHR* (2004) pp. 284–308; A. Sachs, 'The Judicial Enforcement of Socio-economic Rights', 56 *Current Legal Problems* (2003) pp. 579–601.
[70] *See Soobramoney v. Minister of Health,* KwaZulu-Natal, 1997 (12) BCLR 1696, para. 44.

Without doubt, the reasoning in this judgment is difficult to resist. Indeed, a persuasive contention can be made justifying this South African approach being used as guide, albeit, with modifications, to give content to the phrase 'reasonable legislative and other measures' in the interpretation of the constitutional environmental rights clause of the Zimbabwean Constitution. This approach has been endorsed as practically logical and useful by various scholars,[71] including those from outside the South African jurisdiction. Most importantly, the Committee on Economic, Social and Cultural Rights has interpreted socio-economic rights implementation in a manner not very different from the approach suggested by the South African Constitutional Court.[72] For instance, the CESCR has stated that the measures to be taken by states "should be appropriate in the sense of producing results which are consistent with the full discharge of its obligations by the State Party".[73] In addition, the CESCR has held that states have an obligation to permanently monitor the process of realisation of the rights and the problems encountered, and to devise strategies and programs for their implementation, such as detailed plans of action, with special attention for the vulnerable and disadvantaged groups in society.[74]

7 Other Environmental Principles

As mentioned above, an appreciation of the constitutional environmental rights clause illustrates the major principles that must underpin Zimbabwe's environmental law. Some of these principles are already embedded in the framework environmental legislation, namely EMA. The concept of sustainable development has been discussed above, and requires no further elaboration. One of the principles related to sustainable development concept is the principle of integration.

The principle of integration is central to the concept of sustainable development. It essentially entails the consideration of the three elements of social, economic and environmental factors in developmental issues.[75] Kidd provides an interesting analogue to illustrate its meaning:

This approach to sustainable development reflects the commonly-held view that sustainable development is analogous to a traditional African three-legged cooking pot. Without the three legs 'environmental, economic and social', the pot will be useless. Moreover, no one of the legs is more important than the others, or the pot will be unbalanced and topple over. Sustainable development, on the basis of this

[71] D. Bilchitz, 'Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-economic Rights Jurisprudence', 19 *SAJHR* (2003) pp. 1–26.
[72] It must be noted that the South African Constitutional Court appear to reject the notion of minimum core obligation adopted by the CESCR. *See Minister of Health and Others v. Treatment Action Campaign and Others*, 2002 (5) SA 721 (CC), paras. 33–39.
[73] General Comment no. 9 (1998), the Domestic Application of the Covenant, UN Doc. E/C.12/1998/24, para. 5.
[74] General Comment no. 3, para. 11 and General Comment no. 1 (1989), Reporting by States Parties, paras. 3 and 4, contained in UN Doc. E/1989/22.
[75] *See Fuel Retailers* case, *supra* note 45, paras. 48–52.

view, thus regards the economic, environmental and social legs as all equally important – none of them ought to be regarded as a primary consideration.[76]

The Environmental Management Act does not grant isolated recognition of this principle. It however grants power to the minister of the environmental affairs to "promote the integration of conservation and sustainable use of biological diversity into relevant sectoral policies, plans and programmes".[77]

Apart from the above, EMA establishes a list of principles that "shall apply to the actions of all persons and all government agencies, where those actions significantly affect the environment".[78] Section 4(a) of EMA lists the principles, and one such principle recognises that "all elements of the environment are linked and inter-related, therefore environmental management must be integrated and the best practicable environmental option pursued".[79]

Further, EMA provides for the principle of integration in section 4(2)(e), where it provides that "development must be socially, environmentally and economically sustainable". Further, EMA requires that national environmental plans must formulate measures and strategies for purposes of "generally ensuring an integrated approach to the maintenance and improvement of the environment so as to afford an acceptable quality of life".[80]

Several other principles of environmental law that relate to principles in the constitutional environmental rights clause are enshrined in the Environmental Management Act. For instance, EMA recognises the principle of inter-generational equity;[81] prevention, minimization and remediation of adverse environmental impacts;[82] anthropocentric nature of environmental conservation;[83] the polluter pays principle;[84] public participation principle;[85] and other principles.[86] EMA does not however outline all the key principles of environmental law, and this is a weakness. It is submitted that key principles such as the precautionary principle, the public trust doctrine and the environmental justice principle[87] detract from EMA. An argument can however be made that possible future amendments to EMA must consider the

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[76] *See* Kidd, *supra* note 41, p. 18.
[77] Section 116(1)(g).
[78] Section 4(2).
[79] Section 4(2) (a).
[80] Section 88 (g) of EMA.
[81] Section 4(1).
[82] *See* section 4(2)(g).
[83] Section 4(2)(b), which states that "environmental management must place people and their needs at the forefront of its concern".
[84] *See* section 4(2)(g). According to one scholar, this principle has a 'trilateral purpose', namely to institute obligations for the polluter to (i) prevent, reduce and regulate pollution and environmental damages; (ii) pay damages and compensation for damages suffered by the environment and humans as a result of pollution or environmental damage; and (iii) restore and clean up the environment where pollution or environmental damage has occurred. *See* L. Kramer, *EC Treaty and Environmental Law* (1995) pp. 56–57.
[85] Section 4(2)(c).
[86] *See generally* section 4(2) of EMA. *See also* discussion of these in Murombo, *supra* note 6, p. 568.
[87] Ibid.

inclusion of these principles since they add value to the constitutional environmental rights clause.

8 General Overview

There is no doubt that there is a lot of value in the constitutional environmental rights clause. The set of principles and norms integrated in the clause appropriately reflects the global and comparative understanding of environmental conservation principles. As a constitutional right still novel in the constitutional framework, a lot hinges on judicial interpretation to give practical reality to the promise implicit in the right. Apart from over-reliance with judicial reasoning, guidance must be provided by relevant governmental and environmental institutional agencies that implement the constitutional environmental clause in the context of shared constitutional interpretation approach.[88] However, there is no doubt that additional scholarly literature can shed much-needed clarity on the value and promise inherent in the constitutional environmental rights clause.

From the above rendition, it is clear that two key issues deserve reiteration. Firstly, the interpretive approaches to be adopted in relation to the constitutional environmental rights clause must be guided by human rights law. Only by so doing can the human rights agenda and objectives of the Declaration of Rights be met. Indeed, the Declaration of Rights identifies all the constitutional rights as 'fundamental human rights and freedoms.' This chapter has made reference to the general comments of the Committee for Economic, Social and Cultural Rights, which is a key treaty body whose 'comments' provide comprehensive guidance to the meaning and scope of human rights. Secondly, there is value in interpretations of environmental rights adopted by foreign, comparative jurisdictions. The South African environmental conservation framework has been widely referenced as a comparator for this purpose; the environmental jurisprudence developed by their judicial courts is more comprehensive than our youthful jurisprudence in environmental law. Of course, such guidance must leave room for modifications and departures so that the meaning and scope of Zimbabwe's environmental constitutional rights clause can be properly situated in the Zimbabwean context.

9 Conclusions

The constitutional environmental rights clause entrenched in Zimbabwe's Constitution has much promise. It provides a set of environmental principles and norms that can adequately guide sector-specific environmental legislation. By expression, the clause commands a progressive realisation of the rights. However, by interpretation, there are some obligations in the clause that must be immediately met by the state. To that extent, the state can implement the constitutional environmental clause expeditiously, based on international and comparative interpretations of environmental rights as human rights.

Without doubt, there is need to harmonise the normative content of sectorial legislation so that such legislation adequately embraces the normative principles in the constitutional environmental rights clause. This write-up attempts to provide an interpretive guidance on how this right must be interpreted. However, it is hoped that judicial interpretation can also play an important part in fleshing out the various other aspects of the clause in a manner that meets both the constitutional objectives and the human rights agenda underpinning the Zimbabwean Constitution.

13 Children's Environmental Rights and Environmental Governance in Zimbabwe: A Constitutional Approach

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1 Introduction

Recent studies have shown that despite dramatic improvements in other human rights aspects such as survival, nutrition and education, children face an uncertain future due to climate change and environmental degradation.[1] Children are more susceptible to the effects of environmental harm than adults due to their "physical size, immature organs, metabolic rate, behaviour, natural curiosity and lack of knowledge".[2] Children suffer more from the impacts of environmental degradation and (air and water) pollution than adults. It is estimated that approximately 43 per cent of the total burden of disease caused by environmental risks fall on children under five years of age, globally.[3] In many cases, child-related health conditions, such as asthma and other respiratory tract infections are caused by atmospheric pollution and extreme climatic events.[4] This is the case in many developing countries. Zimbabwe is not an exception.

In 2013, Zimbabwe adopted the Constitution Amendment (No. 20) Act (hereinafter 'Constitution') with a justiciable environmental right entrenched in the Declaration of Rights. As it is often referred to, the right to a healthy environment is a constitutional right that all government institutions are obliged to respect, promote and fulfil. Simultaneously, the Constitution explicitly entrenches children's rights as part of the constitutional package within the Declaration of Rights. Children's rights are by nature, indivisible and interdependent. Thus, the protection and promotion of the right to a healthy environment is a prerequisite for the enjoyment of all other rights for children. As some scholars argue, without environmental protection, it is

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The authors are grateful to Dr. Liberty K. Masekesa for his insightful comments on an earlier draft of this chapter. All viewpoints and errors are the authors' own.
[1] H. Clark *et al.,* 'A Future for the World's Children? A WHO–UNICEF–Lancet Commission', 395 *Lancet* (2020) p. 605.
[2] *See* UNEP, UNICEF and WHO, 'Children in the New Millennium: Environmental Impact on Health', *UNEP, UNICEF and WHO* (2002) p. 7. *See also* P. Mitchell and C. Borchard, 'Mainstreaming Children's Vulnerabilities and Capacities into Community-Based Adaptation to Enhance Impact', 6:4 *Climate and Development* (2014) pp. 372–381.
[3] K. R. Smith *et al.*, 'How Much Global ill Health is Attributable to Environmental Factors?', 10 *Epidemiology* (1999) pp. 573–582.
[4] M. Franchini and P. M. Mannucci, 'Impact on Human Health of Climate Changes', 26:1 *European Journal of Internal Medicine* (2015) pp. 1–5.

impossible to safeguard the rights to life, health, water or play.[5] While there is a scholarly discourse on the constitutional protection of the environmental right in general, including the role of the judiciary in environmental protection,[6] there exists a gap in relation to children's environmental rights and environmental governance. The gap is evident mostly in developing countries, particularly in Africa. This chapter bridges the gap, using Zimbabwe as a context setting.

The central aim of this chapter is to examine the extent to which 'environmental governance'[7] in Zimbabwe complies with the constitutional imperative to respect, promote and protect the environmental rights of children as a specifically vulnerable group. The chapter begins by a critical reflection of environmental governance and the environmental rights of children, giving an international and regional perspective. Thereafter, the chapter explores the terrain of environmental governance in Zimbabwe, using the law and policy as instruments of governance, and specifically focus on the protection of children from environmental harm or degradation. Also, the section explores the procedural rights of children in the context of environmental governance. This part is analysed from two lenses: a constitutional approach and the measures taken at the legislative and policy level. The last part is the conclusion.

2 Environmental Governance and the Environmental Rights of Children

The United Nations Environmental Programme (UNEP) defines environmental governance as the constituent of "the rules, practices, policies and institutions that shape how humans interact with the environment".[8] According to Kotzé, environmental governance entails the regulatory functions of environmental governing bodies in an endeavour to regulate the behaviour of people by means of setting rules, standards and principles through legislation, administrative and executive measures.[9] For Challies and Newig, environmental governance is:

> the totality of interactions among societal actors aimed at coordinating, steering and regulating human access to, use of, and impacts on the environment, through collectively binding decisions. Environmental governance arrangements may be directed towards a range of causes – including conservation and environmental protection, spatial and land use planning,

[5] *See* T. Kaime, 'Children Rights and the Environment', in U. Kilkelly and T. Liefaard (eds.), *International Human Rights of Children* (Springer, Singapore, 2019) pp. 564–583.

[6] *See, for instance*, B. C. Soyapi, 'The Judiciary and Environmental Protection in Zimbabwe', in M. Addaney and A. O. Jegede (ed.), *Human Rights and the Environment under African Union Law* (Springer, Singapore, 2020) pp. 349–379; T. Madebwe, 'A Rights-Based Approach to Environmental Protection: The Zimbabwean Experience', 15 *African Human Rights Law Journal* (2015) pp. 110–128.

[7] *See* part 2 below for the definition of environmental governance and the scope and delimitation of this chapter.

[8] United Nations Environmental Programme (UNEP), 'Environmental Governance', 2009 <wedocs.unep.org/bitstream/handle/20.500.11822/7935/Environmental_Governance.pdf?sequence=5&isAllowed=y> visited on 29 November 2020.

[9] L. J. Kotzé, *A Legal Framework for Integrated Environmental Governance in South Africa and the North West Province* (LLD-dissertation, North-West University, Potchefstroom Campus 2005) p. 52. *See also* L. J. Kotzé, Global Environmental Governance: Law and Regulation for the 21st Century (2012) pp. 294–304.

(sustainable) management of natural resources, and the protection of human health – and operate across scales to address local and global environmental problems.[10]

From the above, one could view environmental governance as the vehicle through which the environmental right is realised at different spheres of governance – at "global, continental, national, (provincial) and local levels".[11] One of the prominent aims of environmental law and policy is to protect the health or 'well-being' of present and future generations of human beings.[12] This part explores the elements of environmental governance from the angle of law and policy, and what that entails in the context of the environmental rights of children. While the term 'governance' is broad and used to encompass governing institutions, the focus of the chapter is limited to the regulatory frameworks.

As Knox and Pejan note, it is now clear that under international and African regional law, issues of environmental protection and human rights are profoundly interdependent.[13] Critical legal scholarship around the substantive right to a healthy environment shows that the right is part of international environmental law and a justiciable right entrenched in many modern constitutions.[14] With this in mind, we argue that the Convention on the Rights of the Child, 1989 (CRC) and the African Charter on the Rights and Welfare of the Child, 1990 (African Children's Charter) must be interpreted to ensure the environmental protection of children in the context of environmental governance. For instance, Article 24(2)(c) of the CRC recognises the special vulnerability of children to environmental harm, indicating that environmental pollution poses dangers and risks to the "attainment of a highest standard of health". The vulnerability of children from environmental harm requires the adoption of multi-dimensional approaches and governance strategies that are sensitive to the needs and interests of children. Such an approach of being child-sensitive is in-tandem with the clarion call that in 'all matters concerning the child' – which include environmental issues – 'the best interests of the child' shall be considered as paramount.[15] Also, Article 29(1)(e) of the CRC obliges states parties to ensure, *inter alia*, that the education of children is directed to the development of and respect for the natural environment. This entails that states must include

[10] E. Challies and J. Newig, *What is 'Environmental Governance'? A Working Definition* (Research Group on Governance, Participation and Sustainability, Leuphana University, 2019).

[11] A. A. Du Plessis, 'Local Environmental Governance and the Role of Local Government in Realising Section 24 of the South African Constitution', 21 *Stellenbosch Law Review* (2010) pp. 265–266; A. Du Plessis, *Fulfilment of South Africa's Constitutional Environmental Right in the Local Government Sphere* (2008) p. 110.

[12] On the meaning of 'well-being' in the environmental right, in general, *See* A. Du Plessis, 'The Promise of "Well-being" in Section 24 of the Constitution of South Africa', 34 *South African Journal on Human Rights* (2018) pp. 191-198.

[13] J. H. Knox and R. Pejan, 'Introduction', in J. H. Knox and R. Pejan, *The Human Right to a Healthy Environment* (Cambridge University Press, Cambridge, 2018) p. 1.

[14] *See* C. Soyapi, *The Role of the Judiciary in Advancing the Right to a Healthy Environment: Eastern and Southern African Perspectives* (LLD degree, North-West University, 2018) pp. 1–7, 36–44. *See also* J. H. Knox, 'The United Nations Mandate on Human Rights and the Environment', in J. R. May and E. Daly, *Human Rights and the Environment: Legality, Indivisibility, Dignity and Geography* (Edward Elgar, 2019) pp. 34–48.

[15] *See* Article 3 of the CRC and Article 4 of the African Children's Charter.

environmental and climate change education into the school curriculum. Integrating the education dimension ensures the recognition of children as actors and participants in environmental protection and in the "respect, promotion, protection and fulfilment"[16] of their rights in the context of environmental governance processes. Also, the participation of children in decision-making (as discussed below) constitutes a fundamental factor that facilitates and promote the healthy development of children as well as the realisation of the substantive environmental right.[17]

Generally, the realisation of the substantive environmental right depends on the fulfilment of three essential procedural elements: participation, access to information and access to justice.[18] Thus, it is critical to ascertain, albeit briefly, what these procedural elements mean to and/or for children and how they can be applied to ensure the respect, protection, promotion and fulfilment of the right to a healthy environment for children. First, the child's right to participate, be heard and taken seriously, is entrenched in international and African regional children's rights. Article 12 of the CRC, and Articles 4 and 7 of the African Children's Charter, provides for a justiciable right of children to be heard in all matters concerning them both in public and private spaces. Child participation is a fundamental right and a foundational pillar of children's rights law.[19] The centrality of child participation is emphasised by the CRC Committee on the Rights of the Child (CRC Committee), in its General Comment No. 20, wherein it underscores the obligation to engage and involve children in the formulation, development, implementation and monitoring of all relevant legislation, policies, services and programmes affecting their lives, at all levels including international, regional, national and local.[20] Giving children the opportunity to participate has the potential to enhance the quality of solutions,[21] particularly in the context of environmental governance.

There is a common belief that children are incompetent and lack the necessary experiences to engage and respond to environmental issues because "children, as is the environment, are regarded as objects of protection".[22] Apparently, this

[16] The concept to implies: (a) respect means duty-bearers must refrain from actions that violates rights or should not directly or indirectly interfere with the enjoyment of, or aid and abet any infringement of, children's rights, and that the state must not engage in, support or condone abuses of children's rights; (b) protect means duty-bearers must take all necessary, appropriate and reasonable measures to prevent third parties from interfering, causing, contributing or violating the rights of children; (c) promote means that duty-bearers must take practical and proactive measures to ensure the advancement of the rights of children; and (d) fulfil means taking positive measures or action to facilitate, promote, provide for and ensure the full realisation of the rights of children. *See* D. J. Karp, 'What is the Responsibility to Respect Human Rights? Reconsidering the "Respect, Protect and Fulfill" Framework', *International Theory* (2019) pp. 83–108.

[17] CRC Committee General Comment No. 20 on the Implementation of the Rights of the Child during Adolescence (2016) CRC/C/GC/20 para. 17.

[18] C. Glinski, 'Environmental Justice in South African Law and Policy', *Law and Politics in Africa, Asia and Latin America* (2003) pp. 64–74.

[19] *See, for instance*, CRC Committee General Comment No.12 on the *Right of the Child to be Heard* (2009) CRC/C/GC/12.

[20] CRC General Comment No.20, para. 23.

[21] CRC General Comment No.12, para. 27.

[22] *Ibid.,* para. 20.

misguided view significantly undermines and limits the weight and seriousness given to children's views in environmental decision making.[23] For instance, in its Day of General Discussion (DGD) on children's rights and the environment, the CRC Committee noted that the right of children to participate in decision making in local environmental governance, is still underdeveloped and decision-makers often disregard the views of children.[24] In many cases, there are formal, institutional and legal requirements that restrict the participation of children in environmental decision making at all levels. As the CRC Committee notes, current institutional frameworks of environmental governance are complex, technical and expert-based, [25] thereby marginalising children from actively taking part in environmental decision or policymaking. Platforms for children's engagement in environmental governance are generally limited, particularly because the legal and policy frameworks were not designed and adopted with children in mind.

Second, children have the right to access to environmental information. Broadly, the right is entrenched under international and African regional environmental agreements. For instance, Principle 10 of the Rio Declaration on Environment and Development (1992) declares that:

> At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness … by making information widely available.

Also, the Stockholm Convention on Persistent Organic Pollutants (2001), one of three multilateral environmental agreements regulating hazardous chemicals and wastes, expressly recognises the rights to access to (environmental) information, which extends to children. The right of children to environmental information, at an international, regional, national and local level, has not received enough attention in environmental legal and policy frameworks. If there is available data (and, in some instances, it may be accessible) either through mass media or other platforms, the information is not simplified to enable children to comprehend the essence of the message and drive usefulness to mitigate environmental harm on their lives or health.[26] One of the concerns expressed by the CRC Committee is the dire lack of comprehensive data on the impact of environmental harm on children:

> [and also the] lack of longitudinal data that relates to environmental harm and children's health and development in different life stages; lack of disaggregated data on children most at risk; lack of information about adverse impacts resulting from loss of biodiversity, resource depletion and degradation of ecosystems; and the lack of integration of environmental, health, and social data.[27]

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[23] *Ibid*.
[24] CRC Committee Day of General Discussion: Children's Rights and the Environment (2016) p. 20.
[25] *Ibid*., pp. 20 and 34.
[26] *Ibid*., p. 17.
[27] *Ibid*., p. 16.

States parties to international and African regional law are responsible for ensuring and making environmental information public and accessible to children. This right could generally be interpreted and enforced through the fundamental right to access information entrenched as a constitutional right in many modern constitutions. In the environmental context, access to environmental information, basically, is essential to the protection and promotion of children's substantive rights such as the right to life, clean water and health. It entails "informing children in a child-friendly, understandable, and age-appropriate manner what the right to the environment is, the impacts of environmental degradation, and what needs to be done to preserve the environment for the benefit of the present and future generations".[28] One could argue that access to information in general and environmental information specifically is the gateway to meaningful participation of children (of different age groups) individually and collectively. The CRC Committee observed that given enough, adequate pedagogical, scientific, and logistical support, children are strategically positioned, grounded in an understanding of local contexts, to identify, interrogate and investigate local environmental challenges affecting their communities from a bottom-up approach.[29] The responsibility to disseminate environmental information is primarily upon the state. However, non-state actors such as transnational, national and local businesses are also equally responsible for ensuring that dissemination of environmental information, especially those whose activities affect communities. The United Nations (UN) Guidelines on Business and Human Rights underscores that businesses have a responsibility, as part of their child-rights due diligence, to compile, access, generate and disseminate environmental information in a child and age-appropriate manner.[30]

Third, access to justice in general remains a major challenge in many developing countries. More so, it is complex when reference is made to children and access to environmental justice. In many jurisdictions, children are procedurally without the legal standing *locus standi* to approach any judicial or administrative forum to seek redress against actual or perceived violation of their right to a healthy environment. While children are directly affected or may suffer or have substantial interests in the matter, in many jurisdictions, one has to be an adult to get access or audience before judicial and administrative bodies. As a result, this requirement potentially creates a barrier for children in accessing courts (access to justice). Some of the challenges that children find themselves facing, apart from the lack of legal standing, relates to the burden of proof, limitation (or prescription) periods upon which seek redress, and the lack of financial resources to pursue legal pathways.[31] Regarding the burden of proof, the cardinal rule is that he who alleges must prove. Environmental litigation places the onus upon the litigants, in this case, children, to establish a strong and sound case, supported by expert evidence and complex environmental impact assessment and data against the government or business giants. In some cases, the lack of environmental justice may be exacerbated by the lack of specialised

[28] *Ibid*., pp. 15 and 32–33.
[29] *Ibid*., p. 16.
[30] Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework (A/HRC/17/31).
[31] CRC General Comment, *Supra* note 21, pp. 21–22.

environmental lawyers to undertake thorough environmental strategic litigation with a specific focus on the protection of the rights and interests of children.[32]

Furthermore, court procedures and time limits could also be a barrier for children. Childhood is a time-bound passage, and children can only claim and enforce their rights while below the age of 18 years. Subsequently, the realisation of children's rights and access to remedies must be immediately available to them. Strategic litigation is time-intensive and children could become adults before the litigation is finalised, thereby depriving them of access to justice during their childhood. Also, strategic litigation is expensive and requires adequate financial resources. In some instances, litigants are deterred from pursuing strategic environmental litigation for fear of incurring considerable costs if they lose the case, or the court rules against them.[33] Legal aid systems in many developing countries are government-funded, thereby making it difficult to challenge the government's failure to fulfil its governance responsibilities in the protection of children from environmental harm. Even after obtaining a court order against government institutions that are responsible for environmental governance, compliance and enforcement of remedial action may remain a challenge for children since compliance and enforcement are subject to political will. In addition, access to justice in general, and for children in particular, is hindered by the lack of specialised environmental (law) courts to facilitate better access to justice in relation to the violation of the right to a healthy environment.

Access to environmental justice means that the State has the responsibility to ensure that children have access to meaningful, effective remedies to redress violations,[34] for instance in the context of environmental degradation caused by the business sector. Access to justice entails the availability of remedies and reparation for the violation of children's environmental rights. The CRC Committee recommended that the forms of reparation should:

> take into account that children can be more vulnerable to the effects of [the violation] of their [environmental] rights than adults and that the effects can be irreversible and result in lifelong damage. [States] should also take into account the evolving nature of children's development and capacities and reparation should be timely to limit ongoing and future damage to the child or children affected; for example, if children are identified as victims of environmental pollution, immediate steps should be taken by all relevant parties to prevent further damage to the health and development of children and repair any damage done. States should provide medical … assistance, legal support and measures of rehabilitation to children who are victims of [environmental degradation] caused or contributed to by business actors. They should also

[32] For a critical analysis of this point, using Uganda's case of *Mbabazi & Others v. The Attorney General and National Environmental Management Authority* Civil Suit No 283 of 2012 (High Court of Uganda, Kampala) as an example, *see* L. J. Kotzé and A. A. Du Plessis, 'Putting Africa on the Stand: A Bird's Eye View of Climate Change Litigation on the Continent', 1 *Journal of Environmental Law and Litigation* (2020) pp. 1–28.

[33] Reference can be made to the 'Costs Protection for Litigants in Environmental Judicial Review Claims: Outline proposals for a costs capping scheme for cases which fall within the Aarhus Convention', pp. 1–15.

[34] CRC Committee General Comment No.5 on General Measures of Implementation of the Convention on the Rights of the Child (2003).

guarantee non-recurrence of [violation] through, for example, reform of relevant law and policy and their application, including prosecution and sanction of the business actors concerned.[35]

The three procedural elements of environmental governance, namely, participation, access to information, and access to justice, are critical to the realisation of children's substantive rights to a healthy environment. The following part examines how the environmental legal and policy framework in Zimbabwe respects, promotes, protects and facilitates the fulfilment of children's environmental rights and interests.

3 Environmental Legal and Policy Framework in Zimbabwe

3.1 *The Constitutional Framework: Environmental Right and Children*

Section 73 of the Constitution entrenches the environmental right:

> (1) Every person has the right—
> (a) to an environment that is not harmful to their health or well-being; and
> (b) to have the environment protected for the benefit of present and future generations, through reasonable legislative and other measures that—
> i) prevent pollution and ecological degradation;
> ii) promote conservation; and
> iii) secure ecologically sustainable development and use of natural resources while promoting economic and social development.
> (2) The State must take reasonable legislative and other measures, within the limits of the resources available to it, to achieve the progressive realisation of the rights set out in this section.

The environmental right applies to and protects everyone, including children. In the context of children, section 81 of the Constitution elaborates on the rights of children to non-discrimination and equal protection of the law inclusive of the right to be heard, protection from economic exploitation, and to have their best interests considered as paramount in all matters concerning them. Accordingly, the constitutionalisation of the environmental right, on the one hand, and the constitutionalisation of children's rights on the other hand,[36] provides a strong legal basis to advance the protection of the rights of children in the context of environmental governance. This has to be viewed in light of the fact that a constitution is a document of distinctive and supreme status that stands at the helm of the normative legal pyramid in almost all legal systems.[37] Importantly, the

[35] CRC Committee General Comment No.16 on State Obligations Regarding the Impact of the Business Sector on Children's Rights (2013) para. 31.

[36] On the constitutional implications of including a children's clause in the Zimbabwean Constitution in general, *see* A. Moyo, 'The Legal Status of Children's Rights in Zimbabwe', in A. Moyo (ed.), *Selected Aspects of the 2013 Zimbabwean Constitution and the Declaration of Rights* (Raoul Wallenberg Institute, Sweden, 2019) pp. 126–162; I. Magaya and R. Fambasayi, 'Giant Leaps or Baby Steps? A Preliminary Assessment of the Development of Children's Rights Jurisprudence in Zimbabwe', *De Jure Law Journal* (2021).

[37] On this point, and how it applies in the Zimbabwean context, *see* R. Fambasayi and A. Moyo, 'The Best Interests of the Child Offender in the Context of Detention as a Measure of Last Resort: A Comparative Analysis of Legal Developments in South Africa, Kenya and Zimbabwe', *South African Journal on Human Rights* (2020) p. 32.

Constitution reigns supreme such that any law, practice, custom or conduct inconsistent with it is considered invalid.[38] Thus, the entrenchment of the environmental right in the Constitution is a fundamental strategy towards achieving environmental protection,[39] particularly for the benefit of the present generation and future generations, children included.

The duty to provide for and facilitate the right to an environment that is not harmful to the health or well-being of every person rests upon the state as the primary duty-bearer. Also, non-state actors have a duty towards the implementation and fulfilment of the right, as clearly provided for in terms of section 44, read with sections 45 and 73 of the Constitution. First, section 44 of the Constitution proclaims that the duty to respect, protect, promote and fulfil the rights and freedoms contained in the Declaration of Rights rest upon the state and other non-state actors. Second, section 45 (1)-(2) of the Constitution underscores that the Declaration of Rights binds the State and all executive, legislative and judicial institutions and agencies of government at every level. This entails that non-state actors and all levels of government at the national, provincial and local levels have a constitutional duty to uphold and fulfil all the rights in Chapter 4, in particular the environmental right and children's rights.

The obligation in terms of section 73 is further explained and expanded by other sections of the Constitution, such as the national objectives, in particular national development.[40] The purpose of national objectives, broadly, as set out in Chapter 2 of the Constitution,[41] is articulated by the Supreme Court in *Zimbabwe Homeless People's Federation v. Minister of Local Government and National Housing*:[42]

> … these provisions [national objectives] are essentially hortatory in nature ... In this sense, they cannot be said to be strictly justiciable and enforceable in themselves. Nevertheless, they are not to be regarded as being entirely superfluous and otiose and therefore devoid of any legal significance whatsoever. They remain interpretively relevant for the purpose of informing and shaping the specific contours of the substantive rights enshrined elsewhere in the Constitution.

In principle, the interpretation and implementation of the right to a healthy environment within the scheme of environmental governance entails adherence to constitutional values and principles of transparency, accountability, public participation in decision-making, freedom of associations and the best interest of the child principle.[43] These values are indispensable in implementing and enforcing the

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[38] Section 2(1) of the Constitution.

[39] *See generally* T. Murombo, 'The Utility of Environmental Rights to Sustainable Development in Zimbabwe: A Contribution to Constitutional Reform Debate', *African Human Rights Law Journal* (2011) p. 121.

[40] Section 13(1) and (4) of the Constitution provides for 'national development' as a national objective, and in particular emphasise the need for balanced development in rural and urban areas as well as ensuring that local communities [where the children live] benefit from the (natural) recourses in their areas.

[41] *See* Moyo, *supra* note 36, pp. 41–46.

[42] SC-94-20.

[43] L. A. Feris, 'The Role of Good Environmental Governance in the Sustainable Development of South Africa', *Potchefstroom Electronic Law Journal* (2010) p. 1.

substantive right to a healthy environment for the benefit of children. Also, these principles ensure that children are aware, informed and involved in the environmental management processes and have the ability to advocate for environmental protection effectively. In light of the above, the following discussion examines key features and the content of section 73 of the Constitution, which could either hinder or promote the realisation of children's environmental right. Therefore, it is trite to look at each of these norms and interrogate the extent to which they allow for the respect, protection and promotion of children's rights in environmental governance.

Section 73(1)(b) of the Constitution underscores that every person has the right to have the environment protected for the benefit of present and future generations, through reasonable legislative and other measures. Two important aspects emanate from this provision. Firstly, the protection of the environment is for the present generation – children included. Secondly, a similar duty is placed for the protection of the environment for the benefit of future generations. The right, constitutionally entrenched, suggests that there is explicit constitutional protection of present children's environmental rights and the environmental interests of unborn children. The need to protect the environment for current and generations to come was captured by the High Court in *Augar Investments OU v. Min of Environment & Another*.[44] The Court aptly stated that "it is hoped that the citizens of Zimbabwe will vigorously pursue and enforce their rights as provided in terms of the Environmental Management Act, lest we be judged and found wanting, by future generations, for failing to play our part in preserving and protecting the environment"[45.] This is a clarion call that the present generation must, in terms of the law, pursue the protection of the environment for their own benefit and also for the benefit of future generations.

Further, the adoption of reasonable legislative and other measures, as articulated in section 73(1)(b), must be aimed at ensuring the prevention of pollution and ecological degradation.[46] The prevention of pollution in all its forms (air, land and water) is a critical issue that has the potential to cause irreversible consequences for children. Take air pollution and climate change, for instance, and consider how that will potentially impact children's lives in Zimbabwe. More to it, air pollution is a national concern. In a recent 2019 State of the Environment Report, the Environmental Management Agency (EMA) observed that the increasing amounts of toxic air pollutants from different sources in Zimbabwe is significantly affecting children with acute respiratory infections, contributing to the causes of a high mortality rate for those under the age of 5 years.[47]

The peculiar vulnerabilities of children should be taken into account in standard setting in the context of pollution and ecological conservation. Also, it also entails

[44] HH-278-15.
[45] *Ibid.*
[46] Section 73(1)(b)(i) of the Constitution.
[47] Zimbabwe Environment Outlook 2: A Clean, safe and healthy environment. Zimbabwe's Fourth State of the Environment Report December 2019 <https://www.ema.co.zw/agency/state-of-the-environment-report> visited on 7 December 2020.

that in sanctioning violation, children's rights and needs should be particularly considered. A review of case law relating to water pollution, in particular, suggest that the best interests of the child principle is not taken into account. For instance, in *Zimbabwe Environmental Law Association (ZELA) & Others v. Anjin Inv (Pvt) Ltd & Others*,[48] an application was brought against a group of mining companies involved in diamond exploration and mining. It was alleged that the companies were discharging untreated waste material and effluent, including human waste, into the Odzi river, Singwizi river and Save river. These discharges heavily polluted the rivers causing dirty and water contaminated with chemicals and metal deposits including iron, chromium and nickel. While no reference was made to children's rights in the judgment, particularly the right to life, the right to play and access to clean drinking water, it is pertinent to note that children in the affected communities were potentially, and if not, irreversibly affected by the pollutants. More so, it has been found that, 27 per cent of children in Zimbabwe do not have access to safe drinking water, particularly in rural areas, to which the majority of children live.[49]

Another pressing issue in the prevention of ecological damage is associated with spatial developments taking place in wetlands. Wetlands are fragile ecosystems rich in biodiversity and are of great ecological, economic, cultural and recreational value.[50] The benefits of wetlands include flood attenuation, water purification through the removal of pollutants and other toxic substances, groundwater recharge, carbon dioxide assimilation, habitat for wildlife, sustaining unique biodiversity and serving important recreational and cultural functions.[51] Environmental governance in this area has been uncoordinated and political. State actors, particularly local authorities, appear to act in silos, and they also exclude affected communities. Children from the affected communities are excluded and do not participate in decision-making processes around development plans in wetlands. Yet, such issues affect their lives. The failure to protect the ecological integrity of wetlands has negative impacts on children's rights, taking into account the importance and uses of wetlands. Although no case law relating to wetlands directly mention children, the courts' interpretation in such cases is commendable as it allows and enables the protection of the rights and interests of children. For instance, in *Hillside Park Association v. Glorious All Time Function (Private) Limited & Others*[52] the High Court declared, the development of a wetland without going through the Environmental Impact Assessment (EIA) process violated section 73 of the Constitution as well as section 77 which guarantees the right to food and portable water. It should be noted that EIA provides

[48] HH 523/15, [2015] ZWHHC 523 (16 June 2015) (unreported).
[49] Zimbabwe Environment outlook 2, *supra* note 47, p. 15.
[50] V. Madebwe and C. Madebwe, 'An Exploratory Analysis of the Social, Economic and Environmental Impacts on Wetlands: The case of Shurugwi District, Midlands Province, Zimbabwe', *Journal of Applied Sciences Research* (2005) pp. 228–233.
[51] H. N. Chabwela, 'The Ecology and Conservation Status of the Save-Runde Floodplain', in T. Matiza and S. A. Crafter (eds.), *Wetlands Ecology and Priorities for Conservation in Zimbabwe: Proceedings of a Seminar on Wetlands of Zimbabwe* (International Union for Conservation of Nature and Natural Resources, Harare, 1994) pp. 43–46.
[52] HH-349-19. *See also Harare Wetlands Trust & Another v. Life Covenant Church & Others* HH-819-19; *The Cosmo Trust & Others v. City of Harare & Others* AC 3/19.

the opportunity to consider children's interests and rights in environmental governance.

Judicial and administrative bodies have always, in many instances, demanded scientific evidence to support policy and administrative decision-making processes. In *Cosmo Trust & Others v. City of Harare & Others*,[53] the Administrative Court was faced with such a challenge. No scientific proof was submitted before the court to establish why the Monavale Wetland attracts different kinds of bird species, for instance, some come from as far as Cameroon and Kenya. Again, the court felt that the scientific evidence presented before it was not enough to conclude that the massive construction work proposed on the wetland will not cause massive destruction and cause irreparable destruction of the bird habitat as well as disruption of the natural process of water cleansing. In coming up with the decision, the court relied on the precautionary principle of environmental law which prescribes that where there are serious threats of serious and irreversible damage, lack of scientific certainty should not be used as a reason to act.[54] In *Mustai & Others v. City of Harare and Others*[55] the court came to the same conclusion wherein it held that:

> In the absence of any scientific certainty that the holding bay is not being constructed on a wetland… It is prudent to err on the side of caution by granting the provisional order.

The above-mentioned cases relating to wetlands management present an opportunity for the protection of child right in environmental governance in that policy and decision-makers are not excused from taking action if there is a slight possibility that activity, product or project can potentially violate the rights of children. However, there is a need for the principle to be applied at state institutions rather than wait for the court to determine at all times.

Secondly, measures have to be taken to promote conservation and secure, while promoting, sustainable development.[56] The concept of sustainable development is closely intertwined with (intragenerational and) intergenerational equity. As introduced and defined by the Brundtland Report, sustainable development is "development that meets the needs of the present generation without compromising the ability of future generations to meet their own needs".[57] Although the Brundtland Report has no legal force, the definition it sets has been globally accepted, including in Zimbabwe, and shapes how to view and interpret the concept of sustainable development. Sustainable development demands the need to strike a balance between the need for economic development and environmental protection and conservation. Sustainable development is thus based on three pillars: economy,

[53] AC 3/19.
[54] *See Nyakaana v. National Environment Management Authority & Others* CA 5-11, a case from Uganda.
[55] HH 535-17.
[56] Section 73(1)(b)(ii)-(iii) of the Constitution.
[57] Report to the World Commission on Environment and Development: Our Common Future, 1987 <https://www.britannica.com/topic/Brundtland-Report/> visited on 4 December 2020.

social and environment.[58] Thus, the concept is cognisant of the fact that the realisation of socio-economic rights and the betterment of people's welfare needs financing. It has been further described as "a conceptual framework for achieving economic development that is socially equitable and protective of the natural resource base on which human activity depends". [59]

A review of case law in Zimbabwe shows that while there are cases wherein the concept has been mentioned broadly, its full meaning and scope as it relates to children remains unexplored. For instance, in *Harare Wetlands Trust & Another v. Life Covenant Church & Others*,[60] the Harare High Court held that there is need to strike a proper balance between development and sustainable environmental management. Citing with approval the decision in *Calvert Cliff's Co-ordinating Committee v. Atomic Energy Commission*,[61] the Court held:

> In each individual case the particular economic benefits of planned action must be assessed and weighed against the environmental cost; alternatives must be considered which would affect the balance of values.

In South Africa, the concept of sustainable development was judicially interpreted in the case of *Fuel Retailers Association of South Africa v. Director-General Environmental Management, Department of Agriculture, Conservation and Environment*,[62] where the Court held:

> Pure economic principles will no longer determine, in an unbridled fashion, whether a development is acceptable. Development, which may be regarded as economically and financially sound, will, in future, be balanced by its environmental impact, taking coherent cognisance the principles of intergenerational equity and sustainable use of resources in order to arrive at an integrated management of the environment, sustainable development and socio-economic concerns. By elevating the environment to a fundamental justiciable human right, South Africa has irreversibly embarked on a road, which will lead to the goal of attaining a protected environment by an integrated approach, which takes into consideration, inter alia, socio-economic concerns and principles.

In environmental management generally and in the case of the management of wetlands in particular, the EIA process is a tool that can be utilised to achieve sustainable development as it provides an opportunity to integrate development planning and decision-making process with ecological considerations.[63] However, the current developing framework in Zimbabwe seem to be neglecting the importance, use and value of EIAs. This failure is not only in the case of wetlands,

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[58] D. Hallowes and M. Butler, 'The Ground Work Report. The Balance of Rights – Constitutional Promises and Struggle for Environmental Justice', 2004, <https://www.groundwork.org.za/reports/gWReport2004.pdf> visited 4 December 2020.
[59] J. C. Dernbach, 'Sustainable Development as a Framework for National Governance', *Case Western Reserve Law* (1998) p. 3.
[60] HH-819-19.
[61] 449F 2d (DC Cir 1971).
[62] 2007 (6) SA 4 (CC).
[63] J. Kurian *et al.*, 'Environmental Impact Assessment as a Tool for Sustainable Development', <https://www.researchgate.net/publication/329355638_Environmental_Impact_Assessment_as_a_Tool_for_Sustainable> Visited on 9 December 2020.

but extends to all aspects including in the mining sector. In a 2020 study conducted by ZELA titled, "The state of children and youths' right to a healthy and sustainable environment in Zimbabwe: Assessment of the impacts of mining on children and youth living in mining communities",[64] it was established that often mining companies start operating without going through the EIA process. In some instances, where the EIA is in place, companies ignore or neglect to take measures to safeguard the environment. Thereby, the interests and rights of children are bluntly overlooked and marginalised. The Provincial Mining Directors and other officials in the Ministry of Mines and Mining Development even award mining licences without the EIA process being carried out which practice does not take into account the principle of sustainable development[65] and the best interests of children.

Thirdly, section 73(2) provides that the realisation of the right is progressively realised within the limits of the resources available to the state. In essence, progressive realisation demands that states must promote and protects rights over time "to the fullest extent possible within their available resources".[66] What this entails is that states are required to "move as expeditiously and effectively"[67] as possible, and they must take "deliberate, concrete and targeted"[68] measures towards achieving the full scope and content of the rights of children in question.[69] Borrowing from the South African Constitutional Court, progressive realisation of a constitutional right entails that the state has:

> the obligation to take the requisite measures is that the obligation does not require the state to do more than its available resources permit. This means that both the content of the obligation in relation to the rate at which it is achieved as well as the reasonableness of the measures employed to achieve the result are governed by the availability of resources. [It] does not expect more of the state than is achievable within its available resources … There is a balance between goal and means. The measures must be calculated to attain the goal expeditiously and effectively but the availability of resources is an important factor in determining what is reasonable.[70]

The provision is problematic in many respects, it may result in the state not fulfilling its obligation to provide for the right to healthy claiming lack of resources to meet its obligations.[71] In discharging their mandate on environmental governance that

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[64] Available on <http://www.zela.org/download/research-on-the-impact-of-mining-on-children-youthsright-to-a-healthy-sustainable-environment-in-zimbabwe/> visited on 4 December 2020.

[65] *See Debshan (Private) Limited v. The Provincial Mining Director*, Matebeleland South Province & Others HH-11-17.

[66] B. T. C. Warwick, 'A Hierarchy of Comfort? The CESCR's Approach to the 2008 Crisis', in G. MacNaughton and D. Frey, *Economic and Social Rights in a Neoliberal World* (Cambridge University Press, Cambridge, 2018) p. 133.

[67] UN Committee on Economic, Social and Cultural Rights (CESC) General Comment No. 3 on the Nature of States Parties' Obligations (Article 2, para. 1) (1990) para. 9.

[68] *Ibid*., para. 2.

[69] R. O'Connell *et al*., *Applying an International Human Rights Framework to State Budget Allocations* (Taylor and Francis, 2014) p. 67.

[70] *Government of the Republic of South Africa v. Grootboom* 2001 (1) SA 46 (CC) para. 46.

[71] For a detailed discussion on the challenges with the concept of progressive realisation, *see* S. Byrne, 'Reclaiming Progressive Realisation: A Children's Rights Analysis', *International Journal of Children's Rights* (2020) pp. 748–777.

encompass the rights of children, state institutions can only do so within the parameters of the available resources.

3.2 *Environmental Legislation and Policy Framework*

The framework environmental legislation in Zimbabwe is the Environmental Management Act [Chapter 20:27], which is the primary legislative instrument that provides for environmental management and governance. According to Nel and Du Plessis, "framework (environmental) legislation aims to define overarching and generic principles in terms of which sectoral-specific legislation is embedded, as well as to enhance co-operative environmental governance amongst fragmented line ministries[72]". Framework environmental legislation, such as the Environmental Management Act, provides general basic norms that may be used to introduce new environmental legislation or to amend or maintain existing legislation. Although enacted earlier, the Environmental Management Act reflects the spirit and letter of section 73 of the Constitution, in particular, section 4(1) of the Act enshrines the right to a clean environment that is not harmful to health, and the right to protection of the environment for the benefit of present and future generations.[73] It also provides for every citizen's right to participate in the implementation of the promulgation of reasonable legislative policy and other measures that prevent pollution and environmental degradation; and secure ecologically sustainable management.[74] While the Act needs to be aligned with the constitutional principles discussed above, it should be noted that the Act has been and remains instrumental in environmental governance (management) in Zimbabwe. In *Augar Investments OU v. Minister of Environment & Another*,[75] the High Court emphasised the importance of the Act:

> The purpose of [Act] is to define environmental rights and to set out the principles of environmental management, as well as to provide an enforcement mechanism against recalcitrant offenders. Section 4 of EMA declares that 'every person in Zimbabwe shall have a right to a clean environment that is not harmful to health, access to environmental information, protect the environment for the benefit of present and future generations and to participate in the implementation of reasonable legislative policy and other measures that prevent pollution and environmental degradation, and secure ecologically sustainable management and use of natural resources while promoting justifiable economic and social development.

Section 4 of the Environmental Management Act specifically provides for the rights and principles of environmental management and governance. Some of the environmental governance principles include that environmental management must place people and their needs at the forefront of its concern.[76] The term 'people' includes children, and the placing of their needs at the forefront could be interpreted in light of section 81 of the Constitution which declares that the best interests of children are paramount. In addition, section 4(2)(c) underscores the significance of

[72] J. Nel and W. Du Plessis, 'An Evaluation of NEMA Based on a Generic Framework for Environmental Framework Legislation', *South African Journal of Environmental Law and Policy* (2001) pp. 1–2.
[73] Section 4(1)(a) of the Environmental Management Act.
[74] Section 4(1)(c) of the Environmental Management Act.
[75] HH-278-15.
[76] Section 4(2)(b) of the Environmental Management Act.

the participation of all interested and affected parties in environmental governance. It states that the participation of citizens must be promoted and that opportunities must be created for them to develop the understanding, skills and capacity necessary for achieving equitable, meaningful and effective participation. Children as citizens have the entitlement to enjoy this right too. Thus, it is critical to include the participation of children and young people in environmental governance as a pivotal component.

Further, section 136 of the Act seeks to promote citizen's participation in environmental governance. This also includes children, as citizens. The provision generally states that, "in the exercise of any function as prescribed, officials (the Minister, the Secretary, the Agency, the Director-General) and any other person or authority shall ensure that the rules commonly known as the rules of natural justice are duly observed and, in particular, shall take all reasonable steps to ensure that every person whose interests are likely to be affected by the exercise of the function is given an adequate opportunity to make representations in the matter". While this provision could be utilised to benefit children as one of the affected persons, in practice, the provision is adult-centred. There are no mechanisms to ensure children's participation as interested and affected persons.

In addition, section 4(1)(b) of the Environmental Management Act provides that every person has the right to access to environmental information. As a matter of principle, section 4(2)(d) provides that environmental education, environmental awareness and the sharing of knowledge must be promoted so as to increase the capacity of communities, including children, to address environmental issues, attitudes, skills and behaviour consistent with environmental management. Accordingly, this principle could be construed to extend the right of children to environmental education and knowledge. For instance, the Environmental Management Agency,[77] the authority responsible for environmental management in carrying out its mandate, has made efforts to engage children through environmental clubs in schools, which aim to provide environmental education, campaigns and other awareness-raising initiatives.[78] However, the engagement is discriminatory as it targets children mainly in schools, at the exclusion of non-school attendees. One of the challenges with access to environmental information and participation is that EIA reports are often issued in environmental jargon, making it difficult for children to comprehend and understand, thereby violating the rights of children to access to environmental information.

[77] Established in terms of section 9 of the Environmental Management Act, the functions of EMA as laid out in section 10 includes the formulation of quality standards on air, water, soil, noise, vibration, radiation and waste management; to assist and participate in any matter pertaining to the management of the environment; and in particular (i) to develop guidelines for the preparation of the National Plan, environmental management plans and local environmental action plans; (ii) to regulate and monitor the collection, disposal, treatment and recycling of waste; (iii) to regulate and monitor the discharge or emission of any pollutant or hazardous substance into the environment; (vi) to regulate, monitor, review, and approve environmental impact assessments; amongst others.

[78] Environmental Clubs in Schools, <https://www.herald.co.zw/environmental-education-in-schools/> visited on 29 November 2020.

Another environmental issue that is critical to the rights and interests of children is climate change. It is an emerging and present threat, if not the greatest threat, to children rights. Studies have shown that climate change presents critical challenges to the rights and interests of children in the present and in the future. Responding to this challenge, the National Climate Change Response Strategy (2015) was adopted to guide national (and local) responses and measures to addressing the impacts of climate change. The National Climate Change Response Strategy acknowledges the need to be cognisant of children's special and vulnerable position in society during climate-change decision-making processes. Under the heading 'capacity building', it acknowledges that children may potentially face other growing difficulties such as lapses in education and insecurity caused by climate-induced behavioural changes and livelihood choices of parents and other family members, which may result in displacement, conflict, neglect and abandonment. Children may have to cope with higher levels of pressures which keep them out of school and force them into work too soon. The strategy acknowledges the vital need to ensure the inclusion of children and youth in the policy formulation process for climate change, and in adaptation and mitigation activities. In addition, the National Climate Policy (2017) accentuates on the impacts of climate change on children and notes that education on climate change has to be gender and child-sensitive.[79] While the provision for inclusion of children in governance is commendable, there is a need to ensure practical and meaningful participation in practice. This will also uphold the realisation of the constitutionally entrenched right not to be discriminated, the right to be heard and to have the child's best interests considered as paramount.

4 Conclusion

The constitutionalisation of children's rights in Zimbabwe was a remarkable momentous occasion that gives children a voice and legal (constitutional) claims that cannot be denied. In this chapter, we established that the children are rights holders of the right to a healthy environment and they have the right to be heard and participate in governance, right to access to information and the right access to justice in the contexts of rights violation. We have argued that section 73 – the environmental right – as read with section 81 – the children's rights clause – should be interpreted together to ensure that all environmental management decisions, measures and responses are in the child's best interests and respect the rights of children. Further, we contend that doing so will drive a constitutional approach to environmental governance, and ensure that all environmental legislation, policies and strategies are geared towards the protection of the interests and rights of children. A look at some of the existing legislation and environmental jurisprudence in Zimbabwe shows the great potential that exists in achieving a child rights based approach to environmental governance. However, more work needs to be done in terms of institutional capacity building. Future research should be devoted towards analysing how governance institutions, including traditional leadership structures, could adopt a child rights based approach to environmental governance.

[79] National Climate Policy, para. 4.1.

14 Foreign Investment, Indigenous Communities and the Constitutional Protection of Property Rights in Zimbabwe

James Tsabora* and Mutuso Dhliwayo**

1 Introduction

The 2013 Constitution – which is post-independent Zimbabwe's first ever autochthonous Constitution – contains interesting perspectives in relation to the protection of property rights. Certainly, the rights framework created has important implications on the security of rights of both domestic and foreign investors interested in conducting business in the country. Similarly, the constitutional regime also impacts on the security of the land rights of indigenous communities held under customary law systems of tenure in Zimbabwe, particularly in view of the manner such rights are usually suppressed in favour of other investment projects. From a contemporary economic perspective, the legal protection of property and business interests has been hailed as a critical component in attracting investment and instilling business confidence in a country's economic system. Indeed, the prominence of transnational business investment in the global economy means that the legal regulation of property rights is not only vital for the vibrancy and performance of the private sector but also essential in a globalised world characterised by private commercial transactions of a multinational character.

Yet in the dust created by the rush to attract foreign investment, most African governments deliberately ignore the security of land tenure of indigenous communities that host such investments. Large investment projects in sectors such as mining, road and dam construction and other infrastructure developmental projects have huge impacts on the land rights and interests of indigenous communities. Investment projects are therefore known to bring not only social, economic, cultural and environmental cost to host communities but also introduce land tenure insecurity in such areas. Inescapably one of the greatest issues generated by the presence of foreign investment projects in host communities directly relates to the insecurity of land rights of indigenous community groups. Ordinarily customary based tenure systems provide holders with a very weak level of protection of land rights and interests. In contrast, the investment licenses and special grants held by mostly foreign investment are strongly backed by legislative provisions that trump, in most instances, rights granted under customary law.

African governments have struggled to strike the requisite, albeit delicate, equilibrium between rights of indigenous communities hosting foreign investment projects and the rights of foreign investors. It is therefore relevant to explore whether the constitutional framework reconciles the conflicting land rights and interests of foreign investment and indigenous communities. The Zimbabwean social, economic and political system is not spared the depredations that have come with the foreign

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direct investment mantra in Africa. Since 2000 Zimbabwe has experienced political, economic and social developments that have left a huge imprint on the face of its economic and political system. In this vein, examples of policies that have brought grave and unintended consequences to the national economic system include the controversial policies of the land reform programme and the economic indigenisation policy. These were started under the Mugabe administration and have been continued under the Mnangagwa administration. A more recent, very haphazard and incomprehensible policy direction known as 'consolidation of diamond companies' also deserves particular mention, owing to its deeply problematic implications to foreign investment. The core character of these controversial policy directions was the forcible acquisition, distribution, redistribution and transfer of private property rights in favour of government interests or under the guise of the public interest. Inevitably, the picture created by these economic policies is one without respect for private property rights, especially the property and investments of non-indigenous enterprises. Equally, the manner in which the foreign investment drive has been pursued was in total disregard of the land rights and interests of indigenous communities that hosted such investment.

This chapter is a critical analysis of the constitutional and legislative protection of foreign investment within the context of the 2013 Constitution of Zimbabwe. Importantly, it asks, and seeks to answer, the question of whether the 2013 constitutional setup provides a reasonable shield to foreign investors against government policies that can potentially erode and impinge on their right to property. In addition to conceding the inevitable conflict between the interests of large scale investment and the land rights and interests of indigenous communities, this research also highlights the positivity brought about by the constitutional property clause through recognition of indigenous communities' rights and interests to land. Finally, in order to illustrate the practical context of this research, this chapter examines the diamond consolidation process, and its implications to the right to property. Consequently, the chapter lays out in the open the variance between law and practice in Zimbabwe, and the possibilities that are likely to take place in cases where government's economic interests are not pursued through the formal legal process but are pushed through predatory actions that defy the very law that was formulated to prevent them.

2 The Constitutional Setup

The right to property creates important socio-legal relations of both a horizontal and vertical nature in general, and of a private-public character in particular. The fundamental rights in the 2013 Constitution echo this position. Without doubt, the constitutional regulation of property rights is necessarily critical in the resolution of disputes and conflicts that arise and emerge in the context of these relationships. Indeed, the expectation is that the consequent regulatory fiat can optimally address the often-conflicting legal relationships inherent in the property rights framework.

The post-Mugabe administration has stressed the importance of respect for property rights throughout its national budgetary and economic policy blueprints. It must be

admitted that these policy pronouncements are matched by constitutional provisions that entrench respect for 'vested' rights and the rule of law. Section 71, which is the constitutional property clause, is aimed at this objective. It opens by defining property as "property of any description and any *right or interest* in property".[1]

Clearly, this definition does not add clarity at all into what really can be regarded as property. At best it is an open invitation to the courts to flesh out what is meant by the definition.

In the case of case of *Hewlett v. Minister of Finance*,[2] the Supreme Court appeared unperturbed by this phrasing and decided that the definition "seems to embrace the widest possible range of property". The observations by the Court find support from another angle. Under general common law, property generally refers to 'things' or valuable, corporeal objects of economic value, external to humans, which enjoy a separate legal existence and which can be subjected to juristic control. The objects of value that can be envisaged by this definition are various. It can thus be strongly asserted that the Constitution recognises wide range of objects as property, and this is a positive aspect in the protection of property rights in general. Both ordinary citizens and foreign investors become anxious in cases where the Constitution recognises a narrower definition of property than where such definition is as wide as it is currently envisaged.

It is also important to note that the constitutional definition identifies both 'rights' and 'interests' in property as constituting property as well. Essentially, this means that a person with any right in another person's property is also protected by the right to property. Further, any person without such right but with an 'interest' in a property is protected. Of course the interest has to be legally recognisable. There seems to exist a blurred line between a land 'right' and a land 'interest' that is actionable and subject of protection under section 71.

Apart from defining property, section 71 recognises the individual right of every person "to acquire, hold, occupy, use, transfer, hypothecate, lease or dispose of all forms of property, either individually or in association with others".

This section means every person can be right-holders in as far as property rights are concerned. Indeed, this right is contrasted to other rights in the Constitution that are limited to Zimbabwean citizens only. Importantly, this means that the right to property exists for both indigenous and foreign persons, juristic or natural. There is no discrimination, and this is welcome.

Further, section 71 provides that "no person may be compulsorily deprived of their property" except upon compliance with certain procedures and requirements in the section. By making reference to 'no person', section 71 prohibits the state and all forms of state authority from proceeding with deprivation until or unless certain terms and conditions set therein are met. Again, reference to 'no person' in the section deliberately addresses both citizens and non-citizens and thus guarantees protection

[1] Emphasis added.
[2] 1982 (1) SA 490, at p. 497.

of property to both citizens and non-citizens. This is very important in view of the legal phenomenon of foreign investment and foreign owned property not only in Zimbabwe but across the world.

Having presented these general features of the constitutional property clause, it becomes critical to interrogate the essence and substance of the clause in relation to property rights of foreign investment and the rights of indigenous communities.

3 Indigenous Communities and Land Interests

The significance of recognition of 'interests' as property in section 71 becomes critical in relation to land rights and interests of indigenous communities in areas that usually host large scale investment projects. The majority of these indigenous community groups enjoy land rights on the basis of customary law.[3] Apart from that a host of other laws recognise the interests in rural land of these indigenous communal groups that host foreign investment. However, such recognition does not extend to providing land title or freehold title to rural communities over the land they occupy, use or live on. In general, these laws allow and permit various forms of occupation, use and alienation of the pieces of rural land within the context of each community's cultural and customary backgrounds. Important laws include the Communal Lands Act[4] (CLA). This Act grants communities right of occupation on communal land for residential or agricultural purposes. The Act does not create or recognise individual title to land but gives specific guidelines on occupation and use of communal land by rural communities. Another piece of legislation is the Traditional Leaders Act[5] which addresses land related duties and responsibilities of traditional chiefs in relation to communal land in the interests of communities. Finally, the Rural District Councils Act[6] is another pertinent law which gives the legal basis for rural councils as the responsible authorities that administer communal land in the interest of their subjects.

Scholars have argued that although they do not amount to the right of land ownership, the constitutional recognition of these interests in land created by both customary law and legislation is necessary in a society that seeks to free itself from

[3] *See* the report of the Economic Commission for Africa, *Relevance of African Traditional Institutions of Governance*, p. 24. The land distribution and redistribution of traditional customary authorities exist since pre-colonial times. However, following colonial occupation of Zimbabwe by white settlers, the new government system carved out land for exclusive use by the indigenous population and this land became known as the Tribal Trust Lands (TTL). The various colonial laws gave local chiefs a measure of control in land distribution and redistribution, but they remained under the ultimate authority of colonial administrators. *See* S. Chakaipa, 'Local Government Institutions and Elections', in J. De Visser, N. Steytler and N. Machingauta (eds.), *Local Government Reform in Zimbabwe – A Policy Dialogue* (University of Western Cape, Community Law Centre, 2010).

[4] Chapter 20:04.

[5] Chapter 29:17.

[6] Chapter 29:13.

the rather abstract character of rights under the common law.[7] Van der Walt, for instance, puts this succinctly as follows:

> In terms of the traditional ownership paradigm it is assumed that ownership is not only the most comprehensive but also the most natural and the most desirable land right, and all other land rights are regarded with a certain measure of disdain: they are temporary, limited and less valuable. However, realities regarding the availability of a limited resource such as land for an ever increasing population, coupled with people's need for access to secure land rights, dictate that greater importance should be accorded to land rights, and that they should not be evaluated purely negatively simply because they amount to less than full ownership.[8]

In essence, what these scholars call for is for these interests in land to be recognised to the same level as is the right of land ownership. Yet other scholars even call for the registration of these land rights, albeit not as ownership, but as fragmented land use rights.[9] A question may be asked whether the 2013 Constitution recognises other rights, apart from the right of private land ownership. The answer is in the affirmative, and two grounds justify such answer.

Firstly, section 71 of the 2013 Constitution recognises the right of every person "to acquire, hold, occupy, use, transfer, hypothecate, lease or dispose of all forms of property, either individually or in association with others".[10] In essence, this means that the section recognises four important rights: namely, (i) the right of private ownership (*dominium*), (ii) the right of possession (*possessio*), (iv) the right of use (*usus*) and (iv) the right of occupation (*occupatio*). What this means is that the mere use, occupation and possession of property is protected under section 71. Accordingly, the occupation, use or possession of land by indigenous communities in rural areas for residential, subsistent agriculture, pasture, small scale farming, among other purposes, creates land rights and interests in their favour, and such rights are protected by section 71.

The second ground why the 2013 Constitution appears to have accepted the direction of fragmented land rights is on the basis of Chapter 16, which, however, relates to agricultural land only.[11] Under Chapter 16, the state has power to alienate land to persons, through four mechanisms, namely: (i) transfer of ownership, (ii) a grant of lease, (ii) grant of occupation rights and (iv) grant of use rights.[12] Again, this means that the state can dispose its interests or rights in land through four avenues, namely: (i) granting *dominium*, (ii) granting *possession*, (iii) granting *usus* and (iv) granting *occupatio*. The rights created by recognition in section 293 are similar to

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[7] *See* C. Cross and R. Haines, *Towards Freehold? Options for Land and Development inSouth Africa's Black Rural Areas* (Juta, Cape Town, 1988); A. J. van der Walt, 'The Fragmentation of Land Rights', 8 *South African Journal on Human Rights* (1992) p. 431.

[8] *Ibid.*

[9] G. Pienaar, 'The Registration of Fragmented Use-Rights as a Development Tool in Rural Areas', paper presented to the conference on "Constitution and Law IV: Developments in the Contemporary Constitutional State", Potchestroom University, South Africa, 2–3 November 2000.

[10] Section 71(2).

[11] Section 71 is a constitutional property clause, but does not apply to agricultural land. Section 72 applies to agricultural land, and is phrased in such a way that section 71, the property clause, is 'subject' to section 72.

[12] Section 293.

those created by recognition in section 71 of the Constitution. A critical observation that can be made is that these fragmented land rights are recognised and protected in both agricultural and in relation to all other property envisaged in section 71.

Accordingly, it can be strongly contended that the 2013 Constitution creates a comprehensive and protectionist regime that recognises the rights and interests of indigenous communities who make a living out of the land, through residence, subsistence, peasantry livelihoods and other informal means of livelihoods. The importance of this position is that all the rights that are enjoyed by indigenous communities under customary law and certain legislation amount to constitutionally recognised interests and rights to land and cannot anymore be regarded as weak, inferior or subordinate to the right of ownership.[13] Thus licensing authorities, administrative bodies, government agencies and, pertinently, large scale investment projects that seek to establish their operations in areas inhabited by indigenous communities have to contend with this position. However, to what extent does this rights fiat benefit large scale investments, particularly in relation to the protection of their investments in Zimbabwe?

4 Foreign Investment and Land Rights

As argued above, the mere use, possession or occupation of land without freehold title to such land can grant the user, possessor or occupant a legally recognisable and enforceable right or interest in land. Large scale investments occupy and make use of huge tracts of land to set up physical and technological infrastructure for operational purposes. A clear example in Zimbabwe is Zimbabwe Platinum Mine (Pvt) Ltd (Zimplats), which holds in excess of 80,000 hectares of land.[14] Another example is the Zimbabwe Mining Development Corporation that holds land measuring a total area of 63,548 hectares under special grant, but was reduced to 59,817 hectares after the cession of part of such land to a private company, Anjin Investments Pvt Ltd, in February 2010.[15] By setting this infrastructure on the land, they become users, occupiers or possessors of the land onto or under which the infrastructure is built or established. Ordinarily, however, due to the nature of mining as a land intensive industry, large tracts of land are left for further and future exploration.

It is important to note that, in the mining sector, the three rights (*usus*, *occupatio,* and *possessio*) are not created or granted in favour of mining companies through application of land or land related legislation. These rights are created by relevant

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[13] The socio-political and legal importance of this to society is clear, *see* A. van der Walt, 'Property Rights and Hierarchies of Power: A Critical Evaluation of Land Reform Policy in South Africa', 64 *Koers* (1999) pp. 261–264.

[14] Zimplats is successor to BHP Minerals Zimbabwe, and was granted the 25 year long lease in 1994. *See* 'Mugabe Forges Ahead with Zimplats Land Grab', *Dailynews Live*, 6 January 2017, available at: <https://www.dailynews.co.zw/articles/2017/01/06/mugabe-forges-ahead-with-zimplats-land-grab>, (accessed 1 August 2017)>; 'President Sues Zimplats over 28000ha Idle Land', *The Herald*, <http://www.herald.co.zw/president-sues-zimplats-over-28-000ha-idle-land/> (accessed 1 August 2017).

[15] *See Anjin Investments Pvt Ltd v. Minister of Mines & Ors*, HH228/2016.

and applicable mining legislation. Under the Mines and Minerals Act (MMA),[16] for instance, various mining rights are recognised and protected, and such rights have a direct impact on land ownership or the occupation, use or possession of land where such rights are exercised.

Mining rights are created, held, exercised, distributed and redistributed in a manner that grants to the holder of such rights interests and rights to land. For instance, under the Mines and Minerals Act, a miner can be granted a 'special mining lease',[17] a 'special grant'[18] or a 'prospecting license'. The Mine and Minerals Amendment Bill (MMAB) also recognises a number of mining rights. It defines 'mining title' to mean (a) an exclusive prospecting licence, or (b) an exclusive exploration licence or (c) special grant for exploration.[19] It further defines 'mining right' to mean (a) a certificate of registration of a block of precious metal claims, or (b) a certificate of registration of a block of precious stones claims, or (c) a certificate of registration of a block of base mineral claims, or (d) a certificate of registration of a site mentioned in section 47, or (e) special mining lease, or (f) mining lease or (g) special grants for mining. Without doubt, these mining rights, licenses and grants create land-use impacting rights which necessarily flow from the nature of the different mining rights in question.[20] Further, they inevitably create a legally recognisable and protected interest in land that is not owned by the mining companies in question. For instance, a prospecting licence grants a prospecting mining company the right to search for minerals, through various means, including pegging of the land.[21] Further, the prospecting company also has surface land rights over that land, including fetching water and making use of firewood.[22] The argument is therefore that despite mining legislation providing a framework for the acquisition of mining rights, various provisions in mines laws create interests and rights in land in favour of the mining companies. Indeed, the exercise of the mining rights created is impossible without the added recognition and protection of the rights of mining companies to the land upon which their investments are established and/or intend to be operationalised.[23] Perhaps this analysis will be incomplete if it omits discussion of yet another important provision in the Mines and Minerals Act. Section 2 of the Mines and Minerals Act provides as follows:

> The dominium in and the right of searching and mining for and disposing of all minerals, mineral oils and natural gases, notwithstanding the dominium or right which any person may possess in and to the soil on or under which such minerals, mineral oils and natural gases are found or situated, is vested in the President, subject to this Act.

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[16] Chapter 21:05.
[17] *See* Part VIII of the MMA.
[18] Section 291 of the MMA.
[19] Section 14 thereof. The MMAB recognises and confirms the nature of these rights as property rights. A newly inserted section 2A provides that: "A prospecting, exploration or mining right granted in terms of this Act is a limited right which is subject to the provisions of this Act."
[20] Section 135 and 158 of the MMA (also the whole of Parts VIII & IX of the Act).
[21] Section 27 of the MMA.
[22] Section 27 of the MMA. *See also* section 178 of the MMA that recognises surface rights of miners.
[23] Naturally, the expiry or termination of the mining rights directly leads to the expiry or termination of whatever rights of possession, occupation or use to land that the mining company had. *See Grandwell Holdings Pvt Ltd v. Minister of Mines & Ors*, HH193-2016.

This provision needs clarification. Ordinarily, mineral resources are state property, and the state divests its ownership by parcelling out mining rights and mining title to third parties. In contrast, however, the fact that the Act creates a trusteeship of resources in the president is made clear. In essence, this section entails that third parties only hold mining rights at the pleasure of the president. Most importantly, however, this ownership of mineral resources by the president extends only to minerals in the ground, still to be extracted, exploited, processed or refined. It does not extend to minerals lawfully extracted by private companies and in their possession. The section is aimed at guarding against landowners who claim that their ownership of the land extends to their ownership of everything in the soil, under it and above it including mineral resources.

Accordingly, mining rights and title are well encompassed within the context of the constitutional property clause. Mining investors have the right to acquire, hold, occupy, use and transfer mining rights, but in accordance with relevant and applicable laws. Importantly, however, the Constitution explicitly guarantees, protects and entrenches private property rights such as mining rights.

5 Compensation for Deprivations and Acquisitions of Property

An important feature of the property rights clause is that compulsory deprivation can only proceed in terms of a law of general application, and such deprivation must be necessary in the public interest (i.e. in the interests of defence, public safety, public order, public morality, public health, town and country planning or in the development or use of that property or another for a purpose that benefits the community). The fact that property is subject to deprivation and compulsory acquisition by the state means that the compensation regime for such acquisitions is critical. Generally, in the context of foreign investment, there is no doubting the fact that whilst a strong government that can enforce and protect property rights is necessary, danger always lurk as the same government can also abrogate or take away such rights without due and adequate compensation.

Under the Zimbabwean Constitution, the acquisition or deprivation of property is subject to compensation. In terms of section 71(3), in cases of compulsory acquisition or deprivation, the acquiring authority is required to give reasonable notice to all persons likely to be affected of the intention to acquire property before the acquisition can proceed. Implicitly, this means that an affected property owner can challenge the reasonableness of the notice period. Most importantly, the acquiring authority is required to pay fair and adequate compensation for the acquisition before acquiring the property, or within a reasonable time after the acquisition.

It is important to note that the 2013 Constitution seems to depart from previous constitutions in relation to compensation regimes. Previously only compulsory acquisition of property required compensation.[24] Deprivations, understood to refer to

[24] *Hewlett v. Minister of Finance and Another*, 1982 (1) SA 490 (ZS) (1981 ZLR 571); *Davies v. Minister of Lands, Agriculture and Water Development*, 1994 (2) ZLR 294 (H) and 1997 (1) SA 228 (ZS).

restrictions on the use of property, were uncompensated. The 2013 Constitution interchangeably uses the terms 'acquisitions' and 'deprivations' in section 71. Accordingly, it has become almost impossible not to conclude that this means that both acquisitions and deprivations are now subject to compensation.[25]

It is hereby submitted that in practice the government is likely to compensate only those deprivations that are of such nature as to equate to acquisitions. The rationale is that ordinarily governments find it impossible to compensate for every kind of deprivation, large and small, for instance, those deprivations necessary in town and country planning, environmental conservation, telecommunications development, public health promotion or for any other public purpose. These restrictions are necessary to society and critical in the enjoyment of not only property rights but other rights as well.

6 Compulsory Acquisition under the Mines and Minerals Act

In terms of section 398, the president has the right to "acquire either the whole or any portion of a mining location, or limit the rights enjoyed by the owner thereof" under the Mines and Mineral Act.[26] A mining location is defined in the MMA to mean "a defined area of ground in respect to which mining rights, or rights in connection with mining, have been acquired under this Act". Substantively, this is the actual land or ground upon or under which mining activities are conducted. Such land can be compulsorily acquired by the president for a public purpose. The meaning of *public purpose* is not clear, but it is submitted that it may mean any use that is beneficial to society or that is meant to benefit a wider section of the public. For instance, in attempts to acquire parts of land given to Zimplats, the president claimed that:

> The land to be acquired will allow for the immediate entry of new players into the platinum sector. This will bring immediate benefit to the public through employment creation and an enlarged revenue base for the government of Zimbabwe (that is more companies paying royalties, corporate tax and Pay As You Earn). The Government will also receive dividends as it will be a shareholder in the new companies to be brought on board, as will the local community in the area through the company share ownership scheme.[27]

Further, the MMA makes it clear that the Land Acquisition Act applies in the compulsory acquisition of the mining location. Most importantly, compensation is payable for such acquisition. In order to attend to compensation, the Minister of Mines "may direct any person employed in his Ministry to conduct an investigation into the nature and extent of any mining operations that have been or are being conducted on the mining location that has been or is to be acquired". It is not clear whether the compensation has to be fair, adequate or at market value, as there is no criteria or mechanism to assess the amount. However, it is submitted that the

[25] *See* A. Magaisa, 'Property Rights in the Draft Constitution', available at <archive.kubatana.net/docs/demgg/crisis_zimbabwe_briefing_issue_86_120808.pdf> (accessed on 10 July 2017).
[26] Section 398(1).
[27] *See President of The Republic of Zimbabwe v. Zimbabwe Platinum Mines Pvt Ltd*, LA13/16.

provision might be read to mean compensation that is fair in terms of market value of the acquired rights.[28]

Another intriguing question is whether exploited or extracted mineral resources can be subjected to compulsory acquisition or deprivation under section 71. This question arises in view of the claim that extracted or exploited mineral resources are owned by the person or company that has lawfully extracted them, not the president or the state. Further, this question arises for purposes of business confidence – a foreign multinational company undertaking mineral resource exploitation in Zimbabwe needs to be sure that its exploited minerals are not subject to arbitrary seizure by the government on the basis that they belong to the state or the president.

7 Protection of Mining Investments from Seizure by the State

7.1 *Case Study: Diamond Consolidation*

The final question to be addressed is whether the state can seize or compulsorily acquire mining investments, such as a private company's mines in terms of section 71, justifying this on the public interest. This brings us to one of the most controversial policies by the government of Zimbabwe, namely consolidation of diamond companies.

There is no formal, published policy document known as consolidation policy; neither was there a green paper or white paper document floated for discussions purposes prior to the adoption of this government position. Indeed, the consolidation is a government approach or position, not a policy framework. The consolidation of diamond companies was announced through the press and government media.

In order to understand critical aspects of the consolidation 'policy', it is helpful to start from a governmental interpretation. On 6 April 2017, the Parliamentary Portfolio Committee on Mines and Energy presented to Parliament a *Report on the Consolidation of Diamond Companies*.[29] The Report does not define or attempt to describe the true nature of consolidation. It states that by the end of 2015, government position shifted "with the thrust of centralising all diamond mining activities through Zimbabwe Consolidated Diamond Company (ZCDC)".[30] At best, this is the nearest that the Report comes to definition of consolidation – centralising of diamond mining through a government diamond mining company, the ZCDC.

On paper, the Report implies that the purpose for the consolidation was in the public interest – it included the need "to stimulate growth and productivity of the diamond

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[28] This would be in line with the common law basis of Zimbabwe's property law; *see* F. Mann, 'Outline of a History of Expropriation', 75 *LQR* (1959) p. 188; *Estate Marks v. Pretoria City Council*, 1969 3 SA 227 A 244; *Bestuursraad van Sebokeng v. M & K Trust &Finansiele Maatskappy (Edms) Bpk*, 1973 SA 376 A 385.

[29] *First Report of the Portfolio Committee of Mines and Energy on the Consolidation of Diamond Companies*, S.C. 9 – 2017, 6 April 2017, available at <http://www.veritaszim.net/sites/veritas_d/files/Portfolio%20Committee%20on%20Mines%20and%20Energy

[30] *See* section 2 of the Report.

industry, as well as promote transparency and accountability in the entire diamond value chain, with the ultimate result of improved revenues inflows to Treasury".[31] In practice, however, the real and practical implications of the policy on the property rights of private mining companies, foreign or domestic and on the rule of law were swept under the carpet. Most importantly, the Report describes the corporate structure formed from consolidation as follows:

> ZCDC's shareholding would comprise of all the mining companies that were operating in Marange with government retaining a 50% shareholding. ZCDC was to appoint five of the ten board members and the rest would be selected from among the former joint venture partners. Each joint venture partner would get shares based on the net value of assets and liabilities.[32]

There was no operational or financial incentive for private diamond companies to enter into consolidation at all. Government was fully aware of this, and expected the stiff resistance from targeted companies. The Report states that the consolidation was initiated in the context of section 291 of the Mines and Minerals Act which gave the Minister of Mines power to refuse renewing licenses of mining companies. This means that the government used a carrot and stick approach to private diamond companies; take the consolidation carrot dangled or face non-renewal of licenses and definite expulsion. Indeed, the consolidation policy was carefully timed to coincide with the expiry of mining licenses of various mining companies. Unsurprisingly, most diamond companies were conducting mining activities on the basis of expired mining licences and the government was well aware of this fact. Thus in addition to failing to renew expiring licences, the government just reminded companies that they were operating illegally as their licences had expired, with some licenses having expired more than five years prior. Clearly, the carrot and stick approach was perfect, at least on paper. Despite this context, mining companies continued to resist consolidation, and the government did not hesitate to refuse to renew their licences, move in and take control of their mining locations, sites, operations and activities on the ground. Meanwhile, in the face of this resistance, the government consequently resolved to "expand its shareholding to 100 percent in ZCDC".[33]

Upon the controversial take-over of diamond mining investments, the government was faced with various challenges. The Report states that in addition to exploration problems, the outgoing companies had inadequately invested in diamond mining and had consequently failed to meet mining obligations.[34] Further, most of the joint venture companies were not fully fulfilling their investment agreements. The most damning finding by the Portfolio Committee was, however, that at the time of the take-over all the companies were insolvent.[35]

This meant that these companies were highly exposed to litigation with creditors claiming large sums of money, attaching important mining equipment and auctioning

[31] *See* section 4.1 of the Report
[32] *See* section 4.2.2 of the Report.
[33] *Ibid.*
[34] Section 4.3 of the Report.
[35] *Ibid.*

them at very low prices.[36] Pertinently, the real danger this created was that one of the buyers of auctioned machinery would be the government,[37] which was in real need of cheaper mining equipment to operationalise seized mining locations. Thus, this vicious cycle stood to benefit the government and collapse private mining investment altogether.

The nature of the forcible takeover was aptly described by the High Court in the *Grandwell* case.[38] In essence, the case involved resistance by private diamond mining companies from acquiescing in the 'consolidation' call by the government. The judge observed as follows:

> Apart from its marriage with Grandwell, it (government) had entered into several others with other foreign investors. But the government felt its partners were being unfaithful. It felt it was getting little or no remittances. To remedy this, it crafted a policy to merge all the diamond mining companies at Chiadzwa into one single entity. … All the disparate companies would take up 50% of the equity in it. The government reserved the remaining 50% to itself. …

Apparently government felt there was little or no progress towards the consolidation. On that date it wrote to Mbada advising, among other things, that it had discovered that the Special Grants had expired, and that, with no title, Mbada had to cease all mining activities with immediate effect and vacate the mining site. Mbada was given 90 days to remove all its equipment and other valuables. Any further access to the mining site would be upon request.

The Minister called a press conference to announce the new development. On the same day of the letter, Mbada's operations were forcibly stopped through armed police. Processing plants were shut down. Mbada's security team was disbanded and expelled from site. Other employees were forcibly evicted both from the workstations and from their site residences. Security systems were paralysed.[39]

In the briefest of terms, the takeover by government created chaos in the diamond mining industry and led to the erosion of investor confidence, the flight of foreign investment and adverse productivity patterns in the diamond mining sector. The government eventually opted to expel the diamond mining companies and invade their mining sites to take over mining operations, using equipment seized from the outgoing, expelled companies. All in all, the consolidation exercise, though

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[36] Some of the cases involved joint venture agreements between a Zimbabwean state company (ZMDC or ZCDC) and a foreign state company mining vehicle in Zimbabwe, with the partnerships arising from bilateral international agreements between governments. *See for instance Sakunda Trading Pvt Ltd v. DTZ OZ-GEO Pvt Ltd*, 3102/17, where the foreign mining company approached the courts to compel the government to assume the debts and liabilities accrued by it in its mining operations prior to consolidation.

[37] Apart from the fact that the government is a shareholder in some of the creditors, such as Sakunda Pvt Ltd, the government was directly and indirectly a creditor since the common creditors included revenue authorities, customs and excise authorities, local authorities, rural district councils, traditional leadership authorities, mining authorities at district, provincial and national levels, and other agencies of government.

[38] HH193/16.

[39] *Ibid.*

eventually not operationalised and implemented to the full, was the height of insecurity of mining investments in the diamond sector in Zimbabwe.

7.2 'Consolidation' and Compulsory Acquisition

There is very little doubt that both the consolidation and the take-over of diamond companies amounts to compulsory acquisition or deprivation with far reaching implications on private companies' right to property as envisaged by section 71 of the Constitution. The existing mining laws do not provide for such forcible consolidation; neither do they make provision for the *modus operandi* to be adopted in operationalising the huge consolidated company.

In a research report entitled *Consolidation of Diamond Mines in Zimbabwe: Implications, Comments and Options*, Mtisi describes the consolidation from a legalistic perspective. In this vein, Mtisi explores the consolidation policy in the context of the Companies Act, and observes that:

> the proposal to consolidate diamond mining companies is (in fact) an amalgamation of companies to form a new company that will take over the assets of the mining companies. This also means that the existing diamond mining companies will face dissolution. *This is what is contemplated in Section 193 (of the Companies Act)*. It means government wants to amalgamate companies although the government officials are using the word consolidation.[40]

Generally, even by stretching the provisions of various laws, it remains difficult to reach a conclusion that the government has power to compel consolidation, or amalgamation of private mining companies. Mtisi shares this view, illustrating that:

> there is no law which empowers Government to force companies to merge or amalgamate, unless if it (Government) is making the proposal as a shareholder in the diamond mining companies through ZMDC or Marange Resources. Government may have to negotiate with the companies and convince them to amalgamate. Government has leverage in the negotiations in that it grants mining licences in terms of the Mines and Minerals Act. It may also withdraw such licences. However, the possible negative implications of threatening investors with withdrawal of mining rights may work negatively against investments if not handled properly.[41]

From a constitutional perspective, it is prudent to start from the public interest perspective. Section 71 permits government to compulsorily acquire private property if it is in the public interest. In the above-mentioned report, Mtisi lists a number of reasons for the government's move to consolidate diamond mining. First was that "consolidation is aimed at rescuing the industry since the diamond mining companies have been struggling to operate after allegedly exhausting alluvial diamonds in all resource areas they were allocated".[42] Thus, government needed "to find ways of triggering investment in exploration hence the proposal to form a consolidated

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[40] S. Mtisi, *Consolidation of Diamond Mines in Zimbabwe: Implications, Comments and Options, Zimbabwe Environmental Law Association*, 2015.
[41] *Ibid.*
[42] *Ibid.*

company that can ride on economies of scale and invest in exploration projects".[43] Other reasons, according to Mtisi:

> range from the need to promote transparency and accountability in the production, transportation, marketing and export of diamonds. Diamond mining companies have been fleecing the country. Some have reportedly not been paying taxes and dividends. Further, Government also views the proposed consolidation as an opportunity to streamline administration and monitoring across the whole value chain of diamond mining (production to marketing) to improve transparency and accountability. The belief is that consolidation will assist in plugging diamond leakages worsened by vulnerabilities associated with having too many operators in the field.[44]

Clearly, the consolidation can be understood as a policy crafted in the public interest. However, this is not adequate to meet the requirements of section 71.

In terms of section 71, the right to property therein is limited. Thus compulsory deprivation is permissible in circumstances where:

> (a) the deprivation is in terms of a law of general application;
> (b) the deprivation is necessary for any of the following reasons –
> (i) in the interests of defence, public safety, public order, public morality, public health or town and country planning; or
> (ii) in order to develop or use that or any other property for a purpose beneficial to the community;[45]

The consolidation was announced through the press, and not through the government gazette. It was a cabinet decision not carried through the legislature to be formally implemented through general law, or an Act of Parliament. In practice, this is what is meant by a law of general application. It is that there should be a law that sanctions the limitation of the right in question (in this case, the right to property), and that lays down the conditions which would have to be satisfied prior to the right being limited.[46] Such a law has to be rational, and there must be a rational link between the law and the attainment or achievement of a legitimate societal objective. Further, the law sanctioning the limitation must be of general application and not directed at specific individuals or group, and it must be reasonably certain.[47] People must know with a reasonable degree of certainty the conduct that is proscribed and the conduct that is permitted.[48] There was no such law; the mining law drafted in 1961 has no such provisions.

The need for a general law that provides concrete backing for government policy that limits fundamental rights is echoed in the general limitation clause in section 86 of the Constitution. Section 86 is a clause that formulates principles and draws the parameters within which laws that limit fundamental rights must fall. This limitation

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[43] *Ibid*.
[44] *Ibid*.
[45] Section 71(3) of the 2013 Constitution.
[46] *See for instance* the limitations in the Land Acquisition Act, Chapter 20:10.
[47] A. J. van der Walt, *Property and the Constitution* (PULP, University of Pretoria, 2012) p. 28.
[48] S. Woolman and H. Botha, 'Limitations', in S. Woolman *et al.* (eds.), *Constitutional Law of South Africa*, volume 2, 2nd edition (2006) pp. 48–49.

clause calls for the prior need of "a law of general application".[49] In addition, such a law can only permit limitation of fundamental rights "to the extent that the limitation is fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom". Some of the factors to be taken into account before limiting a right include consideration of the nature of the right in question, the purpose of the limitation, the nature and extent of the limitation, the need to respect and not prejudice rights of others.[50]

In addition, there were no legal formalities that the government followed in seeking to pursue consolidation. Section 71 calls for some procedural steps to be followed by acquiring authorities prior to acquisition or deprivation. The government did not give any form of notice to private mining firms of the impending policy of diamond consolidation. However, the government had raised various warnings and alarm with the manner in which diamond mining was being conducted by mining companies.[51] Such threats did not constitute notice in any manner.

Finally, there was no compensation extended to private mining firms for loss of property in one or another. These companies were compelled to close shop, their licences cancelled despite government guarantees and they lost huge income through government's vindictive behaviour. They lost huge investments that were protected by both domestic law and international bilateral investment agreements.

Clearly, consolidation constituted a systematic attack on the property rights of foreign investors in the diamond sector. It sent the message of conflict between a government and private investors who possessed mining licences and had followed the law. It further illustrated the government's attitude towards mineral resources, and this is fully discussed below.

7.3 *Government Permanent Interest in Mineral Ownership*

The government's attitude in relation to mineral resources that commonly attract foreign investment has changed over the years. However, it has been clear that the government seeks to secure certain minerals resources and tightly control their exploitation for several reasons. The biggest testimony to this is the proposal to identify certain mineral resources as 'strategic minerals' in the draft Mines and Minerals Amendment Bill (hereinafter 'the MMAB') yet to be signed into law.

The Mines and Minerals Amendment Bill (H.B 19 of 2015) introduces the designation of strategic minerals. The Bill defines strategic minerals as minerals that "are declared or designated as strategic in terms of this section on account of their importance to the economic, social, industrial and security development of the country". A more conventional definition of strategic of critical minerals is "minerals for which the risk of disruption in supply is relatively high and for which supply disruptions will be associated with large economic disruptions". The MMAB

[49] Section 86(2).
[50] Section 86(2)(a)–(f).
[51] *See* for instance Ministry of Finance 2014 Mid-Term Fiscal Review. 2015 National Budget Statement, paras. 578–571.

designates coking coal, natural gas or coal bed methane, iron ore, manganese, antimony, tungsten, rare earth elements, lithium, tantalite, uranium, iron ore and natural graphite as critical minerals, to name just but a few. The designation of minerals as strategic minerals is not unique to Zimbabwe. This is a global trend as countries strive to retain a competitive edge over their rivals economically, militarily and technologically. The United States of America, for example, has the National Strategic and Critical Minerals Production Act of 2015. The designation of strategic minerals by developing countries is also increasingly becoming a feature as these play a critical role as feed stocks into other sectors of the economy that includes manufacturing, agriculture, infrastructure and the generation of power.

While the designation of strategic minerals is good, the problem is that the MMAB goes further to state that special and unique conditions will apply to their exploration, ownership, exploitation and beneficiation, marketing and development. The special and unique conditions are not spelt out. In line with international best practices of transparency and accountability, especially when one takes into account the fact that these are the country's most important minerals, these 'unique and special conditions' must be spelt out or provided for under the MMAB. The MMAB should set up clear and transparent guidelines on how strategic minerals are designated. The failure to do so may inhibit Foreign Direct Investment (FDI) due to the lack of clarity on the special conditions and their implications. These must be known upfront before an investor makes a commitment. Again, there is a clear intention of tighter control of mining of these minerals, albeit in a manner that does not seem to garner too much confidence to foreign investors in the mining sector.

Another recent example relates to shifting policy positions on indigenization of mineral resource extraction in Zimbabwe. In 2018, the government passed the Finance Amendment Act whose effect was to scrap the requirement of the 51/49 per centum shareholding between indigenous Zimbabweans and foreign investors in mineral resource business. Under the 2018 amendment, the requirement was now that the 51/49 per centum shareholding requirement would be only limited to two mineral resources namely diamonds and platinum. This meant that all other mineral resources were exempted – there was no requirement for mining investors to shed shareholding to reflect the 51/49 per centum except for diamond and platinum mining. The objective was to woe FDI under the Zimbabwe's economic policy of opening up the country to foreign investment.

The policy position introduced by the 2018 amendment has been reversed by yet another law. In December 2020, the government passed the Finance Act (No. 2 of 2020) which contained several amendments to other existing legislation. A key amendment related to indigenization of extractive businesses as regulated by the Indigenization and Economic Empowerment Act Chapter 14:33. Section 36 of the 2020 Finance Act (No. 2 of 2020) amends section 3 of the Indigenisation and Economic Empowerment Act. It states that "section 3 of the Indigenization and Economic Empowerment Act is amended":

a) by the insertion after “extraction of” such minerals as maybe prescribed by the Minister in consultation with the Minister responsible for Mines and the Minister responsible for Finance
b) by the repeal of paragraphs (a) and (b)

This means that section 3 (1) of the Indigenization and Economic Empowerment Act now reads as follows:

> The State shall , by the Act or through regulations under the Act or any other law, secure at least fifty one per centum of the shares or other ownership interest of every designated extractive business , that is to say a company, entity or business involved in the extraction of such minerals as maybe prescribed by the Minister in consultation with the Minister responsible for Mines and the Minister responsible for Finance , shall be owned through an appropriate designated entity (with or without the participation of a community share ownership scheme or employee share ownership scheme or trust or both.)

In essence, the Act gives the government power to declare which mineral resources can be subjected to the 51/49 per centum shareholding requirement. The initial requirement for this kind of shareholding only to two mineral resources has thus been expanded. There has been a lot concern regarding Zimbabwe’s lack of policy and regulatory consistency and coherence in the mining sector, and the Finance Act amendment of 2020 confirms this. This amendment erodes the protection of foreign investors’ property rights in the mining sector in Zimbabwe. The mining sector requires stable, predictable and transparent legislative and regulatory framework and this amendment does not provide for this.

What this means is that government’s attitude on the control of mineral resources leans on tight control. The laws passed by government to ensure this however do not instil investor confidence – they cause investor flight and scare of interested investors.

Apart from the implications to foreign direct investments, the rights of indigenous communities to benefit from locally existing mineral resources are also diminished. Under section 14 of the Constitution, the state is required to ensure that local communities benefit from the resources in their areas including mineral resources. Community Share Ownership Schemes and Trusts are provided for under section 14 B (1) of the Indigenisation and Economic Empowerment (General) (Amendment) Regulations as one of the ways through which communities have property rights in mining activities in their areas. In essence, this accords the local community a share in mining resources exploited by mining companies. Surprisingly, the Finance (No. 2) Act of 2020 diminishes this right of communities. In terms of this new Act, the government has power to prescribe that the community may not participate in resource exploitation or distribution through a community share ownership scheme or trust. This means that, whilst it seemed that the participation of communities was guaranteed, the new law clearly whittles that right and gives the government power to prescribe where CSOTs can claim participation or are excluded totally. The involvement or participation of communities is now discretionary, and this affects their property rights and their claims to resource exploitation in their communities.

8 Overview

A number of points stand out from the analysis of the constitutional protection of property rights of foreign investors in the mining sector, as well as the impact of foreign investment on the land rights of indigenous communities. The conclusions to be drawn are as follows:

> Firstly, there is no doubt that the 2013 Constitution recognises and protects the right to property. Thus the scope of protection encompasses the protection not only of the rights of foreign property owners and investors, but also guarantees fair and adequate compensation in cases of acquisition or deprivation by the government. Mining rights are property rights well envisaged by the constitutional property clause, and consequently enjoy the full protection accorded by this clause.

Secondly, the 2013 Constitution definition of property encompasses the rights and interests in land possessed by indigenous communities in terms of both customary law and legislation. Thus despite these communities lacking title to land, or freehold tenure, they cannot be easily removed, relocated or displaced from such land as the constitution protects their rights and interests on the land they reside upon, or use. Further, their occupation, use, possession and utilisation of communal land grants them use or occupational rights that are protected by the constitutional framework, despite these rights not equating to private ownership or dominium.

Thirdly, the mining laws that creates a rights framework for mining investors further recognises and protects the land rights of mining companies to the use, occupation and utilisation of the land upon which they conduct mining activities. Consequently, the special grants, general leases and other mining rights and licences are given under the mines law for dual purposes, namely the right to conduct mining activities, and also the corollary right to the occupation, use and/or possession of the land where such activities are done. This chapter has demonstrated that whilst the acquisition and redistribution of mining rights is usually done in terms of mining law, the acquisition of land rights may be done in terms of both mining law and land rights law.

The fourth point is that government policies that result in the compulsory acquisition and deprivation of the property rights of foreign investors fall outside the ambit of the constitutional protection clause, albeit to the extent such policies are not implemented through general law, or fail to compensate for the loss of rights. Accordingly, policies such as consolidation fell outside the precincts of the law. What government needed to do was to pass legislation that would create a justifiable framework for consolidation. The post-Mugabe administration has showed that it is interested in tight ownership and control of mineral resource exploitation, and will continue to pass laws to limit the freedom of foreign investors in this sector. These laws, however, reduce clarity, stability and certainty to foreign direct investment as they do not provide concrete protection or security of mining rights.

Finally, the mining law, particularly the framework Mines and Minerals Act, is outdated and out of sync with contemporary mining methods and practises. The Act needs to be amended as a matter of urgency, and despite positive efforts in this

regard,[52] government is not moving fast enough. As it is, the Act does not adequately complement the constitutional property clause; nor does it make it easy for government to manoeuvre in its attempts to balance the public interest and the expectations of foreign investors in the mining sector.

9 Conclusion

There is little doubt that the 2013 Constitution goes a long way in the recognition, protection and promotion of the right to property. Indeed, this research has illustrated that the manner in which the constitutional property clause is phrased extends a respectful level of recognition and protection to property rights of both foreign investors and indigenous communities. This set up provides an important value system that should guide and determine the content of legislation promulgated to give effect to and/or limit the right to property. And therein lies the problem. Existing legislation is still some way towards milking the gains of a Constitution that post-dates various statutes, and the mining law is just one example of such legislation.

In this chapter, it has also been illustrated that as far as rights discourse is concerned, the Zimbabwean government struggles to balance the conflicting rights and interests of indigenous communities and foreign investors, particularly in the mining sector. Further, and more worryingly, the government has found it difficult to follow the requirements set out in the constitutional property clause prior to interfering with the right to property of foreign investors. This research clearly highlighted the variance between the content of constitutional rights and the content of government policy, and the implications this has had on the right to property are grossly adverse, in the least. Consequently, the consolidation policy, briefly sketched in this chapter, was not crafted, implemented and applied in terms of a law of general application; neither did it ensure compensation for infringed rights. It was a policy that created chaotic developments echoed in various court decisions that eventuated as a result of the consolidation policy.

In conclusion, therefore, at least in relation to the right to property, constitutional theory has not matched or shaped government actions, manifested through government policies. Constitutional theory must match governmental practice in order for fundamental rights to be adequately recognised and protected in Zimbabwe. Constitutional practice must shape the actions and policies of government, and eventually promote the rule of law since it means the government is acting in terms of the Constitution. The larger the gap between constitutional theory and government practice, the lesser the right to property is guaranteed and protected. For Zimbabwe, the consolidation policy explains the gap that exists

[52] This 2015 Mines and Minerals Amendment Bill was the third such meant to amend the Mines and Minerals Act, a piece of law that has stayed in the statute books since 1961. The government drafted the first amendment to the Mines and Minerals Act in 2007. This amendment did not see the light of day. The second amendment to the mines law was drafted in 2010. Again, this effort did not materialise into concrete legislation. In 2013, Zimbabwe adopted a new Constitution, the 2013 Constitution, and this necessitated various changes in all laws in general. Inevitably, the 2015 MMAB version could be seen as directly responding to the framework created by the 2013 Constitution, and incorporates, to some extent, positions suggested in the 2007 and 2010 draft mining law amendments.

between governmental practice and constitutional theory, and the state of the rule of law in the area of property rights.

15 The Constitutional State and Traditionalism under the 2013 Zimbabwean Constitution: A Critique

James Tsabora*

1 Introduction

The nature and system of political governance adopted by constitutional societies is central to the progress and development of such societies. Institutions created to drive systems of political governance become essential in achieving the primary social deliverables required for the stability of such societies. For most Western states, the system of national political governance has been anchored in the structural philosophy bequeathed by the Treaty of Westphalia, promulgated more than three centuries ago in Europe. Such a state system is ordinarily complemented by other unique institutional systems that are aimed at enhancing its social, political and economic functions. Inevitably, the Westphalia model of state has been inescapable for African states due in part to both colonial history and choice. This Eurocentric state model has, however, attempted to accommodate, to varying degrees, traditional institutional governance systems that were prominent prior to colonialism, albeit with necessary structural modifications. Pertinently, the relationship created between these reservoirs of traditional governance and the modern constitutional state system is curious. The conflicts and tensions inevitable in the resultant structural framework are even more interesting.

There is no doubt that the 2013 Constitution of Zimbabwe is a compromise between traditionalism and the new constitutionalism. It establishes the traditional institutional governance system under Chapter 15 of the Constitution, which in turn engenders opportunities for antagonism and adversity. For this reason, the nexus between the republican state and the governance system created by Chapter 15 demands scrutiny. The fact that 17 of the 18 chapters of the 2013 Constitution are reserved for the modern state system, with only one dedicated to traditional political institutions, seems to suggest the superiority of the modern state system. This leads to the major assumption that underpins this chapter, that the structural relationship between the modern state system and the traditional political institutional system in the 2013 Constitution is shaped and influenced by the need to align the interests of traditional institutions with the national constitutional value system. Such a constitutional value system clearly and predominantly favours the modern state system. In interrogating issues around this assumption, a number of questions are raised. Inescapably, the first question relates to the recognition of traditional political institutions under the Constitution, and the status, relevance and contribution of traditional political institutions to national political governance. Does the very

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existence of the modern state, it is pondered, question the validity, relevance and sustainability of the traditional political system? Further, to what extent, does the structural relationships between the modern state system and the traditional political system have any implications on the dual nature of Zimbabwe's legal system, and how so?

The above questions will be explored and interrogated in three parts that make up this chapter. The first part explores the pre-colonial, colonial and post-independent traditional political governance system as an indigenous value system that existed prior to, during and after colonialism. The main argument sustained in this part is that the interactive relationship between the modern state and traditional institutions is born out of Zimbabwe's political and social history, and is a necessary part of modern governance.

The second part analyses the place and role of the traditional institutions in the 2013 Constitution, and the extent that these institutions interact, relate and compete with those of the modern state system. In this part, the new constitutional proposals being driven through a constitutional amendment will be briefly analysed to determine the location of traditional institutions in the ever-changing face of the constitutional state. This part thus evaluates the contribution of traditional political structures and customary legal regimes to the functions and responsibilities of modern government in general, and the arms of the state in particular.

The final part is an overview of the main findings from the analyses in the three parts. This is followed by a conclusion on the general implications of the relationship between the traditional political governance system and republican system of state and government given effect by the Constitution.

2 The Traditional Institutional Governance Framework

It is a difficult task to extensively conceptualise traditional political institutions and their evolution throughout the three epochs of the pre-colonial era, the colonial era and the post-colonial period. A summary of the main developments suffices for purposes of this chapter. In essence, prior to colonialism, the prominence and ubiquity of these institutions was beyond doubt. There was simply no alternative governance system, nor a competing leadership paradigm, despite the existence of varying forms of kingships, chiefdoms and other community leadership systems. That is not to say that these institutions remained static, and resisted development and evolution. Indeed, the heterogeneity of communities and societies these institutions presided over necessitated constant changes, adaptation and gradual evolution. However, such changes did not threaten the very existence of the traditional governance system or its superiority as the governance system of choice.

The African traditional political system thus had political, judicial and social functions that included social regulation, political leadership and judicial administration. In essence, the traditional system was the pivot around which society revolved. Zimbabwe's customary and traditional institutional system can only be understood as part of the larger African system that existed on the continent. Consisting of

kingdoms, chiefdoms, tribal headman, village heads, kraal heads and other traditional political structures, the system had communitarian judicial, legislative and executive features usually centred in the chiefs and their traditional advisory councils.

Colonialism, however, changed the nature and form of traditional political systems drastically. In this vein, Bennett notes as follows:

> The chieftaincy too has changed. Admittedly this institution proved to be remarkably resilient to colonialism; but the tribal authorities were deliberately co-opted to colonial government in terms of the policy of indirect rule. And, later, independent African governments found it impossible to dispense with the services of chiefs. However, this does not mean that the institution is the same as its pre-colonial forebear. Throughout Africa colonial administrations intervened in the indigenous forms of government to appoint and depose chiefs, to divide or create new tribes, and to change powers of competence. The 'traditional' authorities were moulded into a cadre of local government officials compliant with the requirements of state … As a result they often lack any traditional basis of legitimacy. Instead of the support of their people, chiefs can now rely on the power of the state, and with state sanction they can now afford to rule autocratically.[1]

Indeed, the coming of European colonialism signalled a revolutionary moment in relation to the nature, shape, form and relevance of traditional political systems. Juma notes that the consolidation of colonial administration set out on a two-pronged mission, firstly "to create a system of administration that would be capable of adopting the traditional institutions of governance into its ranks", and secondly "to *reinvent* African custom and tradition, drain it of all the regenerative and adaptive qualities, and reduce its rigid concepts and rules so that it could be administered by the colonial judicial system".[2]

It is very clear that colonialism represented a serious threat to the African value system and its traditional political infrastructure. The European colonial regimes superimposed not only alien political and economic institutions on pre-existing African structures but also introduced a powerful social system that actively undermined the foundations of African social systems and cultural institutions. African socio-legal institutions were dealt a body blow, and could not withstand this superimposition. However, the objective of the colonial strategy was not to annihilate the traditional political governance system but, as Makoa argues, to incorporate them into colonial administration and use it to "control and govern the colonized population".[3]

Eventually, these indigenous legal systems were under compulsion to transform in one way or another. Transformation meant the creation of a puppet traditional political system that was at the beck and call of the colonial political administrators. Whether this was necessary for the survival of the African system remains in doubt, but a clear outcome of this is that this puppet system inevitably diminished the

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[1] T. W. Bennet, 'Human Rights and the African Cultural Tradition', *Transformation* (1993) p. 35.
[2] L. Juma 'The Laws of Lerotholi: Role and Status of Codified Rules of Custom in the Kingdom of Lesotho', 23 *Pace International Law Review* (2011) p. 19.
[3] F. K. Makoa, 'Electoral Reform and Political Stability in Lesotho', available at <http://www.accord.org.za/ajcr-issues/electoral-reform-and-political-stability-in-lesotho/> (accessed on 21 September 2017).

amount of respect and dignity that resided in the African traditional political system, and thus eroded its legitimacy. What cannot be denied is that the end of colonialism saw an African society unable to identify with the cultural and institutional system that had for millennia presided over it, whilst at the same time unable to relate to and accept the colonial administration system as the legitimate governance mechanism. Indeed, the puppet system of traditional governance could not even be considered appropriate to receive any seriously devolved powers from the Western colonial government for political and economic administration, a position that is maintained in the post-colonial state. It can therefore be argued that the rise of the modern state system brought by colonialism, and based as it is on a Western liberalistic framework, undermined the legitimacy that had resided in the African value system for centuries. The African traditional system suffered a crisis of legitimacy, and its ability to justify extant social institutions and norms was put under serious strain. Additionally, its ability to legitimate the power and authority that was located in traditional political and social systems was eroded by a nascent colonial agenda. As one author observes, the rise and existence of the modern state in Africa questioned the very existence and legitimacy of the African value system itself.[4]

2.1 *The Post-Independent State and the Traditional Customary System*

The dawn of independence did not signal any significant resurrection of the African customary and traditional system. Indeed, independence did not elevate this system to the same level as the liberal constitutional governance and administrative systems now pursued by the post-colonial state and government. In fact, the Zimbabwean government immediately moved to strip chiefs and other traditional political institutional systems of their powers,[5] making them irrelevant in the new order.[6] Although this policy was later abandoned, the indifferent approach by government meant that the indigenous customary value system continued to play second fiddle to the modern state and government system.[7]

A generational disdain of the African system had taken root especially within urban and semi-urban contexts, and in view of this the new African managers of the African state elected to pay only lip service to the domestic moral and social value system

[4] Juma, *supra* note 3.

[5] This policy had been experimented with in Ghana, Guinea and most famously by Julius Nyerere in Tanzania. *See* P. Lal, 'African Socialism in Post-Colonial Tanzania', *CUP* (2015) p. 46.

[6] *See* Report of the Economic Commission for Africa, *Relevance of African Traditional Institutions of Governance*, 23. According to the Report, Zimbabwe's government later reversed its earlier policy of dismantling chieftaincy and created a Council of Chiefs in 1993, available at <https://sustainabledevelopment.un.org/index.php?page=view&type=400&nr=442&menu=35> (accessed on 21 March 2017).

[7] For Nyerere, the reason for abolishing traditional political governance system was "to build a centralised territorial state and a common citizenship in the face of a colonial legacy defined by politically and legally enforced racial and tribal privilege". *See* M. Mamdani, 'Nation-state: Nyerere's legacy', *Mail and Guardian*, 15 March 2013, available at <https://mg.co.za/article/2013-03-15-00-nation-state-nyereres-legacy> (accessed on 15 September 2017).

especially in its competition and contests with the modern state system.[8] There were no points of convergence to be sought between the African traditional political system and the infrastructure of the modern state. Similarly, and most importantly, there was no attempt at insisting for constant negotiation between the African cultural normative system and the liberalistic constitutional normative system introduced after 1980.

It must further be stated that the Zimbabwe post-colonial state and government seemed uninterested in devolved structures of government that would compete with central government. The unitary idea of the state was paramount, and all forms of local government were established for purposes of delegation and decentralisation. Unsurprisingly, there was no role for traditional leadership systems in a devolved system of government simply because there was no devolved government system. The points of contact between traditional systems and central government had a clear aim – to ensure that central government took precedence and was superior in national political and economic administration.

In clear terms therefore, this illustrates the fact that the immediate post-independence state and government clearly struggled to meaningfully accommodate this traditional system under the wings of the new constitutional system. Legitimacy of power and authority had long ceased to be derived or sought from African socio-legal norms and customary traditional institutions, due to there being a new *grundnorm*, namely, the Constitution. This *grundnorm* had become the validator and all-important *legitimator* of power and authority in the modern state.

2.2 *The Constitutional Value System and the Modern State*

The 2013 Constitution introduces several trajectories that impact on the relationships and interactions between the modern state and government system and the traditional leadership institutional system. To start with, it is relevant to explore the value system adopted or preferred by the 2013 Constitution and in order to check the implications of that value system to the relationship between the modern state system and the traditional political governance system. The Constitution of Zimbabwe is largely a human rights-centred document. Its main features, principles, institutions and substantive values are derived from international human rights law. Its preamble underscores desire for freedom, justice and equality and recognises the need for the rule of law, democracy and transparent political governance. It further reaffirms a commitment to "upholding and defending fundamental human rights and freedoms". However, the preamble also celebrates "the vibrancy of our traditions and cultures". This is critical in that the Constitution does not ignore the worth or relevance of the customary law system and its institutional structures. In essence, therefore, the Constitution affirms the values of a dual system, namely the traditional value system, with all its customary rules and institutions and the human rights value system as guiding the modern state system. It may be argued that by so

[8] H. K. Prempeh, 'Africa's Constitutionalism Revival: False Start or New Dawn?', 5 *International Journal of Constitutional Law* (2007) p. 469.

doing the Constitution, though less openly, seems to suggest the existence of a pluralist legal system with essentially two legal systems, namely the general civil law system and the customary law system.

Various other provisions in the Constitution seek to entrench human rights either by creating necessary institutions for their promotion or outlining the substantive human rights concepts, principles, values and positions for the purposes of their protection. For instance, one very important provision is section 3, entitled "Founding values and principles". This section establishes, among others, a human rights and democratic value system that underpins the Constitution. It recognises various human rights principles and concepts such as rule of law, equality, dignity and gender equality. In addition, section 11 creates an obligation on the state "to take all practical measures to protect the fundamental rights and freedoms" in the Constitution and to promote their realisation and fulfilment. Further provisions in Chapter 2 of the Constitution are underscored by human rights discourse on children's rights, persons with disabilities, gender, shelter, health, social welfare and education.

A critical component of human rights is found in the Declaration of Rights in Chapter 4. The rights in this Chapter are comprehensive, progressive and substantive. These rights can be classified under the three traditional categories of civil and political rights (first generation rights), socio-economic and cultural rights (second generation rights) and group/collective rights (third generation rights). It is important to note that there are some rights that were traditionally recognised as constitutional rights only, and not strictly human rights *per se*, such as right to access to information, right to administrative justice, media rights, political rights, labour rights and marriage rights. It could be argued that these rights are now recognised as human rights in Zimbabwe since they are situated in the human rights chapter. This expansion of human rights is welcome and provides an opportunity for the interpretation of such rights not only from a constitutional perspective but also from a human rights context.

It is also important to observe that the human rights entrenched in the Declaration of Rights echo and reflect the fundamental constitutional and human rights themes that have characterised Zimbabwe's political and legal history since colonial times. Examples of these important thematic concerns include the need to address inequities and oppression created by a patriarchal society, the need to embrace international human rights standards from international human rights instruments and finally the need to create an open, equal, just and democratic society. In view of this, it can be argued that the main objective of the human rights directions embraced in the Zimbabwean constitutional system is the achievement of socio-economic justice, political justice and the attainment of an open, free, just and equal society. These objectives are a direct result of various factors that shape Zimbabwean socio-political and cultural history such as colonial racial oppression, economic disenfranchisement, gender discrimination, inequalities engendered by patriarchy and political oppression in general.

Apart from this, the outcome of the interpretation of the Declaration of Rights has to achieve a number of human rights and democratic objectives such as openness,

justice, human dignity, equality, freedom, among others. In addition, such interpretation should be guided by the need to develop the common law and customary law. The import of this is that customary law development now has to proceed within the precincts of the Declaration of the Rights; customary rules can thus not be judicially developed independent of, or outside, the ambit of the Declaration of Rights.

In relation to custom, the 2013 Constitution clearly recognises custom and traditional cultural values in various sections. Firstly, custom is recognised as a part of the law to be administered in Zimbabwe on the day the Constitution came into force.[9] Secondly, the constitutional supremacy clause reiterates the supremacy of the Constitution and the legal invalidity of any other law, practice, conduct, *custom* or conduct inconsistent with it.[10] What this means is that custom, customary practices or rules of conduct or customary behaviour have to be consistent with the Constitution for their validity to stand. Thirdly, the Constitution recognises "the nation's diverse cultural, religious and traditional values" as a founding constitutional value underpinning the Constitution. The rights of ethnic, racial, cultural, linguistic and religious groups are envisaged as part of the broader understanding of the principle of good governance.

With specific reference to culture, the Constitution creates an obligation on the state and government "to promote and preserve cultural values and practises which enhance the dignity, well-being and equality of Zimbabweans". Further, the same provisions call for the state and government to promote and preserve Zimbabwe's heritage and take measures to ensure "due respect for the dignity of traditional institutions".[11]

Again, this can be interpreted as the call for the promotion of cultural values and practices that extend, promote and assist in the enjoyment of human rights. Cultural values are recognised in as far as they positively relate to human rights, and conversely those cultural behavioural practises that undermine dignity, equality and well-being are not recognised.

An important human right in the Declaration of Rights is the right to language and culture. In terms of section 63, every person has the right to use the language of their choice, and to participate in the cultural life of their choice. However, the limitation of this right is that the exercise of such rights must not be inconsistent with other rights in the Declaration of Rights. Quite clearly therefore the right to culture and language has to be exercised subject to other rights in the Declaration of Rights. To an extent, this is a massive internal limitation that undermines the right to culture. In essence, the import of this is that cultural practices and beliefs have to meet and comply with the general standards of constitutionalism and human rights for their legal validity to hold. Accordingly, the message from the Constitution is that the standards and values of human rights and constitutionalism entrenched in the Constitution take precedence over other value systems in society, and further that

[9] Section 192 Constitution of Zimbabwe Amendment (No. 20) Act 2013.
[10] Section 2.
[11] Section 16.

the human rights agenda can best be championed by the institutions and machinery of the modern state system and not any other seemingly contrasting political governance framework.

3 Traditional Institutions under the 2013 Constitution

As with its 1980 predecessor, the 2013 Constitution establishes a clear machinery for state and government based on the Western-oriented republican state system. Unmistakably, the major features include creating a state and government system based on the three arms, namely the executive, the legislature and the judiciary. In terms of section 1 of the Constitution, the Zimbabwean state is 'unitary' as opposed to federal, democratic and also a 'sovereign republic'. The orientation to 'republicanism' suppresses any prominence that traditionalism may lay claim to. Further, the fact that the nature of political governance is unitary, means that there is less devolution of central government powers.[12] In this vein, the 2013 Constitution recognises and identifies a three-tier government system based on the (i) national (central) government, (ii) provincial and metropolitan councils and (iii) local authorities, which includes urban and rural councils.

Other main features of the resultant republican system of government include establishing a civil service administrative system, national security apparatus, criminal justice institutions, democratic governance institutions and commissions supporting democracy. A novel feature in the 2013 Constitution is the establishment of a public administrative framework and its value system in Chapter 9, and a public financial management framework under Chapter 17. Traditional 'leadership' institutions are established in Chapter 15, and quite unsurprisingly not as another tier of government.

An analysis of the institutions for the modern state and government established by the Constitution provides interesting perspectives that relate to the role and place of traditional institutions. Firstly, the Constitution is clear on the modern state and government; it establishes a sovereign republican system of government based on the three tiers of government being the executive, the legislature and the judiciary. Clearly, this three-tier framework reserves little room if any for the direct participation of traditional institutions in spaces meant for its manifestation. But what are these spaces, it may be queried.

Under Chapter 15 of the Constitution, the traditional political system is given the responsibility of performing cultural, customary and traditional functions of a chief, head person or village head for a community. These functions are listed and consist of a mix of dispute resolution, administration of communal land and environmental affairs and taking measures for the preservation and promotion of their cultural value systems.[13]

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[12] Chapter 14 of the 2013 Constitution, however, creates a substantive framework for devolution, which framework is to be implemented 'whenever appropriate' (*see* section 264 specifically).
[13] Section 282.

Another important part is in Chapter 15 of the Constitution. This Chapter contains the list of principles that the traditional political system must observe. These principles include the principle of legality, fair and equal treatment, impartiality, non-partisanship, no to be members of political parties, among others.[14] Most importantly, traditional leaders are under an obligation not to violate the fundamental human rights and freedoms of any person. These principles are far reaching; they limit some of the rights that accrue to traditional leaders as persons in terms of the Declaration of Rights such as political rights. Curiously, these principles have a striking similarity to general principles that should be observed by members of the civil service. Such a similarity suggests that the Constitution implicitly regards traditional leaders as civil servants in the same manner as the colonial administration system had done or sought to do.[15]

This reality is also true with the traditional political system in various parts of Africa. Commenting on a similar structure, Juma observed this concerning the Lesotho chieftaincy system:[16]

Although the chiefs played such a prominent role in governance immediately after independence, their significance has slowly dwindled in subsequent years due to the rapid political and social change that the country has been through. While *chiefs are firmly entrenched in the civil service* of the state and rely on —their position [s] as [its] salaried functionaries, limitations on their powers are now explicit in many legislative regimes brought into force in the last three decades.

To echo this, the Constitution makes a call for an Act of Parliament to regulate the 'conduct of traditional leaders'. Whether this can be interpreted as suggesting a form of code of conduct with a disciplinary system remains to be seen. Currently, no such Act exists and a Traditional Leaders Declaration is still in the early stages of debate and discussion in Parliament.

Another very important development in the Constitution is the incorporation of traditional leaders into Zimbabwe's legislative system. In terms of section 120 of the Constitution, the Senate membership includes 16 chiefs, and also the president and deputy president of the National Council of Chiefs. This inclusion in the legislative arm of the state and government means that they take part in the main business of the legislature, namely initiating, preparing, debating and commenting on legislation. It is important to note that their double roles as traditional leaders on one hand and members of Senate on the other does not grant them special privileges in Parliament. They are thus treated as ordinary legislators, and lose or extend membership in similar terms as elected senators.

It can be argued that the co-optation of traditional leaders into the legislature has both symbolic and practical significance. The symbolism is in the respect that seemingly comes with incorporation of traditional institutions into the legislative

[14] Section 281.
[15] This argument is generally proposed in reference to the relationship between the colonial administrators and the puppet traditional institutions. *See generally* Juma, *supra* note 3.
[16] Ibid.

structures of a modern state and government system. Indeed, the message this sends is that these institutions are not excluded from mainstream political and governmental activities carried out by the adopted government system that admittedly has superior organs and agencies for its administration. On the other hand, the practical significance is that by such co-optation, the traditional leaders in Parliament are exposed to modern constitutional processes of the day which constantly denounce and condemn patterns of social, cultural and political life that violate human rights, constitutional principles and the rule of law. Accordingly, the co-optation enables the chosen representatives of traditional leaders to appreciate human rights abuses committed in the name of culture and custom in their communities. To an extent, this exposure may be read, arguably though, as the opportunity for constant negotiation and renegotiation between the traditional political system and the constitutional legislative system.

Additionally, co-optation into a formal institution such as the legislature can also be interpreted on the basis that chiefs and village heads in traditional chieftaincies "constitute a forum where local interests are debated and articulated" and to that extent chiefs become "a valuable resource in informing the state about the interests of local communities they represent".[17] Thus the co-optation of the traditional political system in modern government enhances their representative roles and consequently the level of interaction between the modern state and local communities living in traditional settings and contexts.

Apart from the general advantages of co-optation, dangers lurk. There is a real risk that traditional institutions will be used as an instrument of state power and a conduit of the government in its various policies that might impact on human rights. This point needs further exemplification.

For the past decade, Zimbabwean politics has been characterised by attrition, vicious political contests and electoral mishaps that have tainted constitutional democracy.[18] Unsurprisingly, various reports have emerged of political parties, led by the ruling party, making use of traditional institutions and leaders such as chiefs, village heads, kraal heads and other leaders for political purposes.[19] Some reports

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[17] T. von Trotha, 'From Administrative to Civil Chieftaincy: Some Problems and Prospects of African Chieftaincy' 37:38 *Journal of Legal Pluralism* (1996) pp. 79–108.

[18] *See generally* B. M. Tendi, 'Making History in Mugabe's Zimbabwe', *Politics, Intellectuals and the Media* (Lang, Germany, 2010).

[19] *See* 'Charumbira calls on chiefs to back Mugabe', *Newsday*, available at <https://www.dailynews.co.zw/articles/2017/10/31/charumbira-calls-on-chiefs-to-back-mugabe> (accessed on 31 October 2017); 'Chiefs endorse Pres Mugabe's candidature', *ZBC*, 28 October 2017; 'Chiefs backs Amai Mugabe's elevation', *Herald*, 10 September 2014; 'Chiefs appeal to President for power restoration', Herald, available at <http://www.herald.co.zw/chief-appeals-to-president-for-power-restoration/> (accessed on 20 September 2017);
'Chief empowered to prop ZANU PF', *The Independent*, available at <https://www.theindependent.co.zw/2005/01/07/chiefs-empowered-to-prop-up-zanu-pf/> (accessed on 21 October 2016); 'Chiefs now Mugabe's auxiliaries', *Daily News*, available at <https://www.dailynews.co.zw/articles/2016/02/29/chiefs-now-mugabe-s-auxiliaries> (accessed on 10 September 2016); 'Zimbabwe ballot papers spark row', *BBC News*, available at <http://news.bbc.co.uk/2/hi/africa/7310544.stm> (accessed on 13 September 2016); 'Opposition leader says voters forced to choose Mugabe', *CNN*, available at

have claimed that traditional institutions were central in vote buying, intimidation, hate speech, political manipulation, political campaigns, violence against supporters of political rivals, denial or withdrawal of benefits or privileges to people in their communities supporting certain political parties, espionage on behalf of political parties and various other misbehaviour.[20]

There is a case in point to exemplify this. In the case of *Election Resource Centre v. Chief Charumbira and Others*,[21] the High Court of Zimbabwe ordered a prominent traditional leader, who is the president of all traditional chiefs, not to interfere in national politics in a partisan manner. In specific terms, the High Court considered that statements by the traditional leader in support of a political party were unconstitutional and that such statements must be retracted by the traditional leader. The High Court further ordered that the national chiefs' council, which is presided over by the traditional leader, must commence disciplinary proceedings against the traditional leader since his actions were clearly unconstitutional and in contravention of the law.

A direct consequence of the clear involvement of traditional chiefs in national politics has been that traditional institutions have descended onto the political space for their own survival, and in a manner that directly impacts on electoral freedom, freedom of speech, assembly, political rights, among other rights. Accordingly, there is no denying the conclusion that traditional institutions are generally regarded as a conduit of the government and an instrument to carry out or support political programmes of the government of the day.

3.1 *Proposed Constitutional Changes*

The government of Zimbabwe has gazetted an amendment to the current Constitution[22] whose changes impact on the involvement of traditional leadership in provincial councils. Currently, provincial councils constitute a key feature of devolution in terms of Chapter 14 of the Constitution. Thus, apart from central government, which is a superior tier of government, provincial government is established through provincial councils as a second important tier of government in terms of section 5 of the Constitution. In the 2013 Constitution, traditional leaders are also members of the provincial councils. This means that traditional leaders are co-opted into the second tier of government, which is provincial government.

This position is set to change if the constitutional amendment sails through. The constitutional amendment proposes to remove traditional leaders from membership in the provincial council altogether.[23] This means that traditional leaders are removed

<http://edition.cnn.com/2008/WORLD/africa/06/27/zimbabwe.vote/> (accessed on 13 September 2016).

[20] T. Makahamadze, N. Grand and B. Tavuyanago, 'The Role of Traditional Leaders in Fostering Democracy, Justice and Human Rights in Zimbabwe', 16:1 & 2 *The African Anthropologist* (2009) p. 33.

[21] HH270/2018 (HH1718/18).

[22] Constitution of Zimbabwe Amendment (No 2) H.B 23.2019.

[23] *See* Clause 20 of the Amendment, which seeks to amend section 268 and 269 of the Constitution.

from the second tier of government, although they shall remain in the national legislature. Their initial involvement in the provincial councils was problematic from an oversight perspective. If they are already members of the legislature, it would be impossible for them to undertake oversight over provincial councils who are invited to national parliament for accountability since they sit both in parliament and in the provincial legislature.

4 General Overview

From a consideration of the various issues discussed above, certain fundamental themes and aspects of the constitutional system established by the 2013 Constitution emerge. The first observation that can be made is that the 2013 Constitution is clear on its constitutional objectives and priorities. It exalts the virtues of constitutionalism, constitutional supremacy, rule of law and human rights. The constitutional value system is anchored on these principles and the philosophy underpinning the whole constitutional document supports these values.

Secondly, the constitutional system is not apologetic of the modern state and government system it establishes; neither does it regret the fact that the existence of this modern state framework appears to question the validity of the continued existence of the traditional institutional system. To this extent, the constitutional system illustrates a desire to continuously and progressively develop the fundamental features of this modern state system, and not destroy them. Where there is need for any alterations or modifications of the modern state system, the constitutional system seems to suggest that this will not be in order to destroy the state system or subjugate it to the traditional institutional system. Indeed, there is nothing in the constitutional system that suggests that these two systems enjoy equality or will gradually attain that position in the foreseeable future. Inevitably, it can easily be observed that the traditional system established by the Constitution is decidedly subservient to the modern state machinery, and where these two systems conflicts, the modern state system triumphs. Accordingly, the Constitution does not compel constant negotiation and renegotiation between the traditional institutional system and the constitutional democratic system for purposes of finding points of convergence.

Thirdly, the customary legal system preserved by the Constitution is recognised only to the extent it is consistent, hence compliant, with the Constitution. This means that whilst the conclusion that there exists a pluralist legal system in Zimbabwe's constitutional framework holds water in theory, the reality is that this is of no practical relevance considering the subservient status of the customary law system to the general system established by the Constitution. Customary practices, social behavioural patterns, cultural values and various other traditional value systems are only legally valid to the extent that they are permitted by or consistent with the Constitution.

Most certainly, a functional position that can be established is that the customary system is only recognised to the extent it seeks to advance and promote the objectives and values in the Constitution. Accordingly, it can be concluded that the

philosophical orientation of Zimbabwe's constitutional framework is underpinned by the requirement that the customary law and traditional political system is established not as a competing legal system but for the purposes of complementing and promoting modern constitutional values and principles considerations in the interests of the modern state system.

Finally, the relationship between traditional institutions and the modern state created by the Constitution puts traditional institutions at risk of instrumentation by the government of the day. Traditional institutions are independent on paper only as they are likely to always be manipulated by the government of the day in its implementation of social and economic policies that impact rural and traditional livelihoods. The Constitution does not insulate traditional institutions from this risk, and indeed Zimbabwe's politics of the past 20 years has illustrated this sad reality. Even more pointedly, the trajectory of constitutional amendments does not seek to reverse this direction; in fact the intended removal of traditional leaders from provincial councils, which are a second important tier of government, suggest deliberate suppression of traditional leadership institutions from the modern, republic system of state and government desired by the 2013 Constitution.

5 Conclusion

The 2013 Constitution creates a modern state system that has very little room for traditional institutions. Further, the constitutional system has very limited space for legal pluralism, at least to the extent that this can be taken to mean existence of two legal systems competing at an equal level. The values of the modern state system and modern constitutional values are superior to those of the African value system. Indeed, there is very little support for the discourse or 'myth'[24] of harmonisation or unification[25] of the traditional political system and the general modern state system given prominence by the Constitution.

In relation to the traditional political system, what the Constitution illustrates is the existence of a subservient traditional political institutional system whose validity, sustainability and continued existence depends on the discretion of the modern state system. Again, there is very little support for the substantive integration of the traditional political system within the modern state machinery in a manner that would elevate the relevance of traditional political systems. Thus, the traditional political institutional system can only be relevant to the extent that it advances the agendas not only of the modern state, but also of the constitutional value system in the 2013 Constitution such as democratic governance, constitutionalism, separation of powers and the rule of law. This means that the social, economic and political agendas to be advanced by the modern state system and enshrined in the 2013 Constitution are not imperilled by the conditional recognition of the traditional political framework. Indeed, the constitutional system seeks to ensure that the traditional

[24] *See* M. Boodman, 'The Myth of Harmonization of Laws', *American Journal of Comparative Law* (1991) p. 699.
[25] A. Allott, 'Towards the Unification of Laws in Africa', *International Comparative Law Quarterly* (1965) pp. 366–389.

institutions and customary legal system it creates promote the objectives of the modern state, particularly where the agendas and objectives of the modern republican state system lead to the consolidation of the state, its regeneration and its effectiveness.

Part V - Mechanisms for the Enforcement of Rights and Conclusion

16 Standing, Access to Justice and Human Rights in Zimbabwe

Admark Moyo*

1 Introduction

There has been a significant paradigm shift, especially in light of the broad provisions of section 85(1) of the Constitution, towards the liberalisation of *locus standi* in Zimbabwe. The liberalisation of standing allows a wide range of persons who can demonstrate an infringement of their rights or those of others to approach the courts for relief. It is intended to enhance access to justice by individuals and groups without the knowledge and resources to vindicate their rights in the courts. To this end, the drafters of the Declaration of Rights acknowledged that restrictive standing provisions defeat the idea behind conferring entitlements upon the poor and the marginalised. The majority of the people intended to benefit from the state's social provisioning programmes often do not have the resources, the knowledge and the legal space to drag powerful states, transnational corporations or rich individuals to court in the event that a violation of their rights occurs. To address this problem, section 85(1) of the Constitution allows not only persons acting in their own interests but also any person acting on behalf of another person who cannot act for themselves, any person acting as a member, or in the interests, of a group or class of persons, any person acting in the public interest and any association acting in the interests of its members to launch court proceedings against alleged violators of the rights in the Declaration of Rights.

This chapter focuses on standing, access to justice and the human rights in Zimbabwe. It is composed of nine parts of which this introduction is the first. The second part of the chapter discusses, in some detail, the meaning of access to justice and delimits the reach of the research by confining the term to mean access to courts as the primary dispute resolution forum. This entails an inquiry into the scope of constitutional provisions governing access to courts and the right to a fair hearing. It is shown that the right of access to court, which forms part of the more general right to a fair hearing under the Constitution, is an essential ingredient of access to justice and the rule of law in all modern democracies. The term 'court' is interpreted in its narrow sense to include formal courts where provisions regulating standing have some relevance.

In the third part, the chapter briefly explains the scope of the standing provisions of the Lancaster House Constitution and the extent to which they limited access to justice and the rule of law. The fourth part critically analyses the scope of section 85 of the Constitution, its limitations, strengths and implications for access to justice.

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The liberalisation of standing, particularly the constitutionalisation of public interest litigation, represents a major shift from restrictive standing rules and evidences an intention to widen the pool of citizens who exercise the right of access to court in this country. It is argued that the drafters of the Constitution should have realised that insisting that the person who institutes proceedings be the one whose rights have been directly and immediately adversely affected would have hindered public interest litigation by non-governmental organisations, pressure groups and other interested persons.

Our Constitution abolishes the 'dirty hands doctrine', a concept in terms of which a litigant lacks standing if he is alleging that the statute in terms of which they are charged is unconstitutional. Their hands are said to be 'dirty', and the common law historically required them to comply with the impugned legislation first before they challenged it. The fifth part is devoted to a discussion of this doctrine and the positive changes brought by the current Constitution. In the sixth part, the chapter describes the constitutional provisions regulating the formulation of rules of all domestic courts. These provisions lay out principles which should guide the formulation and content of all court rules. This part discusses the extent to which the applicable principles promote access to justice and the rule of law in Zimbabwe. Referral by lower courts of constitutional issues, which arise in the course of litigation, to the Constitutional Court is discussed in the seventh part of the paper. It is argued that the conditions governing referral of constitutional issues that arise during court proceedings are stringent and are seemingly inconsistent with the spirit and purpose behind the broad standing provisions entrenched in the Constitution. This is particularly so because whether or not the Court hearing the matter gives a litigant leave to take up the matter with the Constitutional Court, the litigant ordinarily has the right of direct access to the Constitutional Court.

Intersections and overlaps between standing, access to justice and human rights are explored in the eighth part of the chapter. It is argued that a liberal approach to standing requires courts to place substantial value on the merits of the claim and underlines the centrality of the rule of law by ensuring that unlawful decisions are challenged by ordinary citizens and straightened by the courts. When a court refuses to entertain a matter on the basis that the petitioner does not have standing in terms of the applicable rules, the same court is essentially both neglecting its duty to assess the validity or constitutionality of the impugned conduct or legislation and undermining the rule of law. The final part of the chapter concludes the discussion by making some remarks on the future of access to justice and the rule of law in Zimbabwe, especially in light of the provisions governing standing and other related matters.

2 Access to Justice (a Fair Hearing) as Access to an Impartial Court

The notion of standing is based on the existence of a right, whether *prima facie* or certain. Where a litigant is wrongly before the courts and lacks a clear or sufficient interest in the matter, courts usually dismiss the matter and emphasise that the

appropriate person appear before them.[1] The right of access to court is constitutionally protected as part of the broad right to a fair hearing. Section 69(1)–(3) of the Constitution is framed in the following terms:

> (1) Every person accused of an offence has the right to a fair and public trial within a reasonable time before an independent and impartial court.
> (2) In the determination of civil rights and obligations, every person has a right to a fair, speedy and public hearing within a reasonable time before an independent and impartial court, tribunal or other forum established by law.
> (3) Every person has the right of access to the courts, or to some other tribunal or forum established by law for the resolution of any dispute.

The phrase 'right to a fair trial' consists of a number of component rights including but not limited to the right to a speedy hearing, legal representation, cross-examination, the presumption of innocence and pre-trial disclosure.[2] It is patent that the first two subsections outline the key components of the right of access to court, which is meant to give effect to the broad notion of access to justice. Section 69(1) of the Constitution captures the key components of the right to a fair hearing in criminal trials, and section 69(2) broadly describes the right to a fair hearing in civil proceedings. Notably, the component rights of a fair trial foster equality and enable litigants to present their side of the story in impartial courts or tribunals. The principle of equality becomes the core of the structure of fairness and lies at the heart of modern civil and criminal processes. The right to a fair hearing is as ancient as the trial process itself, stretching over the centuries and underlining the need for justice for all and equality before the law. It is aimed at promoting the administration of justice and securing the rule of law.[3]

The right to a 'fair trial' is treated as overlapping with the overarching right to a "fair and public hearing by a competent, independent and impartial tribunal established by law".[4] It implies that all persons should have inherent access to the courts and tribunals, including access to effective remedies and reparations.[5] Fairness of the hearing goes beyond the requirement of independence and impartiality of the judges and entails the absence of any direct or indirect influence, pressure or intimidation or intrusion from whatever side and for whatever cause.[6] The public character of

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[1] *See generally* I. Currie and J. de Waal, *The Bill of Rights Handbook*, 6th edition (2013).
[2] *See* R. Clayton and H. Tomlinson, *Human Rights Law* (2000) pp. 589–590. Treehsel clarifies fair trial rights into two components: a general one which applies to the general proceedings and specific rights involving the rights of the accused. *See* S. Treehsel, *Human Rights in Criminal Proceedings* (2005) p. 85.
[3] *See generally* UN Human Rights Committee (HRC), General Comment No. 32, Article 14, 'Right to equality before courts and tribunals and to fair trial', CCPR/C/GC/32 (23 August 2007).
[4] In the case of *Goktan v. France*, 33402/92, Judge Loucaides stated that "I believe that the right to a fair hearing/trial is not confined to procedural safeguards but extends to the judicial determination itself of the case. Indeed, it would have been absurd for the Convention to secure proper procedures for the determination of a right or a criminal charge and at the same time leave the litigant or accused unprotected as far as the result of such a determination is concerned. Such an approach would allow a fair procedure to end up in an arbitrary or evidently unjustified result."
[5] *See* further Counter-terrorism Implementation Taskforce, *Basic Human Rights Reference Guide: The Right to a Fair Trial and Due Process in the Context of Countering Terrorism*, 2014, p. 14, para. 9.
[6] W. Kalin and J. Kunzli, *The Law of International Human Rights Protection* (2011) pp. 453–454.

hearings and of the pronouncement of judgements is therefore one of the core guarantees of the right to a fair trial and implies that court proceedings should be conducted orally and in a hearing to which the public has access.

The right to a fair hearing implies in particular that tribunals and other decision-making authorities must refrain from any act that could influence the outcome of the proceedings to the detriment of any of the parties to court proceedings.[7] In general, fair trial guarantees are not only concerned with the outcome of judicial proceedings but rather the process by which the outcome is achieved.[8] There are structural rules regarding the organisation of domestic court systems. Securing the right of access to court and to a fair hearing can require a high level of investment in the court system, and many states often fail to fulfil their obligations because of serious structural problems. It should be noted, however, that human rights law does not seek to impose a particular type of court system on states but rather the implementation of the principle that there should be a separation of powers between the executive, the legislature and the judiciary.[9]

Fairness, justice and the rule of law all have substantive and procedural dimensions. They suppose an inherent need to comply with the procedural and substantive requirements of the law in order to ensure that justice is delivered to individuals and communities [10] In general, it is an essential element of a fair trial that litigants be treated fairly and in accordance with lawful procedures, not only during the trial itself, but also from the moment they first come into contact with law enforcement agencies. If lawful procedures are violated at any stage in the process, not only does the adversely affected litigant have a civil remedy against the responsible authorities, but the violation very often affects the validity of subsequent stages. This aspect of procedural justice is often referred to as procedural fairness and seeks to ensure that the state and the court comply with the procedural requirements of the rule of law. The procedural element of the rule of law requires state and non-state actors to function in a manner that is consistent with the applicable rules of procedure in any given case. Finally, the right to a fair hearing includes the right of equal access to courts and equality of arms before decision-making forums. These elements are pursued in turn.

[7] J. Burchel, *Principles of Criminal Law*, 3rd edition (2005) p. 19.
[8] S. Shah, 'Detention and Trial', in D. Moeckli, S. *Shah*, and S. Sivakumaran (eds.), *International Human Rights Law,* 2nd edition (2014) p. 270.
[9] *Ibid*., p. 270.
[10] S *v. Sonday & Anor*, 1995 (1) SA 497 (C) at 507C, where Thring J held that "[t]he concept of a 'fair trial', including a fair appeal, embraces fairness, not only to the accused or the appellant, as the case may be, but also, in a criminal case, to society as a whole, which usually has a real interest in the outcome of the case". *See also Taylor v. Minister of Education and Anor*, 1996 (2) ZLR 772.

2.1 *Equal Access to Courts*

The right to access to courts is essential for constitutional democracy and the rule of law.[11] Its significance lies in the fact that it outlaws past practices of ousting the court's jurisdiction to enquire into the legal validity of certain laws or conduct. A fundamental principle of the rule of law is that anyone may challenge the legality of any law or conduct.[12] In order for this entitlement to be meaningful, alleged illegalities must be justiciable by an entity that is separate and independent from the alleged perpetrator of the illegality.[13] Access to court and the rule of law both seek to promote the peaceful institutional resolution of disputes and to prevent the violence and arbitrariness that results from people taking matters into their own hands.[14] Thus not only is the right of access to court a bulwark against vigilantism, but also a rule against self-help and an axis upon which the rule of law rests. Unless there are good reasons (self-defence or necessity for instance), no one should be permitted to take the law into their own hands.[15] Thus this is intended to ensure that individuals do not resort to the law of the jungle.[16] The threshold enquiry which must be met to access the right is that there must be a dispute capable of resolution by law, and once this is present factors such as independence, access, impartiality as well as fairness are triggered.[17]

Even though not explicitly provided for in fair hearing provisions, all human rights bodies, whether international or domestic, have confirmed that guaranteeing access to courts is an essential step on the journey to determining the parties' rights and obligations in a lawsuit. This implies that all persons must have an equal opportunity to have their constitutional rights and obligations determined by a court of law in the event of a dispute. The Human Rights Committee has stated that access to the administration of justice must be effectively guaranteed in all cases to ensure that no individual is deprived, in procedural and substantive terms, of their right to claim justice.[18]

Ensuring equal access to courts and tribunals involves substantial activity on the part of states.[19] They must ensure that judicial systems are organised so that all individuals who may find themselves in their territory or subject to their jurisdiction

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[11] *Road Accident Fund v. Mdeyide*, 2011 (2) SA 26 (CC) [1] and [64]; *De Beer NO v. North-Central Local Council and South-Central Local Council*, 2002 (1) SA 429 (CC) [11]; *Bernstein v Bester NO*, 1996 (2) SA 751 (CC) [105].

[12] *De Lange v. Smuts NO*, 1998 (3) SA 785 (CC) [46]-[47].

[13] *Road Accident Fund v. Mdeyide*, *supra* note 11, para 1.

[14] In *Chief Lesapo v. North West Agricultural Bank*, 2000 (1) SA 409 (CC) paras. 11–12, 18 and 22, the Court stressed the need for "institutionalising the resolution of disputes, and preventing remedies being sought through self-help".

[15] I. Currie and J. De Waal, *The New Constitutional and Administrative Law*, volume 1 (2001) p. 407.

[16] Resolution of legal disputes has to be by fair, independent and impartial institutions so as to prevent individuals from resorting to self-help

[17] In *Telcordia Technologies Inc v. Telkom SA Ltd*, 2007 (3) SA 266 (SCA), the Court held that this was a waiver of the right to a public hearing and that the waiver was acceptable and valid, unless contrary to some other constitutional principle or otherwise *contra bonos mores*.

[18] General Comment No. 32, para. 9.

[19] Shah, *supra* note 8, p. 273.

can access the courts.[20] It is important to note that access to courts and tribunals can be severely troubled if no legal assistance is available or only available at a prohibitively sky-rocketing cost. Thus, states may only restrict access to courts where such restrictions are based on law, can be justified on objective and reasonable grounds, and not discriminatory.[21]

2.2 *Equality of Arms and Treatment without Discrimination*

The right to equality before the courts also includes protection of equality of arms and treatment without discrimination. Equality of arms means that all parties should be provided with the same procedural rights unless there is an objective and reasonable justification not to do so and there is no significant disadvantage to either party.[22] The principle of equality of arms is of ancient origin.[23] Early trials took the forms of battles wherein the accused and the accuser fought in armour and rode on horses with batons and fought to death.[24] The contest ended with the death of one contestant, at which point justice would have been served.[25] The rules of combat ensured that neither party enjoyed advantage in terms of arms and armaments.[26]

The principle of equality of arms has roots both in common law and civil law traditions.[27] It is an expression of the natural law principle '*audi alteram partem*' which was first formulated by St. Augustine.[28] The principle involves striking a "fair balance between the parties, in order that each party has a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage vis-a-vis his opponent".[29] The essence of the guarantee is that each side should be given the opportunity to challenge all the arguments put forward by the other side.[30] Indeed, the principle forms part of international human rights principles.[31] It is particularly relevant in the adversarial tradition which manifests itself as an interest based system. The system demands that there must be balance and equality between the players, and in a criminal trial the accused should be assisted to present his case in such a manner that he is not disadvantaged in relation to the prosecution

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[20] General Comment No. 32, para. 9.
[21] General Comment No. 32, para. 9.
[22] Shah, *supra* note 8, p. 274.
[23] S. Bufford, 'Center of Main Interest, International Insolvency Case Venue, and Equality of Arms: The Eurofood Decision of the European Court of Justice', 27 *North-western Journal of International Law and Business* (2007) p. 351, at p. 395.
[24] J. S. Silver, 'Equality of Arms and the Adversarial Process: A New Constitutional Right, *Wisconsin Law Review* (1990) p. 1007.
[25] *Ibid.*
[26] *Ibid.*
[27] J. D. Jackson, 'The Effects of Human Rights on Criminal Evidentiary Process: Towards Convergence, Divergence or Realignment?', 68:5 *Modern Law Review* (2005) p. 737, at p. 751.
[28] A, Patrick, *Human Rights Practice* (2001) p. 145.
[29] *See generally* C. J. M. Safferling, *Towards a International Criminal Procedure* (2001) p. 256 and K. Lenarts '"In the Union We Trust": Trust- Enhancing Principles of Community Law', 41:2 *Common Market Law Review* (2004) p. 317, at p. 329.
[30] General Comment No. 32, para. 13.
[31] Article 14 of the ICCPR, Article 10 of the UDHR, C. Safferling, *International Criminal Procedure* (2012) p. 265.

'Equality of arms' is a concrete right that forms part of the residual fair trial right.[32]As Robertson and Merills points out, the 'equality of arms' principle in criminal trials represents those procedural mechanisms with which the vast inequality in power between the state and the accused is sought to be addressed.[33] The use of the principle in the criminal sphere may have unfortunate consequences if the 'equality' notion is taken too literally: the tendency would be to think that an accused should not be entitled to any procedural or evidential privileges to which the prosecution is not entitled, even though those privileges might well have been created to seek to 'equalise' the forces between prosecution and defence in the first place.[34]

2.3 *An Illimitable and Non-Derogable Right at the Domestic Level*

Unlike in other jurisdictions, the Zimbabwean Constitution clearly stipulates in no uncertain terms that no law may limit the right of access to an impartial court and to a fair hearing.[35] Such a provision is quite laudable given that the aim of the right of access to court is to ensure the proper administration of justice. Thus, in order for the state to commit itself to a society founded on the recognition of human rights, there is need to value and respect the aforementioned right to a fair trial.[36] This must be demonstrated by the state in everything that it does, including the way in which hearings are conducted.[37] Given the importance of justice and fair treatment in the constitutional scheme, the gross unfairness as well as injustice which arises as a result of the absence of a fair hearing carries no less weight.[38] This right may not be derogated from even during an emergency. The identification of this right as non-derogable implies that its suspension cannot directly assist in the objective of protecting the life of the nation, access to justice and the rule of law.[39]

The Zimbabwean Constitution expressly stipulates that no law may limit the right to a fair trial and no person may violate this right.[40] This right is also non-derogable in terms of section 87(4)(b) of the Constitution. In theory, the inclusion of this right to a fair trial under a list of illimitable and non-derogable rights entrenches the nation's commitment to due process rights such as the presumption of innocence and the right to a public hearing that is not arbitrary. The Human Rights Committee has previously reiterated that "deviating from fundamental principles of fair trial, including

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[32] S. Stravos, *The Guarantees for Accussed Persons under Article 6 of the European Convention and a Comparison with Other Instruments* (1993) p. 43.
[33] A. H. Robertson and J. G. Merills, *Human Rights in Europe: Study of the European Convention on Human Rights*, 3rd edition (1993). Some educative cases on 'equality of arms' include *Unterpertinger v. Austria,* (1986)13 EHPR 434 and *Kostovski v. Netherlands*, (1989) 12 EHRR 175.
[34] In *S v. Van de Merwe*, 1998 (1) SACR 194 (O), fairness of treatment of the subject was regarded as a question of the fairness of the trial that occurred subsequently.
[35] Section 86(3)(e) of the Constitution.
[36] *See*, for instance, *S v. Sebejan & Others*, 1997 (8) BCLR 1086 (W).
[37] I. Currie and J. De Waal, *The Bill of Rights Hand book*, 6th edition (2013) p. 165.
[38] This is in line with the principles of transparency, accountability and openness that inform our Constitution and its entrenchment of democracy and the rule of rule.
[39] For example, there is no additional protection of the life of the nation to be gained from suspending the right to a fair trial, this is so particularly because derogating from this right only leads to arbitrariness and defeats the entire process of proper administration of justice in a nation.
[40] Section 86(3)(e) of the Constitution.

the presumption of innocence, is prohibited at all times",[41] thereby underlining the centrality of this right in modern democracies.

The right to a fair trial and its illimitability and non-derogability underline the social importance of the right to equality in the context of access to an impartial court or tribunal. As stipulated by the Human Rights Committee, the "right to equality before courts and tribunals, in general terms, guarantees … equal access and equality of arms, and ensures that the parties to the proceedings in question are treated without any discrimination". Access to justice must be guaranteed to all in all circumstances, even during emergencies, in order to ensure that no one, not even a foreign national, is denied their right to claim justice and, where their claim is accepted by the court, to an effective remedy. Against this background, it is patent that the inclusion of section 86(3)(e) in the Constitution was meant to ensure that individuals' right of access to court is not systematically frustrated by legislative provisions or conduct which runs counter to the very idea of equality before the law. There is, in the right to a fair trial, an inherent prohibition of discrimination with regards to access to courts regardless of how heinous the crime one is charged with might be. Accordingly, even the most vile persons in our society have due process rights and are entitled to demand that the process by which their guilt or innocence is ascertained be procedurally and substantively fair. These principles underscore the centrality of access to justice and the rule of law.

3 Standing under the Lancaster House Constitution

Under the Lancaster House Constitution (LHC), only persons directly affected or about to be affected by infringements of rights were entitled to approach the courts for relief. The idea that 'any person acting in their own interests' is entitled to approach the local courts for relief was concretised by the provisions of the now defunct Lancaster House Constitution. Section 24(1) thereof provided as follows:

If any person alleges that the Declaration of Rights has been, is being or is likely to be contravened in relation to him (or, in the case of a person who is detained, if any other person alleges such a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may, subject to the provisions of subsection (3), apply to the Supreme Court for redress.

Section 24(1) of the LHC was designed to promote direct access to the then apex court (the Supreme Court) by any person who alleged that their personal rights had been infringed. Under the LHC, only persons negatively affected by the impugned conduct could institute court proceedings against alleged violators of rights. Thus, a person could not have *locus standi* unless they were able to demonstrate that a provision of the Declaration of Rights had been contravened in respect of

[41] UN Human Rights Committee (HRC), CCPR General Comment No. 29: Article 4: Derogations during a State of Emergency, CCPR/C/21/Rev.1/Add.11, (2001), para. 11.

themselves.[42] When seeking direct access to the Supreme Court, a litigant had to demonstrate that their right(s) had been violated by the impugned law or conduct.[43] It would not suffice that the interests of the person seeking direct access to the Supreme Court had been infringed.[44] The LHC codified a restrictive approach to standing and prevented civil society organisations, pressure groups and political parties from seeking justice on behalf of marginalised groups. In *United Parties v. Minister of Justice, Legal and Parliamentary Affairs and Others*,[45] the applicant, a political party, sought to challenge the constitutionality of certain provisions of the Electoral Act[46] on the basis that they violated the right to freedom of expression as protected in section 20 of the LHC. The relevant provisions of the Act conferred on constituency registrars the right to object to the registration of voters and to refrain from taking any action relating to objections lodged by the electorate (within the period of 30 days before the polling date) concerning the retention of their names on the voters' roll. The Court held that the political party had no legal standing to challenge the provisions of the Electoral Act. Gubbay CJ (as he then was) held that:

> section 24(1) [of the LHC] affords the applicant *locus standi in judicio* to seek redress for a contravention of the Declaration of Rights *only in relation to itself* (the exception being where a person is detained). It has no right to do so either on behalf of the general public or anyone else. The applicant must be able to show a likelihood of itself being affected by the law impugned before it can invoke a constitutional right to invalidate that law.[47]

The Court observed that the provisions in question impacted on the rights and interests of 'claimants' and 'voters'. It relied on the definitions of the words 'claimant' and 'voter' in the Electoral Act. Section 3 thereof defined a claimant as a person "(a) who has completed a claim form; or (b) has submitted a written application in terms of section 24(2)". The same section defined a voter as "a person who is entitled to vote and is registered in the voters roll". Relying on a literal reading of these provisions, the Court held as follows:

> When regard is had to the meaning of "claimant", it becomes apparent ... that the applicant, as a political party, does not come within the purview of section 25(1). It does not complete a claim form, nor is it registered on the voters' roll. The applicant is not a person even liable to be affected by the opinion of the constituency registrar, or by the mandatory inaction of that official. Precisely the same line of reasoning is applicable to section 26(5). The applicant is not touched by this

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[42] *See In Re Wood v. Hansard*, 1995 (2) SA 191 (ZS) at p. 195. *See also Chairman of the Public Service Commission and Others v. Zimbabwe Teachers Association and Others*, 1996 (9) BCLR 1189 (ZS), at p. 1199 where Gubbay CJ held that "legal rights and interests do not exist in vacuo. They must vest in legal persons who can petition the courts for their enforcement or enjoyment. When a person petitions for the enforcement or enjoyment of a legal right or interest, the court must, of necessity, enquire into the nature of the right or interest claimed in order to determine whether, and when, the entitlement to the enjoyment of such right or interest, if any, is due."

[43] G. Linington, 'Developing a New Bill of Rights for Zimbabwe: Some Issues to Consider', in N. Kersting (ed.), *Constitution in Transition: Academic Inputs for a New Constitution in Zimbabwe* (2009) p. 52.

[44] *See Mhandirwe v. Minister of State*, 1986 1 ZLR 1 (S) where Baron JA stated that "section 24(1) provides access to the final court in the land. The issue will always be whether there has been an infringement of an individual's rights or freedoms, and frequently will involve the liberty of the individual".

[45] 1998 (2) BCLR 224 (ZS).

[46] Electoral Act, Chapter 2:01 of the Laws of Zimbabwe.

[47] *United Parties v. Minister of Justice*, at p. 227.

> provision. The objection must be that of a voter. The applicant is not entitled to vote and is not registered on a voter's roll. It is a political association whose members, though not necessarily all of them, are voters. It is they, if voters, not the applicant itself, who are given the right of objection.[48]

The Court held in its final analysis that "the applicant is not entitled under section 24(1) of the Constitution to carry the torch for claimants and voters generally".[49] For these reasons the Court held that the applicant did not have *locus standi* to proceed under section 24(1) of the LHC. This restrictive reading of the applicable provisions has been correctly criticised, with some scholars arguing that since "the applicant alleged a contravention affecting the public (with him being a member thereof)", they were entitled "to mount a constitutional challenge on the basis of his rights having been contravened. It is not self-evident that where a person is being affected as part of a … group, he has not been affected personally".[50] It would also appear that even if the Court was right in refusing the applicant (a political party) standing, it should have seized the opportunity and clarified "the important issue of 'public interest' litigation then recognised in other jurisdictions". As Madhuku later argued, "[n]o better situation can present itself for a pronouncement on 'public interest' litigation in defence of constitutional rights than where a political party, on behalf of members of the public generally, challenges electoral legislation in the way the *United Parties* did".[51] Strict adherence to the idea that only persons who are directly affected by the impugned conduct approach the courts for relief severely limits access to justice, the enjoyment of constitutional rights and the rule of law. In the *United Parties* case, the restrictive reading of provisions governing standing prevented the Court from deciding on the constitutionality of the impugned provisions and therefore constituted a limitation to the application of the substantive element of the rule of law.

Regardless of the restricted nature of standing provisions under the LHC, the Supreme Court later developed some flexibility in human rights litigation and expanded its capacity to hear cases that were brought before it in the public interest. *In Catholic Commission for Justice and Peace in Zimbabwe v. Attorney-General and Others*,[52] a human rights organisation brought an application to prevent the execution of certain prisoners on death row on the basis that the sentences had been rendered unconstitutional by virtue of the lengthy delay in carrying them out. One of the questions to be determined by the Court was whether the organisation had *locus standi* to act on behalf of the prisoners. The Court observed that the organisation's "avowed objects" were "to uphold human rights, including the most fundamental right of all, the right to life", and that it was "intimately concerned with the protection and preservation of the rights and freedoms granted to persons in Zimbabwe by the

[48] *Ibid.*, at p. 228.
[49] *Ibid.*, at p. 229.
[50] L. Madhuku, 'Constitutional Interpretation and the Supreme Court as a Political Actor: Some Comments on *United Parties v Minister of Justice, Legal and Parliamentary Affairs*', 10:1 *Legal Forum* (1998) p. 48, at p. 52.
[51] *Ibid.*, p. 53.
[52] 1993 (1) ZLR 242 (S).

Constitution".[53] Gubbay CJ, for the Court, held that "it would be wrong ... for this court to fetter itself by pedantically circumscribing the class of persons who may approach it for relief to the condemned prisoners themselves; especially as they are not only indigent but, by reason of their confinement, would have experienced practical difficulty in timeously obtaining interim relief from this court".[54] Unfortunately, progressive court decisions constituted exceptions to the widespread denial of *locus standi* at the time they were decided. They laid the groundwork for access to court and justice by indigent individuals or groups without the legal knowledge and fiscal space to institute court proceedings.

However, later cases would restrict access to justice and the rule of law by preventing the leading opposition candidate from mounting constitutional challenges against laws governing presidential elections. In *Tsvangirai v. Registrar General of Elections*,[55] the applicant argued that the Electoral Act (Modification) Notice,[56] published three days before the 2002 presidential election by the president (the laws restricted postal voting to only members of the uniformed forces), violated his rights to protection of law and freedom of expression as envisaged by the LHC. In his dissent, Sandura JA took a different route and underscored the fact the he would have given the applicant standing in order to promote human rights, access to justice and the rule of law.[57] To this end, he made the following remarks:

> Quite clearly, the entitlement of every person to the protection of the law, which is proclaimed in section 18(1) of the Lancaster House Constitution, embraces the right to require the legislature … to pass laws, which are consistent with the Constitution. If, therefore, the legislature passes a law, which is inconsistent with the Declaration of Rights, any person who is adversely affected by such a law has the locus standi to challenge the constitutionality of that law by bringing an application directly to this court in terms of section 24(1) of the Constitution. Thus, in the present case, the applicant had the right to demand that the presidential election be conducted in terms of the Electoral Law passed by parliament as required by section 28(4) of the Constitution. In the circumstances, he had the right to approach this Court directly in terms of section 24(1) of the Constitution and had the locus standi to file the application.[58]

The majority's decision in this case has been largely criticised for both denying a candidate in the election the right to challenge laws which directly affected the manner in which the election was conducted and fleshing out a very narrow approach

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[53] *Catholic Commission for Justice and Peace in Zimbabwe v. Attorney-General*, 1993 4 SA 239 (ZS), at 246H.

[54] *Ibid.*, at 246H-247A. It is arguable that since section 24(1) of the LHC afforded to 'any other person' the right to approach a court on behalf of detained persons, it was not even necessary for the Court to indicate its preparedness to broaden the number of persons entitled to approach the courts on behalf of prisoners. *See* G. Feltoe, 'The Standing of Human Rights Organisations and Individuals to Bring or be Parties to Legal Cases Involving Issues of Human Rights', 7:2 *Legal Forum* (1995) p. 12.

[55] (76/02) 2002 ZWSC 20 (4 April 2002).

[56] Statutory Instrument 41D of 2002.

[57] For comparative academic scholarship, *see* G. N. Okeke, 'Re-examining the Role of *Locus Standi* in the Nigerian Legal Jurisprudence', 6 *Journal of Politics and Law* (2013) p. 209, at p. 210, where the author argues that provisions governing standing should not be used as an overly-restrictive weapon for "narrowing the road to litigation".

[58] *Tsvangirai v. Registrar General of Elections*, (76/02) 2002 ZWSC 20.

to standing.[59] In the case of *Capitol Radio (Pvt) Ltd v. Broadcasting Authority of Zimbabwe*,[60] the Court denied the applicant access to court on the ground that it was not licensed in terms of the relevant Act.[61] The Court failed to protect the applicant's rights which were allegedly being violated by the Broadcasting Services Act. In the view of the Court, the applicant had to submit to the impugned legislation before challenging its unconstitutionality. This approach violated the rule of law and access to justice in that if the legislation were to be found to be unconstitutional, the Court would have denied the litigant a remedy where, in fact, one existed. Chiduza and Makiwane, after making extensive analysis of key cases that were decided before the adoption of the current Constitution, make the following findings:

> The narrow interpretation of the rules of standing adopted by the judiciary became an impediment to human rights litigation in Zimbabwe. It limited litigants' right to access courts for the protection of their fundamental rights and freedoms. In an effort to improve human rights litigation and access to justice, the new constitutional dispensation in Zimbabwe, with great influence from the South African legal system, has adopted a more liberal approach to standing.[62]

These remarks provide a useful background against which to analyse the various ways in which the new Constitution has enhanced access to court or justice, human rights and the rule of law in Zimbabwe.

4 Standing under the New Constitution

The current Constitution follows the South African model and broadens the number of persons who are entitled to bring rights or interests-based claims for determination by the local courts. 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 interests, of a group or class of persons; any person acting in the public interest; and any association acting in the interest of its members. The stipulated categories of persons may approach a court alleging that a fundamental right or freedom protected in the Constitution has been, is being or is likely to be infringed by the impugned law or conduct. This section discusses in detail the standing of each person, the circumstances under which each of these groups can vindicate human rights and the extent to which the Constitution liberalises *locus standi* to enhance access to justice by marginalised groups.

[59] A. De Bourbon, 'Human Rights litigation in Zimbabwe: Past, Present and the Future', 3:2 *African Human Rights Law Journal* (2003) p. 195, at p. 201.
[60] 2003 ZWSC 65 (2003).
[61] Broadcasting Services Act, Chapter 12:06 of the Laws of Zimbabwe.
[62] L. Chiduza and P. Makiwane, 'Strengthening *Locus Standi* in Human Rights Litigation in the New Zimbabwean Constitution', 19 *Potchefstroom Electronic Law Journal* (2016) p. 1, at p. 9.

4.1 *Any Person Acting in Their Own Interests – Lessons from the Lancaster House Constitution*

The idea that persons acting in their own interest are entitled to approach the courts for relief mirrors the common law principle that only persons who are directly affected by the matter to be considered by the court have a right to seek a remedy before it. However, it has been suggested that the term 'interest' is 'wide enough' and includes, for example, instances where a trustee seeks to maintain the value of the property.[63] An argument can be made that the term 'acting in their own interest' has a wider meaning under the Constitution than it had at common law. This view has support from the majority decision in *Ferreira v. Levin NO & Others*.[64] The majority of the South African Constitutional Court denied Ackermann J's claim that the interest referred to must relate to the vindication of the constitutional rights of the applicant and no other person.[65] Chaskalson P, as he then was, emphasised that the Court would adopt a broader interpretation of the term 'sufficient interest' and indicated that the person bringing the claim should not necessarily be the person whose rights have been infringed.[66] He insisted that "[t]his would be consistent with the mandate given to [the] Court to uphold the Constitution and would serve to ensure that constitutional rights enjoy the full measure of the protection to which they are entitled".[67] The application for relief need not relate to the constitutional rights of the plaintiff but may relate to the constitutional rights of other persons.[68]

Historically, courts generally appear to have followed a restrictive approach to standing, especially before the adoption of the LHC. In *Zimbabwe Teachers Association & Others v. Minister of Education*,[69] Ebrahim J reviewed earlier decisions where the issue of *locus standi* had been determined. In coming to the conclusion that the association had *locus standi*, the judge held that the association's membership was about 42 per cent of the total number of teachers in the country, and in the circumstances it would be fallacious to conclude that the applicant had no real and substantial interest in the litigation to redress the unlawful dismissal of three teachers. Before holding that the applicant before him had the requisite *locus standi*, he summarised the legal position as follow:

> From these authorities it is apparent what the legal approach to the issue of *locus standi* should be. The petitioners must show that they have a direct and substantial interest in the subject matter and what is required is a legal interest in the subject matter of the action.[70]

The judge would later emphasise that "[i]t is well settled that, in order to justify its participation in a suit such as the present, a party … has to show that it has a direct

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[63] *Van Huyssteen v. Minister of Environmental Affairs and Tourism*, 1996 (1) SA 283.
[64] 1996 (1) SA 984 (CC).
[65] For this narrow approach to standing, *see* para. 38, and for a critique of this narrow approach, *see* O'Regan J's judgment, especially para. 226.
[66] Paras. 163–168.
[67] Para. 165.
[68] *See Port Elizabeth Municipality v. Prut NO & Another*, 1996 (4) SA 318 (E), 324H-325J.
[69] 1990 (2) ZLR 48 (HC).
[70] *Ibid.*, at 57B.

and substantial interest in the subject-matter and outcome of the application".[71] Although the phrase 'direct and substantial interest' is meant to bar litigants from bringing all sorts of vexatious and frivolous claims to courts of law, it tends to suggest that for one to have recourse to the courts, they must be seriously and directly affected by the conduct of the defendant. The assertion that a litigant should show a 'direct and substantial interest' which could be affected by the court's decision on the issues raised by a particular case implies that it has to be the person whose rights have been infringed who institutes proceedings in our courts. In other words, it is only when the rights of the petitioner are implicated that the courts may hear the matter. This means that the capacity to litigate would only be accorded to a plaintiff who shows that their rights have been or are in danger of being infringed or adversely affected by the conduct complained of.

Section 85(1)(a) of the Constitution embodies the common law rule that the person claiming the right to approach the court must show on the facts that he or she seeks to vindicate his or her own interest adversely affected by an infringement of a fundamental right or freedom.[72] The infringement must be in relation to himself or herself as the victim or there must be harm or injury to his or her own interests arising directly from the infringement of a fundamental right or freedom of another person. There must be a direct relationship between the person who alleges that a fundamental right has been infringed and the cause of action. This familiar rule of *locus standi* was based on the requirement of proof by the claimant of having been or of being a victim of an infringement – whether actual or threatened – of a fundamental right or freedom enshrined in the Declaration of Rights.

Section 85(1)(a) of the Constitution represents the traditional and narrow rule of standing. The shortcomings of this rule prompted Chidyausiku CJ, in *Mawarire v. Mugabe NO and Others*,[73] to make the following remarks:

> Certainly this Court does not expect to appear before it only those who are dripping with the blood of the actual infringement of their rights or those who are shivering incoherently with the fear of the impending threat which has actually engulfed them. This Court will entertain even those who calmly perceive a looming infringement and issue a declaration or appropriate order to stave the threat, more so under the liberal post-2009 requirements.[74]

It appears Chidyausiku CJ was mostly concerned with the fact that the traditional approach to standing only served a litigant who had suffered an infringement of their rights or who had faced an imminent threat to their rights. This approach had to be broadened to include even those who calmly perceive a looming infringement in order to fulfil the constitutional imperative that any person alleging that a right has been, is being or is likely to be infringed is entitled to approach the courts for relief.

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[71] *Ibid.*, at 52–53. The Court was following Beck J's holding in *Deary NO v. Acting President & Ors*, 1979 RLR 2090 (G), at 203A. For comparative jurisprudence, *see* Cobertt J in *United Watch and Diamond Co (Pvt) Ltd & Others v. Disa Hotels Ltd & Anor*, 1972 (4) SA 409 (C).

[72] *See Mudzuru and Another v. Minister of Justice, Legal and Parliamentary Affairs and Others*, CCZ 12/15, 8-9.

[73] CCZ 1/2013.

[74] *Ibid.*, at p. 8.

Yet, the main threat to access to justice has been the fact that the categories of persons entitled to approach the courts for a remedy has been limited under the traditional rules governing standing.

As is demonstrated below, there has been a significant paradigm shift, especially in light of the broad provisions of section 85(1) of the Constitution, towards the liberalisation of *locus standi.* The new approach addresses the shortcomings of the traditional and narrow approach. It is intended to enhance access to justice by individuals and groups without the knowledge and resources to vindicate their rights in the courts. There is no doubt that the new approach to Declaration of Rights litigation acknowledges that the old approach defeated the idea behind conferring entitlements upon the poor. The majority of people who benefit from the state's social provisioning programmes do not have the resources, the knowledge and the legal space to drag powerful states or transnational corporations to court in the event of a violation of their rights. Insisting that the person who institutes proceedings be the one whose rights have been directly and immediately adversely affected would hinder public interest litigation by non-governmental organisations, pressure groups and other interested persons.

Nonetheless, there is room for broadening the ambit of standing under section 85(1)(a) of the Constitution to ensure that a person would have standing to challenge an unconstitutional law if they could be liable to conviction for an offence charged under that law, even if the unconstitutional effects were not necessarily directed at them per se. As Malaba DCJ once observed, "[i]t would be sufficient for a person to show that [they were] directly affected by the unconstitutional legislation" and it mattered not whether they had suffered an infringement or not.[75] In the Canadian case of *R v. Big M Drug Mart Ltd*,[76] a corporation was allowed to challenge the constitutionality of a statutory provision at a criminal trial on the grounds that it infringed the rights of human beings and was accordingly invalid. The corporation had been charged in terms of a statute which prohibited trading on Sundays.

Although the corporation did not have a right to religious freedom, it was nonetheless permitted to raise the constitutionality of the statute which was held to be in breach of the Charter on the Rights and Freedoms of the Person. According to the Court, the corporation had a financial interest in the form of profits made out of trading on Sundays. This approach broadens the meaning of the phrase 'own interests' used in section 85(1)(a) of the Constitution to include indirect interests such as commercial interests. In attempting to demonstrate that the statute was unconstitutional, the corporation argued that the statute infringed the fundamental right to freedom of religion of non-Christians who did not observe Sunday as the day of rest and worship. In getting the statute declared unconstitutional, the corporation's primary purpose was the protection of its own commercial interests and freedom from criminal prosecution for alleged breach of an invalid statutory provision.

[75] *Mudzuru and Another v. Minister of Justice*, at p. 10.
[76] (1985) 18 DLR (4th) 321.

Interests have been defined broadly in both Canadian and Zimbabwean jurisprudence. In the Canadian case of *Morgentaler Smoling and Scott v. R*,[77] male doctors who were prosecuted under anti-abortion provisions successfully challenged the constitutionality of the impugned legislation. The legislation directly violated pregnant women's right to have an abortion and did not in any way directly negatively affect the rights of males. Although the rights did not and could not vest in the male doctors, the anti-abortion provisions reduced the doctors' revenue in-flows in the sense that if pregnant women were free to consult the male doctors, the later would benefit financially from charging pregnant women for performing abortions. The doctors had their own financial and personal interests to protect in challenging the constitutionality of the anti-abortion legislation, even though the legislation primarily infringed upon women's fundamental right to security of the person as protected in section 7 of the Canadian Charter. This approach has been replicated by domestic courts. For instance, in *Retrofit (Pvt) Ltd v. PTC and Another*,[78] the court held that the applicant had *locus standi* to bring the suit to protect a 'commercial self-interest and advantage' that was being threatened by the respondent.

4.2 *Any Person Acting on Behalf of Another Person Who Cannot Act for Themselves*

The Constitution confers on 'any person' the authority to seek redress 'on behalf of another person who cannot act for themselves'. To claim relief based on this ground, the applicant should usually demonstrate why the person whose rights are adversely affected is not able to approach the court personally and should also show that the person in question would have instituted proceedings if they were in a position to do so. In *Wood and Others v. Ondangwa Tribal Authority and Another*,[79] the South African Appellate Division allowed church leaders to seek in the interests a large, vaguely defined group of persons who feared being arrested, prosecuted and be handed summary punishment on the basis of their political affiliations. The Court held that it would be impractical to expect the persons whose rights and interests were allegedly violated to approach the Court themselves. Part of the reason was that the majority of the affected persons were tribesmen living 800kms away from the seat of the Court and lived in an environment in which legal assistance was not easily accessible.[80] The reasoning of the Court supports the view that standing should be allowed under section 85(1)(b) of the Constitution where the party affected feared victimisation if they launch court proceedings in their own name.

There are numerous groups of persons who are patently unable to institute proceedings on their own behalf for various reasons. Due to conditions of stringent rules governing pre- or post-trial detention, detained persons constitute one category of persons who are usually incapable of acting for themselves. Under section 24(1) of the LHC, any person could seek redress on behalf of detained persons.

[77] (1988) 31 CRR 1.
[78] 1995 (2) ZLR 199 (S).
[79] 1972 (2) SA 294 A.
[80] *See also* J. R. De Ville, *Judicial Review of Administrative Action in South Africa* (2003) p. 424.

Accordingly, the traditional condition that the person instituting proceedings be substantially and directly affected by the impugned conduct would be generally shelved for purposes of ensuring access to justice by detainees. Due to the deprivation of liberty and physical confinement, lack of access to legal practitioners at custodial institutions and other administrative or institutional barriers, detainees are usually not able to institute proceedings to vindicate their rights. As such, it is reasonable for any person acting on behalf of detained persons to institute court proceedings to defend or advance the rights of detainees. Additional categories of persons who are generally incapable of acting on their own behalf include mental health patients and children. With regards to children, some countries such as South Africa now confer on them the capacity to litigate and this might have implications on the provisions that are relied upon to justify standing on behalf of children.

4.3 *Any Person Acting as a Member, or in the Interests, of a Group or Class of Persons*

Members of groups or persons acting in the interests of a group have the legal competence to represent such groups in class actions. In terms of section 85(1)(c) of the Constitution, 'any person as a member, or in the interests, of a group or class of persons' is allowed to approach a court alleging that a right has been or is about to be infringed. This provision underlines the importance of class action and seeks to avoid the proliferation of separate court proceedings by litigants who are collectively affected by the conduct of a defendant. To constitute a class action, the defendants must have the same cause of action. More importantly, however, standing in the interest of a group or class of persons is not constrained by the requirement that the members of the group or class of persons be not able to act in their own names.

Local courts have confirmed the importance of class actions and the role they play in enhancing access to court by people who are similarly negatively affected by the impugned law or conduct. In *Law Society and Others v. Minister of Finance*,[81] the Law Society sought to challenge the constitutionality of a withholding tax that would affect practicing lawyers as a group. Counsel for the respondents objected, arguing that the Law Society did not have *locus standi*. McNally JA, in his usual clarity, remarked that the Supreme Court would take a broad view of *locus standi* generally, especially given that the Class Action Act was not yet in force and he was not under a legal obligation to make an order that would hinder the development of class actions. He held as follows:

> [T]he question is whether the Law Society has a basis for claiming that the Declaration of Rights has been or is being contravened in relation to itself. In this jurisdiction there has not yet been a great deal of development in the field of class actions or representative actions. The Class Actions Act, No. 10 of 1999, is not yet in force. But it would not be right for this court to make

[81] 2000 (2) BCLR 226 (ZS).

> any ruling that would hinder the development of such actions. Therefore we are disposed to take a broad view of locus standi in matters of this nature.[82]

McNally JA held that the applicant had standing, especially given that the applicant had statutory empowerment to involve itself in proceedings of this sort.[83] He partly relied on the provisions of the Legal Practitioners Act, [Chapter 27:07], particularly section 53, which provides that one of the objects of the Law Society is "to employ the funds of the Society in obtaining or assisting any person to obtain a judicial order, ruling or judgement on a doubtful or disputed point of law where the Council of the [Law] Society deems it necessary or desirable in the interests of the public".[84] As such, the Law Society had a real and substantial interest in the proceedings.

Matters relating to representative actions have also arisen in the context of labour-related disputes. In *Makarudze and Another v. Bungu and Others*,[85] the Harare High Court had to determine whether other members of a trade union had *locus standi* to initiate proceedings for the removal of the president of the union on the basis that the president, having been dismissed by the employer, had legally ceased to be a member of the union. Mafusire J held that the "court will be slow to deny *locus standi* to a litigant who seriously alleges that a state of affairs exists, within the court's area of jurisdiction, where someone in [a] position of authority, power or influence, abuses that position to the detriment of members or followers".[86] Given that the plaintiffs reasonably seriously felt that the first defendant had become ineligible to hold any office within the union and to continue serving in the position of chairman, the Court had to avoid fettering "itself by pedantically circumscribing the class of persons who might approach it for relief. There could be no better demonstration of, or justification for, *locus standi in judicio* than the plaintiffs' position in this matter."[87]

Moreover, the Court held that it was beyond doubt that the applicants "had a direct and substantial interest in the management of the affairs of the Union [and that] they [had] demonstrated a sufficient connection to the subject-matter of their complaint".[88] In the words of the Court, "[i]f an alien, in the sense of someone having lost the capacity to remain a member of the Union, let alone of Excom, continued to cling onto that position, then a member or members of the Union, individually or collectively, would certainly have the right, power and authority to approach the courts for relief".[89] On the whole, domestic courts have indicated that they are prepared to allow groups of persons similarly affected by the conduct or law complained of to initiate court proceedings, individually or collectively, to advance the interests and rights of the group. This is consistent with the constitutional

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[82] At 243B-C. McNally JA indicated that he was following the Chief Justice's line of thought in *Catholic Commission for Justice and Peace in Zimbabwe v. Attorney-General & Others*, 1993 ZLR 242 (S) at 205A-E.
[83] *Ibid.*
[84] *Ibid.*
[85] HH 08-15.
[86] *Ibid.*, p. 7.
[87] *Ibid.*
[88] *Ibid.*
[89] *Ibid.*

provision regulating standing and access to courts by any person acting as a member, or in the interests, of a group or class of persons.

4.4 *Any Person Acting in the Public Interest*

Regardless of the difficulties confronted in attempting to flesh out a universally acceptable definition of the 'public interest', it can be construed as an action instituted by a representative in the interest of the public generally, or in the interest of a section of the public, but not necessarily in that representative's own interest. In *Mudzuru v. Minister of Justice*, the Court was at pains to emphasise that the public interest litigation procedure should not be exploited "to protect private, personal or parochial interests since, by definition, public interest is not private, personal or parochial interest".[90] The public interest does not connote "that which gratifies curiosity or merely satisfies appetite for information or amusement".[91] This is an important safeguard against vexatious, frivolous and *mala fide* actions brought to the courts, not in an attempt to have access to justice, but to buy time and sometimes prevent the administration of justice. There is an unambiguous distinction between 'what is in the public interest' and 'what is of interest to the public'. Public interest issues relating to fundamental rights and freedoms include, among others: public health; national security; defence; international obligations; proper and due administration of criminal justice; independence of the judiciary; observance of the rule of law; the welfare of children; and a clean environment.[92] As argued by Sloth-Nielsen and Hove:

> [M]atters that are of interest to the public are often matters that arouse the public's curiosity, for example, a scandal involving a person widely known in that society. Whereas matters in the public interest involve the protection and promotion of fundamental rights of a section of society, matters of interest to the public do not revolve around the protection or promotion of any rights.[93]

The central question is whether the challenged law or conduct or violation of any of the fundamental right and freedoms protected in the Constitution has the effect of adversely impacting on the community or a segment thereof. It is not material that the impugned law or conduct affects the interests of a significant segment of society. Where, however, the fundamental rights and freedoms of any of the vulnerable or disadvantaged group is negatively affected by the challenged law, the courts will most likely ground standing in the public interest clause.[94] In *Ferreira v. Levin*,[95] the Constitutional Court of South Africa set out the criteria for determining whether a matter is 'genuinely in the public interest'. O'Regan J held as follows:

> Factors relevant to determining whether a person is genuinely acting in the public interest will include considerations such as: whether there is another reasonable and effective manner in

[90] *Mudzuru v. Minister of Justice*, p. 15.
[91] *Ibid*., p. 17.
[92] *Ibid*.
[93] J. Sloth-Nielsen and K. Hove, '*Mudzuru & Another v The Minister of Justice, Legal and Parliamentary Affairs* & 2 Others: A Review', 16 *African Human Rights Law Journal* (2016) p. 554, at p. 559.
[94] *Mudzuru v. Minister of Justice*, p. 18.
[95] 1996 1 SA 984 (CC).

> which the challenge can be brought.; the nature of the relief sought, and the extent to which it is of general and prospective application; and the range of persons or groups who may be directly or indirectly affected by any order made by the Court and the opportunity that those persons or groups have had to present evidence and argument to the Court.[96]

These findings were reinforced in *Lawyers for Human Rights v. Minister of Home Affairs,*[97] where the same Court added the degree of the vulnerability of the people affected, the nature of the right said to be infringed and the consequences of the infringement of the right as crucial elements to be considered.[98] These criteria ensure that only cases that are genuinely intended to promote the public interest are entertained by our courts and to distinguish such cases from those intended to advance private or political or publicity interests.[99] Public interest litigation does not only promote human rights, but enhances the rule of law by ensuring that the majority of the cases are decided based on the merits and not on mere technicalities or failure to comply with procedural formalities. It requires courts to proceed to the substance of the application, to apply the relevant rules of law and to determine whether or not these rules have been violated by the impugned law or conduct.

Public interest litigation has a long history in Zimbabwe and a number of pre- and post-independence judicial decisions have dealt with circumstances in which public authorities and private bodies may institute proceedings in the public interest.[100] For them to justify their appearance before the court in the public interest, the petitioner must demonstrate that the interest at stake involves a large number of victims such as to constitute the public interest. As Makarau J would have it, "[t]he parties to the dispute and the nature of the dispute [must be] such as to place the litigation in the public domain".[101] For instance, litigation to protect the environment may be pursued in the public interest. In *Deary NO v. Acting President and Others*,[102] a public body that had brought an application on behalf of the citizens of the then Rhodesia against the colonial government alleged that it had standing based on the public interest. Although the applicant is cited as Deary, the application was brought by the Catholic Commission for Justice and Peace, a public authority, seeking to protect the rights of the citizenry. The *locus standi* of the applicant was objected to and initially it was contended that the application had been brought for purely political reasons and was vexatious. In holding that the applicant was properly before the Court, Beck J made the following remarks:

> It must be said from the outset that the Court will be slow indeed to deny locus standi to an applicant who seriously allege that a state of affairs exists within the court's area of jurisdiction,

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[96] *Ferreira v. Levin, para.* 34.
[97] 2004 (4) SA 125 (CC).
[98] Paras. 16–18.
[99] *See* A. K. Abebe, 'Towards More Liberal Standing Rules to Enforce Constitutional Rights in Ethiopia', 2010 10:2 *African Human Rights Law Journal* (2010) p. 407, at p. 414.
[100] *See generally Law Society of Zimbabwe v. Minister of Justice, Legal & Parliamentary Affairs and Another*, 16/06, *Law Society and Others v. Minister of Finance, 1999* (2) ZLR 231 (S), In re Wood and Another 1994 (2) ZLR 155 (S); *Ruwodo v. Minister of Home Affairs and Others 1995* (1) ZLR 227 (S) and *Capital Radio (Private) Limited v. Broadcasting Authority of Zimbabwe and Others, SC 128/02*.
[101] *The Zimbabwe Stock Exchange v. The Zimbabwe Revenue Authority, HH 120-2006*, p. 6.
[102] 1979 ZLR 200 (S).

> whereunder people have been or about to be, and will continue to be unlawfully killed. No more pressing need for the protection of the mandatory interdict *de libero homine exhibendo*, or a prohibitory interdict restraining such alleged oppression can possibly be imagined. (See Wood and others v Ondangwa Tribal Authority and Another, 1975 (2) SA 294 (AD). The non-frivolous allegation of a systematic disregard for so precious a right as the right to life is an allegation of an abuse so intolerable that the court will not fetter itself by pedantically circumscribing the class of persons who may request the relief of these interdicts.[103]

The nature of the right plays an important role in determining the extent to which a court is prepared to entertain matters brought before it in the public interest. As the above remarks suggest, where the right allegedly infringed by the impugned conduct is 'so precious' and compelling that its violation would negatively impact on the enjoyment of other constitutional rights and freedoms, courts should not limit their powers to entertain cases simply because the plaintiff is not directly affected by the impugned conduct.

In *Mudzuru and Another v. Minister of Justice, Legal and Parliamentary Affairs and Others*,[104] two young girls who had dropped out of school after becoming pregnant sought to challenge the constitutional validity of the statutory provisions allowing girls of particular ages to marry before attaining majority status. The applicants claimed that the fundamental rights of a girl child to equal treatment before the law and not to be subjected to any form of marriage enshrined in section 81(1) as read with section 78(1) of the Constitution had been, were being and were likely to be infringed if an order declaring section 22(1) of the Marriage Act and any other law authorising child marriage unconstitutional was not granted by the Court. Counsel for the applicants conceded that the applicants were not victims of the alleged infringements of the fundamental rights of girl children involved in early marriages since they had attained the age of majority.

The applicants failed to show that any of their own interests were adversely affected by the alleged infringement of the rights of girl children subjected to early marriages. The Constitutional Court of Zimbabwe dismissed as 'erroneous' the respondents' contention that the applicants lacked standing under section 85 (1) (d) of the Constitution. It held that "[t]he argument that the applicants were not entitled to approach the court to vindicate the public interest in the well-being of children protected by the fundamental rights of the child enshrined in s 81(1) of the Constitution, overlooked the fact that children are a vulnerable group in society whose interests constitute a category of public interest".[105] Thus, public interest litigation becomes a mechanism designed to ensure that vulnerable groups in society are fully protected.

The bulk of human rights violations negatively affect not only individuals but also families and the communities in which people live. While it may be difficult, in some cases, to identify particular individuals affected by the infringement of rights, it is patent in the majority of contested cases that the disputed legislation or conduct

[103] *Ibid.*, at 203A-B.
[104] 79/14 (2015) ZWCC 12.
[105] *Ibid.*, pp. 11–12.

violates certain rights. Public interest litigation enables lawyers and non-governmental organisations to expose and challenge human rights violations in instances where there is no identifiable person or determinate groups of persons directly negatively affected by the disputed legislation or conduct. This line of reasoning is applied in *Mudzuru and Another v. Minister of Justice*, where Malaba DCJ makes the following remarks:

> Section 85(1)(d) of the Constitution is based on the presumption that the effect of the infringement of a fundamental right impacts upon the community at large or a segment of the community such that there would be no identifiable persons or determinate class of persons who would have suffered legal injury. The primary purpose of proceedings commenced in terms of s 85(1)(d) of the Constitution is to protect the public interest adversely affected by the infringement of a fundamental right. The effective protection of the public interest must be shown to be the legitimate aim or objective sought to be accomplished by the litigation and the relief sought.[106]

Some jurisdictions, South Africa is a typical example, have generous standing rules which open the gates for a wide range of persons and entities to bring claims on behalf of others or in the public interest.[107] In countries where victims of human rights violations are often too poor to seek a remedy, the significance of civil society intervention and therefore the need to broaden standing rules cannot be overemphasised.[108] To this end, the ECOWAS Court once held:

> A close look at the reasons above and public international law in general, which is by and large in favour of promoting human rights and limiting the impediments against such a promotion, lends credence to the view that in public interest litigation, the plaintiff need not show that he has suffered any personal injury or that he has a special interest that needs to be protected to have standing. Plaintiff must establish that there is a public right which is worthy of protection which has been allegedly breached and that the matter in question is justiciable. This is a healthy development in the promotion of human rights and this court must lend its weight to it, in order to satisfy the aspirations of citizens of the sub-region in their quest for a pervasive human rights regime.[109]

Public interest litigation allows courts to entertain matters they would not entertain if they were to follow the technical rules and procedural formalities historically governing *locus standi*. According to Olowu, "it is important for the effective protection of human rights … to achieve liberal and wider access to court for social action and public interest litigation".[110] Elsewhere, the ECOWAS Court has relied on the *action popularis* to hold that "in public interest litigation, the plaintiff need not show that he has suffered any personal injury or has a special interest that needs to be protected to have standing. Plaintiff must establish that there is a public right which is worthy of protection which has been allegedly breached and that the matter

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[106] *Ibid.*, p. 12.
[107] *See* section 38 of the South African Constitution, 1996.
[108] S. T. Ebobrah, 'Human Rights Developments in African Sub-regional Economic Communities During 2009', 10 *African Human Rights Law Journal* (2010) p. 233, at p. 262.
[109] *Registered Trustees of the Socio-Economic Rights & Accountability Project (SERAP)*, ECW/CCJ/APP/0808, 27 Oct 2009, para. 34.
[110] D. Olowu, *An Integrative Rights-Based Approach to Human Development in Africa* (2009) p. 172.

in question is justiciable."[111] Requiring the plaintiff to demonstrate a personal interest 'over and above' those of the general public unnecessarily limits the jurisdiction of domestic courts, the usefulness of public interest litigation and marginalised people's rights to the provision of goods and services.

4.5 *Any Association Acting in the Interests of Its Members*

Section 85(2)(e) of the Constitution confers on "any association acting in the interests of its members" the capacity to seek relief on behalf of its members. There has been little development of the law governing the standing of associations in domestic courts. More importantly, however, the Constitution does not refer to 'incorporated associations', thereby leaving room for unincorporated associations to approach the courts for relief. This is important, specifically in Zimbabwe where the rise of the informal sector (employing thousands of citizens) has witnessed the proliferation of unincorporated associations.

Although local courts have had limited experience with actions brought by associations, other jurisdictions have had occasion to deal with such matters. In *South African Association of Personal Injury Lawyers v. Heath and Others*,[112] the Court relied on a similar provision of the South African Constitution (*i.e.* section 38(e)) to grant the applicant association *locus standi* to challenge the constitutionality of search and seizure provisions that threatened to infringe the constitutional rights of its members. In *Highveldridge Residents Concerned Party v. Highveldridge Transitional Local Authority and Others*,[113] the Court had to address the capacity of an unincorporated association to litigate in its own name. In this case, the applicant association sought relief in the interests of the residents of a township. The respondents challenged the applicant association's capacity to litigate on the ground that as an unincorporated association the association did not have the attributes of a *universitas,* and therefore lacked the capacity to litigate in its own name. The Court held that the Constitution's expanded *locus standi* provisions demonstrated that the common law restrictions on the *locus standi* of voluntary associations could not apply without qualification to associations seeking redress for alleged violations of fundamental rights. In *Rail Commuter Action Group and Others v. Transnet Ltd t/a Metrorail and Others* (No 1),[114] the Court adopted an approach that advances the fundamental rights and interests of a vulnerable constituency represented by a voluntary association. Following the *Highveldridge* line of reasoning, the Court held that "to restrict voluntary associations in the way that they are restricted by common-law requirements would be contrary to the ideal of a vibrant and thriving civil society which actively participates in the evolvement and development of a rights culture

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[111] *Registered Trustees of the Socio-economic Rights and Accountability Project (SERAP) v. Federal Republic of Nigeria & Universal Basic Education Commission, Suit ECJ/CCJ/APP/08/08,* p. 16.
[112] 2000 (10) BCLR 1131 (T). Standing was no longer an issue when this case came before the South African Constitutional Court. *See South African Association of Personal Injury Lawyers v. Heath and Others*, 2001 (1) SA 883 (CC).
[113] 2002 (6) SA 66 (T).
[114] 2003 (5) SA 518, 556 (C).

pursuant to the rights enshrined in the Bill of Rights".[115] This liberal approach to the issue of standing broadens the promotion of fundamental rights and ensures that cases are not dismissed based on mere technicalities.

At the domestic level, it remains to be seen whether the courts will follow the same line of reasoning adopted by South African judges. Arguably, our courts should draw inspiration from the rulings of courts in other foreign jurisdictions, especially in light of the fact that the Constitution confers on them the discretion to consider foreign law when interpreting provisions in the Declaration of Rights.[116] Given that standing provisions are found in the Declaration of Rights and that our Constitution was largely derived from the South African Constitution, the relevance of court judgments from that jurisdiction cannot be overemphasised.

5 The Demise of the Dirty Hands Doctrine

The formulation of the dirty hands doctrine is mirrored in the famous maxim 'he who comes into equity must come with clean hands'. Despite its rootedness in 'natural law' principles and its moralistic tenor, the doctrine has been scrapped off the constitutional legislation of most civilised jurisdictions. Section 85(2) of the Constitution provides that a person may not be debarred from approaching a court for relief simply because they have contravened 'a law'. This effectively means that a litigant can mount a claim challenging the constitutionality of a piece of legislation in terms of which they are being charged. The rationale behind this approach is simple; it would not make sense to require litigants to first comply with a piece of legislation which violates their rights for them to be given the right to challenge the constitutionality of that piece of legislation.

Unfortunately, domestic courts have a sad history of using this doctrine to deny litigants any audience before them. The *locus classicus* in this regard is *Associated Newspapers of Zimbabwe (Pty) Ltd v. Minister of State for Information and Publicity in the Office of the President.*[117] In that case, the Court refused to hear the applicant's claim because it had not yet complied with the provisions of the piece of legislation it sought to challenge. Chidyausiku CJ observed as follows:

> This is a court of law and as such cannot connive or condone the Applicant's open defiance of the law. *Citizens are obliged to observe the law of the land and to argue afterwards*. It was entirely open to the applicant to challenge the constitutionality of the Act before the deadline for registration and thus avoid compliance with the law it objects to pending a determination by this Court. In the absence of an explanation as to why this course was not followed, the inference of a disdain for the law becomes inescapable. For the avoidance of doubt the applicant is not being barred from approaching this Court. All that the applicant is required to do is to submit itself to the law and approach this Court with clean hands on the same papers.[118]

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[115] *Ibid.*, para. 24.
[116] Section 46(1)(e) of the Constitution.
[117] *Associated Newspapers of Zimbabwe (Pvt) Ltd v. Minister of State for Information and Publicity in the President's Office,* (07/03) (Pvt) 2003 ZWSC 20 (11 September 2003).
[118] *Ibid.*, emphasis added.

The Court clearly misdirected itself in this respect. Requiring litigants to suffer prejudice and harm before they can be heard by the courts is not even remotely reconcilable with the notions of justice and fairness, even for the average legal systems. The Court's assertion appears to have proceeded from the erroneous premise that the state's laws are perfect and that citizens' rights are not recognised as long as they have not yet complied with those laws. The Constitution now concretises the need to provide prompt redress to victims or potential victims of constitutional rights violations by scrapping away the dirty hands doctrine which in effect denied the general public access to justice and, in most instances, violated the rule of law.

6 Principles with Which All Court Rules Must Comply

The constitutional provisions governing standing outline four principles with which all court rules must comply. These principles are meant to ensure that the promise of access to justice protected in section 85 of the Constitution is not thwarted by restrictive court rules at every level of the judicial system. They include the need to fully facilitate the right to approach the courts; the fact that formalities relating to court proceedings, including their commencement, should be kept to a minimum; the need to ensure that the courts are not unreasonably restricted by procedural technicalities; and the need to ensure that experts in relevant fields of the law make submissions as friends of the court.[119]

These principles are generally meant to ensure both that as many cases as possible reach the stage where the parties have the opportunity to be heard in court and are decided based on merits. In a way these principles are meant to ensure that rules of court do not prevent courts from determining whether impugned laws or conduct are valid or constitutional. They allow courts to entertain as many cases as possible to ensure that there is due respect for the rule of law and that the majority of litigants have access to both procedural and substantive justice. This approach is reinforced by the constitutional injunction that the absence of court rules should not limit the rights to commence proceedings and to have one's case heard and determined by a court of law.[120] In the event that a court has not yet adopted its own rules of procedure, it should be guided by the letter and spirit of section 85 as a whole. Below is an explanation of how each of the principles relating to court rules promotes human rights, access to justice and the rule of law.

6.1 *The Need to Fully Facilitate the Right to Approach the Courts*

Rules of court may not unnecessarily restrict access to court by individuals seeking relief for violations of fundamental rights. If they do so such rules would be inconsistent with the letter and spirit of the new Constitution. The need to have rules of court which facilitate rather than restrict access to court must be interpreted in line with the purposes of two other provisions of the Constitution. The first is section 85(2)

[119] Section 85(3)(a)–(d) of the Constitution.
[120] Section 85(4) of the Constitution.

which, as has been demonstrated above, liberalises *locus standi* and permits a broad range of individuals to approach the courts for relief should their or other persons' human rights be violated. The liberalisation of *locus standi* is intended to broaden access to court, and rules of court may not undermine this purpose. In the event that rules of court restrict access to court by victims of violations of rights, such rules have to be declared invalid to the extent of their inconsistency with the Constitution. This approach is in line with the rule, entrenched in section 2(1) of the Constitution, that the Constitution is the supreme law of the land and any law or conduct that is inconsistent with it is invalid to the extent of the inconsistency.

In addition, the requirement that rules of court enhance rather than limit access to court is more directly related to the right to a fair hearing as protected in section 69(1)–(4) of the Constitution. Section 69(3) provides that "[e]very person has the right of access to the courts or to some other tribunal or forum established by law for the resolution of any dispute". The Constitution departs from the assumption that no one should be denied access to court for the resolution of their disputes and recognises the need to have rules of court which make this objective possible. The principle of equality underlies the core of the structure of fair trial rights and lies at the heart of the modern legal system.

The right to a fair hearing, including access to court, is an important norm of international human rights law that is designed to protect individuals from the unlawful and arbitrary curtailment or deprivation of other basic rights and freedoms. At the domestic level, the right to a fair hearing and access to court is illimitable and non-derogable.[121] Section 86(3)(e) of the Constitution provides that "[n]o law may limit the right to a fair trial", and section 87(4)(b) of the Constitution provides that "[n]o law that provides for a declaration of a state of emergency … limit any of the rights referred to in section 86(3), or authorise or permit any of those rights to be violated". It is patent that there can be no fair trial without access to court in the first place. The significance given to this set of rights informs the constitutional injunction that rules of court facilitate rather than limit access to court.

6.2 *The Need to Keep to the Minimum Formalities Relating to Court Proceedings*

Failure to comply with minor requirements as to the completion of forms has been held to be a 'minor omission' that should not impede an applicant's right to have a matter determined by a court of law. In *Telecel Zimbabwe (Pvt) Ltd v. POTRAZ & Others*,[122] the applicant contested the cancellation of its licence by the first respondent (POTRAZ), a regulatory body responsible for licencing in terms of the relevant statute. The first respondent had cancelled the licence on the grounds that the applicant had failed to comply with the requirement that it cede 11 per cent of its shares to locals in terms of the Indigenization and Economic Empowerment Act.[123] Counsel for the first respondent sought to contest the validity and urgency of the

[121] *See* sections 86(3) and 87(4)(b) of the Constitution.
[122] HH-446-15.
[123] Chapter 14:33 of the Laws of Zimbabwe.

application and argued that the application did not comply with Rule 241(1) of the High Court Rules, 1971 in that the purported Form 29B does not contain a summary of the grounds on which the application is brought. As such, the first respondent argued that there was no application at all before the Court due to lack of compliance with the relevant Rule. Counsel for the applicant conceded the omission of the grounds from the Form, argued that the grounds were contained in the founding affidavit and prayed the Court to condone what he thought was a 'minor omission'. Mathonsi J, for the Court, held as follows:

> I take the view that the rules of court are there to assist the court in the discharge of its day to day function of dispensing justice to litigants. They certainly are not [designed] to impede the attainment of justice. Where there has been a substantial compliance with the rules and no prejudice is likely to be sustained by any party to the proceedings, the court should condone any minor infraction of the rules. In my view to insist on the grounds for the application being incorporated in Form 29B when they are set out in abundance in the body of the application, is to worry more about form at the expense of the substance. Accordingly, by virtue of the power reposed to me by r 4C of the High Court Rules, I condone the omission.[124]

Accordingly, failure to conform with court rules or other formalities may be condoned to ensure that the applicant approaches a court of law for relief. The adoption of the Constitution created room for the local courts to place more emphasis on substance rather than form. Ultimately, the need to ensure that courts are not unreasonably restricted by procedural technicalities is intended to ensure that such technicalities do not frustrate both the liberalisation of *locus standi* and access to justice by aggrieved persons.

6.3 *The Need to Ensure That Courts Are Not Unreasonably Restricted by Procedural Technicalities*

Procedural technicalities may not be invoked in a manner that unreasonably restricts the courts' institutional competence to entertain cases that are brought before them. One of the procedural technicalities often relied upon by local lawyers to frustrate access to justice has been the argument that matters brought before the courts on an urgent basis are not urgent at all. When this happens, the court is then required to rule on whether or not the matter is urgent before making a ruling on the merits of the case. Ultimately, this delays court proceedings and enables the other party to buy time on the basis of a mere procedural technicality. In *Telecel Zimbabwe (Pvt) Ltd v. Post and Telecommunications Regulatory Authority of Zimbabwe (POTRAZ) & Others*,[125] the respondent submitted that the applicant should not be entertained on an urgent basis because the matter was simply not urgent, in fact this is self-created urgency. Given that the applicant had been made aware on 5 March 2015, argued the first respondent, through a formal letter that the first respondent intended to cancel its licence, it should have taken remedial action at that point instead of waiting until 30 April 2015 to file an application challenging the cancellation of the licence. The Court agreed with counsel for the applicant in the following terms:

[124] *Telecel Zimbabwe v. POTRAZ,* p. 6.
[125] HH-446-15.

> [R]aising the issue of urgency by respondents finding themselves faced with an urgent application is now a matter of routine. Invariably when one opens a notice of opposition these days, he is confronted by a point *in limine* challenging the urgency of the application which should not be made at all. We are spending a lot of time determining points *in limine* which do not have the remotest chance of success at the expense of the substance of a dispute. Legal practitioners should be reminded that it is an exercise in futility to raise points *in limine* simply as a matter of fashion. A preliminary point should only be taken where firstly it is meritable and secondly it is likely to dispose of the matter. The time has come to discourage such waste of court time by the making of endless points *in limine* by litigants afraid of the merits of the matter or legal practitioners who have no confidence in their client's defence vis-à-vis the substance of the dispute, in the hope that by chance the court may find in their favour. If an opposition has no merit it should not be made at all. As points *in limine* are usually raised on points of law and procedure, they are the product of the ingenuity of legal practitioners. In future, it may be necessary to rein in the legal practitioners who abuse the court in that way, by ordering them to pay costs *de bonis propiis*.[126]

Just like the Constitution, the Court, in *Telecel Zimbabwe v. POTRAZ*, recognises a genuine concern that if undue emphasis is placed on technicalities many litigants will suffer denial of access to justice based on sheer technicalities which leave their causes unresolved. In *Zibani v. Judicial Service Commission and Others*,[127] Hungwe J emphasised that "courts should be slow, and indeed they are slow, in dismissing legitimate causes on the basis of technical deficiencies that may exist on the papers".[128] Where the technical deficiency raised does not in any way resolve the issues placed before the court by the applicant, it would be a travesty of justice for the Court to dispose of a matter based on such deficiency. Excessive reliance by litigants on deficiencies which do not dispose of the issues under consideration, wastes the time of the court, delays the substance-related resolution of the dispute and violates the constitutional command that courts be not unreasonably restricted by procedural technicalities.

With reference to the issue of urgency, it is vitally important for the courts to be mindful that the threshold for determining urgency should not be so high that litigants are likely to face difficulties in proving that the matter is indeed urgent. If an applicant demonstrates that there is an imminent threat to any of their rights and, more importantly, that there is a possibility of irreparable harm if the court does not intervene, the matter should then be heard on an urgent basis.[129] As is the tradition,

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[126] *Telecel v. POTRAZ*, p. 7. In *The National Prosecuting Authority v. Busangabanye & Another*, HH 427/15, p. 3, the Court held as follows: "In my view this issue of self-created urgency has been blown out of proportion. Surely a delay of 22 days cannot be said to be inordinate as to constitute self-created urgency. Quite often in recent history we are subjected to endless points *in limine* centred on urgency which should not be made at all. Courts appreciate that litigants do not eat, move and have their being in filing court process. There are other issues they attend to and where they have managed to bring their matters within a reasonable time they should be accorded audience. It is no good to expect a litigant to drop everything and rush to court even when the subject matter is clearly not a holocaust."

[127] HH 797/16.

[128] *Ibid.*, p. 4.

[129] *See Triple C PIGS (Partnership) and Another v. The Commissioner-General Zimbabwe Revenue Authority*, HH7-2007, where Gowora J held that "[a]s courts, we therefore have to consider, in the exercise of our discretion, whether or not a litigant wishing to have the matter treated as urgent has shown the infringement or violation of some legitimate interest, and whether or not the infringement of

the test for determining urgency is objective, not subjective.[130] In *Dilwin Investments P/L t/a Formscaff v. Jopa Engineering Company Ltd*,[131] Gillespie J made the following remarks about the idea of the urgency of court proceedings:

> A party who brings proceedings urgently gains a considerable advantage over persons whose disputes are being dealt with in the normal course of events. This preferential treatment is only extended where good cause can be shown for treating one litigant differently from most litigants. For instance where, if it is not afforded, the eventual relief will be hollow because of the delay in obtaining it.[132]

An applicant would have shown 'good cause' if they establish, first, that the respondent has by their actions threatened or interfered with some legally recognised right or legitimate expectation in a way that is likely to result in irreparable harm and, second, that the absence of immediate relief from the court would eventually render any subsequent relief hollow. Once this threshold for examining the urgency of the matter is reached, a court may not create additional requirements for proving 'urgency' in a bid to restrain its competence to hear the matter as this would constitute a self-imposed procedural technicality.

6.4 *The Need to Ensure That Any Person with Particular Expertise Appears as a Friend of the Court*

Rules of court should also "ensure that any person with particular expertise appears as a friend of the court".[133] Friends of court, commonly known as *amicus curiae,* play a pivotal role in assisting courts to reach informed judgments. The term 'friend of the court' can have a wide range of meanings.[134] Historically, the term *amicus curiae* referred to a person who appeared at the request of the court to represent an unrepresented party or interest.[135] The person who appears as a friend of the court would be tasked with presenting the best possible case for the unrepresented party or parties. In this case, the role of the friend of the court is not any different from that of the paid legal practitioner. The second form of *amicus* responds to a request by a court for a lawyer to appear before it to give guidance in developing answers to novel questions of law which would have arisen in a matter or, in some cases, where a practicing lawyer asks for permission to intervene for this purpose.[136] In this case,

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such interest if not redressed immediately would not be the cause of harm to the litigant which any relief in the future would render a *brutum fulmen*".

[130] *See generally Document Support Centre P/L v. T. F. Mapuvire*, HH 117/2006.

[131] HH 116/98.

[132] *See also Dilwin Investments P/L t/a Formscaff v. Jopa Engineering Company Ltd,* 1998 (2) ZLR 301 (H), p. 302.

[133] Section 85(3)(d) of the Constitution.

[134] *See* C. Murray, 'Litigating in the Public Interest: Intervention and the Amicus Curiae', 10 *South African Journal on Human Rights* (1994) p. 240, at pp. 241–243.

[135] *See*, for example, The Merak S: *Sea Melody Enterprises SA v. Bulktrans (Europe) Corporation, 2002* (4) SA 273 (SCA).

[136] For an educative discussion on the role of *amicus curiae*, *see* G. Budlender, 'Amicus Curiae', in S. Woolman and M. Bishop (eds.), *Constitutional law of South Africa*, 2nd edition (2014) 8-1.

the *amicus* does not represent a party's interest or view and would simply articulate the legal position on a particular issue.

The third type of *amicus* relates to either a law society or bar association intervening in the application for the admission of a legal practitioner.[137] In this case, the professional body appears not to represent the interests of its members but to advise the bench in a manner that advances the interests of justice.[138] The fourth type of *amicus* involves a non-party requesting the right to intervene to advance a particular legal position which it has chosen. This normally happens when non-governmental organisations or independent research centres request leave to intervene to clarify complex legal questions related to their focus areas.[139] In this case, the *amicus* normally appears to advance the public interest on a particular issue of tremendous legal importance and assist the court to fully comprehend the issues involved.

The idea that rules of court should ensure that any person with particular expertise should appear as a friend of the court is an important innovation by the drafters of the new Constitution. This approach reinforces the idea of participatory democracy which lies at the heart of the new constitutional order. Moreover, concrete cases often raise far-reaching legal, economic and political questions that are often beyond the interests of the parties to the litigation. The fact that legal disputes may have consequences which affect the rights and interests of the parties not before courts raises the need for specialist information and justifies the need for a more liberal approach to the admission of *amicus curiae*. Thus, our Constitution underscores the need to evaluate the impact of litigation upon categories of persons not already before the courts and, in a way, challenges the notion that the resolution of legal disputes merely affect those who are party to litigation.

Public interest or non-partisan type of *amicus curiae* play an important role in assisting courts to reach informed decisions about legal disputes before them.[140] The central purpose of an *amicus* is to assist the court rather than to advance a particular point of view. In *Hoffman v. South African Airways*,[141] the South African Constitutional Court explained the role of an *amicus* in the following terms:

> An amicus curiae assists the Court by furnishing information or argument regarding questions of law or fact. An amicus is not a party to litigation, but believes that the Court's decision may affect its interest. The amicus differs from an intervening party, who has a direct interest in the outcome of the litigation and is therefore permitted to participate as a party to the matter. An amicus joins proceedings, as its name suggests, as a friend of the Court. It is unlike a party to litigation who is forced into the litigation and thus compelled to incur costs. It joins in the proceedings to assist the Court because its expertise on or interest in the matter before the

[137] *Ibid.*
[138] *Ibid*.
[139] For a detailed discussion of this type of *amicus*, *see* N. Lieven and C. Kilroy, 'Access to the Court under the Human Rights Act: Standing, Third Party Intervenors and Legal Assistance', in J. Jowell and J. Cooper (eds.), *Delivering Human Rights: How the Human Rights Act is Working* (2003) p. 115.
[140] *See generally In Re Northern Ireland Human Rights Commission*, [2002] UKHL 25, at para. 24. *See also* S. Hannett, 'Third Party Intervention: In the Public Interest?', 1 *Public Law* (2003) p. 128.
[141] 2001 (1) SA 1 (CC).

> Court. It chooses the side it wishes to join unless requested by the Court to argue a particular position.[142]

Generally, these remarks adequately explain the importance of *amicus curiae*. However, it should be emphasised that an *amicus* is allowed and, in most cases, required to identify its position in its application for admission. What makes the *amicus*' views more credible is neither that it has not identified its chosen legal position nor that it has no interest in the outcome of the case, but that it is not directly involved in the dispute in the first place.

Our legal system is adversarial in nature and lawyers from both sides are generally driven by the need to demonstrate why the other side should not win a particular case. More often than not, counsel for applicants and respondents are influenced by the desire to win cases 'at all costs', and this implies that they are often not well placed to perform their most important function, namely assisting the court to reach a correct and informed judgment. They side with their clients, carry out research intended to prove or disprove a particular element of the law that serves their client's interests and sit in the client's corner in court, raising as many objections as possible and making very few, if any, concessions. The adversarial nature of our legal system underlines the critical role that friends of the court can play in assisting courts to reach fair rulings in concrete cases. This partly explains why section 85(3)(d) provides that rules of every court should allow a person with particular expertise to appear as a friend of the court.

7 Referral of Cases to the Constitutional Court

It is important to understand the referral procedure because this is a promising avenue through which litigants might be afforded audience before the Constitutional Court. The courts seem to have placed emphasis on the need to have an application which is accompanied with evidence of why a litigant may seek to refer a matter to the Constitutional Court even if such a process may cause delays and undue hardships for the party that wishes to have its matter heard before the Constitutional Court. Section 175(4) of the Constitution provides as follows:

> If a constitutional matter arises in any proceedings before a court, the person presiding over that court may and, if so requested by any party to the proceedings, must refer the matter to the Constitutional Court unless he or she considers the request is merely frivolous or vexatious.

The discretion to refer matters to the Constitutional Court should always be exercised with full consideration of the interests of justice[143] as well as the principles stipulated in section 85 of the Constitution. These include the reduction of formalities relating to commencement of court proceedings and the need to avoid unreasonably restricting the administration of justice due to procedural technicalities.[144]

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[142] *Ibid*., para. 63.
[143] Section 167(5) of the Constitution.
[144] Section 85(3)(a) and (b) of the Constitution.

There are cases where the magisterial discretion to refer matters to the Constitutional Court has either been exercised inappropriately or entirely misunderstood by the trial magistrate. In *S v. Njobvu*,[145] the applicant had applied to the trial magistrate to have the matter referred to the Supreme Court in terms of section 24(2) of the LHC[146] (which is more or less the equivalent of section 175(4) of the 2013 Constitution) on the grounds that the applicant's right to trial within a reasonable time had been infringed. The magistrate granted the application without hearing any evidence or argument notwithstanding the fact that the applicant intended to place evidence before the court in order to enable it to properly refer the matter to the Supreme Court. The Supreme Court eventually dismissed the application mainly because of the magistrate's misdirection in terms of the law and held that "the proceedings before the magistrate in respect of this application, having been conducted contrary to the law and rules of procedure, were a nullity".[147] It is highly likely that the reasoning applied by the Supreme Court will not bode well with the current Constitution, particularly with section 85(3)(c) which provides that cases should not be thrown out on the basis of unnecessary procedural irregularities.

The second point is that it becomes clear that the rule that the trial magistrate must first conduct an inquiry by receiving evidence as to the allegation of the contravention of the Declaration of Rights is very problematic in that it is time consuming and has the potential of severely inconveniencing the applicant, especially in cases where a timeous remedy is sought from the Constitutional Court. This 'inquiry requirement' can potentially blow into a 'trial within a trial' of some sort, and this only increases the time and cost of the litigation. Assuming that the applicant is unsuccessful after the inquiry, they still have recourse to apply directly to the Constitutional Court to hear the matter, but there are high chances that the unsuccessful litigant might become discouraged by misconstruing the refusal of a referral as a sign that their allegations are unmeritorious and there is no incentive for forking out more money to secure direct access to the Constitutional Court.

If due regard is to be had to section 85(3) of the Constitution, it becomes imperative to find that requiring trial magistrates to undertake an investigation into an applicant's claim for purposes of making a referral to the Constitutional Court will delay and sometimes obstruct the course of justice as argued above.[148] However, this is not to entirely dismiss the valid point that the direct access mechanism is to be ordinarily avoided because it requires the court to convene as a court of first instance thereby denying the court the benefit of other judges' considerations or opinions. It is true that cases should sometimes go through other courts so that when they finally reach the Constitutional Court arguments can be reconsidered and refined, but the need

[145] *S v. Njobvu*, 2007 (1) ZLR 66 (S).
[146] Section 24(2) of the LHC provided as follows: "If in any proceedings in the High Court or in any court subordinate to the High Court any question arises as to the contravention of the Declaration of Rights, the person presiding in that court may, and if so requested by any party to the proceedings shall, refer the question to the Supreme Court unless, in his opinion, the raising of the question is merely frivolous or vexatious."
[147] *S v. Njobvu*, p. 6.
[148] Section 85 (3)(c) of the Constitution provides that the courts should not be unreasonably restricted by procedural technicalities.

to afford this opportunity to the apex court should lead to the unnecessary dismissal of cases due to procedural technicalities. In other jurisdictions, it has been stated that the 'direct access' mechanism is an exceptional procedure[149] and that this principle is premised on the reasoning that "decisions are more likely to be correct if more than one court has been required to consider the issues raised".[150] These are noble considerations, but they should not be insisted upon where procedural delays are likely to result in an injustice.

In the case of *Chihava & Ors v. Principal Magistrate & Anor*,[151] the applicants approached the Constitutional Court in terms of section 85(1) of the Constitution alleging that the manner in which criminal proceedings against them were conducted in the Magistrates' Court breached their fair trial rights provided for in section 70 of the Constitution. They sought an order quashing the proceedings and directing a trial *de novo* before a different magistrate. This application was made whilst proceedings were still pending in the Magistrates' Court and on this ground the respondents raised a point *in limine* stating that the only course which was open to the applicants was a referral in terms of section 175(4) of the Constitution since the subject matter of the application had arisen during the course of proceedings. The Court upheld this point *in limine*. The Court also held that where a lower court improperly refuses to refer a matter in terms of section 175(4) of the Constitution, the unsuccessful litigant is nonetheless entitled to approach the Constitutional Court directly in terms of section 85(1) of the Constitution.

It is important to observe that this is an unnecessary technicality. There are no compelling reasons for denying a litigant an opportunity to have their case heard before the Constitutional Court by way of referral by a lower court only to require them to directly apply to the Constitutional Court itself. There is a high probability that when a magistrate refuses to refer a matter to the Constitutional Court, the unsuccessful litigant may be led to believe that this entails that their claim is of no merit and they should not pursue it further, which is not necessarily the case.

A favourable scenario would be immediate referral to the Constitutional Court if a constitutional matter arises during the course of proceedings in a lower court. Obviously the Constitutional Court would retain the power to throw out a matter if it deems it as 'merely frivolous or vexatious'. Basically, the filtering of constitutional matters by lower courts is undesirable and is counterproductive if litigants still retain their right to pursue the matter directly. It only serves to delay the direct access route which, in principle, creates space for the determination of constitutional matters on the merits. In *Chihava & Others v. Principal Magistrate & Anor*, Gwaunza JCC specifically acknowledges "that section 85(1) does not expressly exclude a direct approach to this Court where the violations alleged were perpetrated in the course of proceedings in a lower court".[152] This tends to suggest that when a constitutional issue arises during proceedings in the lower courts, the presiding judge should not

[149] *See,* for example, *S v. Zuma and Others*, 1995 (2) SA 642 (CC) and *S v. Prinsloo*, 1996 (2) SA 464 (CC).
[150] *Bruce & Another v. Fleecytex Johannesburg CC & Others, 1998* (2) SA 1143 (CC).
[151] *Chihava & Ors v. Principal Magistrate & Anor, (1) 2015* (2) ZLR 351 (CC).
[152] *Ibid.*, p. 3.

readily dismiss the petitioner's attempt to have direct access to the Constitutional Court, especially where the legal issue in question is of fundamental social value.

8 The Liberalisation of *Locus Standi*, Access to Justice and the Enjoyment of Human Rights in Zimbabwe

The rule that a litigant approach courts for relief only when they have a direct and substantial interest in the matter makes it impossible to challenge legislation or conduct where the affected individual is unable to bring a challenge (prisoners for instance) or when arbitrary, unlawful and unconstitutional legislation exists but has not yet affected any person or has affected persons who are unable to institute court proceedings. The liberalisation of rules governing standing reflects a conceptualisation of human rights and the rule of law in terms of which the judiciary sits at the centre of decision-making processes and can be approached to determine any constitutional dispute and assess the validity of governmental action against the demands of the Constitution and the law.[153] It becomes difficult for the courts to claim that the occasion has not yet arisen for them to consider whether or not the impugned law or conduct is invalid.

When a court refuses to entertain a matter on the basis that the petitioner does not have standing in terms of the applicable rules, the same court is essentially refusing or neglecting its duty to assess the validity or constitutionality of the impugned conduct or legislation. Keyzer notes, "as a matter of constitutional law, that people are entitled to know whether the laws that govern them are valid", and therefore the general public must have standing to obtain a binding declaration about the state of the law.[154] A liberal approach to standing requires courts to place substantial value on the merits of the claim and underlines the centrality of "vindicating the rule of law and ensuring that unlawful decisions do not go uncorrected".[155] This has implications for the realisation of the rule of law and the enjoyment of human rights. In *R v. Inland Revenue Commissioners, ex parte National Federation of Self-Employed and Small Businesses Ltd*,[156] Lord Diplock made the following remarks:

> It would, in my view, be a grave lacuna in our system of public law if a pressure group, like the federation, or even a single public-spirited taxpayer, were prevented by outdated technical rules of *locus standi* from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped.[157]

In one of its recent cases, *Mudzuru v. Minister of Justice*, the Constitutional Court adopted a similar approach to standing and extended to everyone the right to institute proceedings even on occasions when they have an indirect or direct interest

[153] S. Evans and S. Donaghue, 'Standing to Raise Constitutional Issues in Australia', in R. S. Kay (ed.), *Standing to Raise Constitutional Issues* (2005) p. 115, at p. 142.
[154] P. Keyzer, *Open Constitutional Courts* (2010) p. 138.
[155] A. Street, *Judicial review and the Rule of Law: Who Is in Control?* (2013) p. 24.
[156] [1982] AC 617.
[157] *Ibid.*, at 644E.

in the outcome of the dispute. The Court held that while the applicants had failed to fulfil the requirements for standing under section 85(1)(a) of the Constitution – which permits persons to act in their own interest – they could still act in terms of section 85(1)(d) which allows public interest litigation. In its analysis on the relationship between broad standing rules and access to justice, the Court held that the Constitution guarantees:

> real and substantial justice to every person, including the poor, marginalised, and deprived sections of society. The fundamental principle behind section 85(1) of the Constitution is that every fundamental human right enshrined in Chapter 4 is entitled to effective protection under the constitutional obligation imposed on the state. *The right of access to justice, which is itself a fundamental right, must be availed to a person who is able*, under each of the rules of standing, *to vindicate the interest adversely affected by an infringement of a fundamental right, at the same time enforcing the constitutional obligation to protect and promote the right or freedom concerned.*[158]

The constitutionalisation of public interest litigation and class actions constitutes an unambiguous departure from the traditional 'direct and substantial interest' requirement. In essence, it represents a shift from the historical emphasis on the existence of a link between the challenger of a particular law and the challenged law. It underlines the importance of conferring on individuals, groups or civil society organisations the right to challenge the national laws in which they operate, even if there is no direct link between their own rights and the law they are challenging. This approach rightly locates the source of constitutional challenges and seeks to prevent the state from immunising unconstitutional legislation or decisions. It places emphasis not on the question of whether the claim is being brought by the appropriate person but on whether the challenged law or conduct is valid or constitutional.

There are strong linkages between broad standing rules, access to constitutional justice and the enjoyment of human rights in all political communities. This is because "a more liberal standing regime … makes it easier for individuals to raise constitutional issues as a means of vindicating constitutional entitlements".[159] The current Constitution contains both a fairly comprehensive list of founding values and principles and promising human rights guarantees that play an important role in guiding state and non-state actors. Given that the Constitution protects a broad range of civil and political rights as well as economic, social and cultural rights, access to constitutional justice implies the vindication of these rights and imposes on the state the duty to ensure that citizens have access to platforms that have a constitutional mandate to apply, interpret and enforce the law.

The special status of constitutionally protected human rights norms and standards requires the state to facilitate access to court and therefore to adopt a liberal approach to standing, especially in the context of constitutional litigation. The substantive content of economic, social and cultural rights mirrors not only a

[158] *Mudzuru v. Minister of Justice*, p. 14, following the reasoning of the South African Constitutional Court in *Ferreira v. Levin NO & Others*, 1996 (1) SA 984 (CC), emphasis added.
[159] S. Evans, 'Standing to Raise Constitutional Issues', 22:3 *Bond Law Review* (2010) p. 38, at p. 50.

commitment to social justice but the need to improve the material conditions of the poor and marginalised. When deciding matters affecting persons living on the margins of society and the economy, it is vitally important for the courts to embrace the liberalisation of standing and to avoid shutting the doors of justice to persons whose capacity to enjoy their rights is severely imperilled.

With respect to founding values, which include respect for fundamental rights and freedoms, it is important to realise that they perform an important interpretive function and broaden the meaning of substantive constitutional provisions entrenching human rights. Both the liberalisation of *locus standi* and the founding principle of respect for fundamental rights and freedoms legitimise the instrumentalisation of the state in that they revolve around the idea that the central purposes of the law and the state are to serve the citizen and to protect human rights, to prevent the arbitrary and unlawful use of public power, to enable individuals to challenge public authorities that are thought to infringe upon the fundamental rights of the citizen and to ensure that unjust laws are struck down by an independent judiciary.[160] To this end, the liberalisation of *locus standi* constitutes one of the means through which the twin ends of access to justice and human rights can be achieved.

9 Conclusion

This chapter has demonstrated that the prospects for access to justice and the enjoyment of human rights have been, at least in theory, improved by the liberal approach to standing entrenched in the current Constitution. The liberalisation of *locus standi*, particularly the constitutionalisation of public interest litigation, has broadened the number of persons who may appear before the local courts to vindicate their or other people's rights. A liberal approach to standing enables citizens to approach the courts to determine wide-ranging constitutional disputes and assess the validity of governmental action against the demands of the Constitution and the law. This requires courts to place substantial value on the merits of the claim and underlines the centrality of vindicating the rule of law and ensuring that unlawful decisions do not go uncorrected.

However, access to justice in the sense of access to court requires more than just the implementation of constitutional provisions regulating standing, access to court and human rights. There are numerous possibilities for enhancing access to justice through other means than by insisting on strict adherence to duties imposed on the state by constitutional provisions. First, the Constitution itself might be unknown to the ordinary citizens who are often the victims of gross violations of human rights. It could be that the country also needs to embark on grassroots-based legal literacy and educative programmes especially targeting remote rural communities where the majority of the people are uneducated and unaware of the applicable constitutional provisions. This could be done through initiatives involving Parliament, local law schools, civil society organisations, independent commissions and other relevant

[160] *See generally* J. H. H. Weiler, 'The Rule of Law as a Constitutional Principle of the European Union', Jean Monnet Working Paper 04/09, p. 44.

institutions in mobile legal aid clinic work educating communities about their constitutional rights and how to enforce these rights.

Second, it could be that there is need for a huge drive towards representation of litigants by public interest lawyers or trained paralegals. This highlights either the need for lawyers in private practice to, on their own volition or through some kind of regulatory provision, develop or broaden their *pro bono* services or for the government to expand the role and increase substantially the budget and visibility of the Legal Aid Directorate. Finally, the complexities associated with the formal justice system and the limited public knowledge of formal court proceedings might be a solid reason for increasing calls for the simplification of the relevant procedures to ensure not only that the average person understands what is involved but also that the formal justice system is accessible to local communities. Only then can we have full access to justice and promote the rule of law in the formal courts.

More importantly, however, access to justice and the enjoyment of human rights are not fostered by liberal standing rules alone. In other words, courts play an important but limited role in promoting human rights, and if other players do not perform their functions, the enjoyment of fundamental rights and freedoms will remain a distant dream. To this end, other institutions such as independent commissions, the auditor general, the National Prosecuting Authority, the police service, line government ministries, civil society organisations and rights holders themselves should claim their place in the fight against human rights abuses. In poor and middle income countries, the government remains the primary duty bearer in the protection and promotion of human rights. As such, the roles of the Ministry of Justice, Legal and Parliamentary Affairs, the Ministry of Finance and Economic Development, the Ministry of Home Affairs, the Ministry of Health and Child Care and many others should also take a leading role in the promotion of human rights. The government should not 'occupy the back seat' and wait for the judiciary and civil society to drive social and economic transformation. If the entire economic, social and political system perceives the realisation of human rights as a collective responsibility, the liberalisation of standing will feed into the system and ensure that constitutional rights enjoy the full measure of protection to which they are entitled.

17 The Role of the Zimbabwe Human Rights Commission in the Protection, Promotion and Enforcement of Fundamental Rights and Freedoms

Chris Munguma*

1 Introduction

Human rights commissions are important entities in the protection of human rights in many countries. They play the role of a watchdog, educator, promoter and at times enforcer of human rights. Such commissions can take up cases, investigate them, resolve complaints and refer some cases to courts for judicial pronouncement. In many countries in Africa and beyond such institutions are in place. Zimbabwe was one of the latecomers in Africa in coming up with a national human rights institution (NHRI). Other African countries such as Uganda, Malawi, South Africa and Ghana had taken the lead in a development that Hatchard refers to as a wind of change. Hatchard makes the observation that prior to 1990 the constitutional landscape of much of Commonwealth Africa was characterised by military rule or executive dictatorship in the form of the one-party state coupled with the widespread abuse of human rights. This period was followed up by a phase where countries adopted new constitutions some of which introduced human rights commissions.[1] According to Chiduza the development of NHRIs in Africa was also partly helped by the provision of donor support in the 1990s. These funds resulted in the establishment of several NHRIs to serve as independent bodies for the protection and promotion of human rights.[2]

Gomez explains that a human rights commission is a state sponsored and state funded entity set up under an act of parliament or under the constitution, with the broad objective of protecting and promoting human rights.[3] The key features of a good NHRI are that it must be independent and not subject to control of any person; must be accessible to the people; have the capacity to provide remedies for infringement of rights; accountable to the public; its members have security of tenure; and it must be adequately supported from the national purse for it to pursue its mandate without resource constraints. The legal framework which sets up the Zimbabwe Human Rights Commission (ZHRC) fares very well in relation to NHRIs found in other jurisdictions in trying to provide the necessary legal guarantees for the effective operations of the Commission. A few aspects require streamlining to make the operations of this important constitutional body top notch.

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[1] *See* J. Hatchard, 'A New Breed of Institution: The Development of Human Rights Commissions in Commonwealth Africa with Particular Reference to the Uganda Human Rights Commission', 32:1 *The Comparative and International Law Journal of Southern Africa* (March 1999) pp. 28–53. *See also* J. Hatchard, 'The Human Rights Commission Act, 1998 (Malawi)', 43:2 *Journal of African Law* (1999) pp. 253–257.

[2] L. Chiduza, 'The Zimbabwe Human Rights Commission: Prospects and Challenges for the Protection of Human Rights', 19 *Law, Democracy & Development* (2015).

[3] M. Gomez, 'Sri Lanka's New Human Rights Commission', 20:2 *Human Rights Quarterly* (May 1998) pp. 281–302.

2 The Background of the Zimbabwe Human Rights Commission

The Zimbabwe Human Rights Commission (ZHRC) was created in 2009 during the era of the Government of National Unity (GNU), which came about through the Global Political Agreement (GPA).[4] The ZHRC then started its work in 2010, after the promulgation of Lancaster House Constitution Amendment No. 19. However, the history of the ZHRC can be traced earlier than that. Section 100R of Amendment No. 19 introduced the ZHRC. An Act of Parliament to regulate the ZHRC was also crafted and promulgated in 2012. Under the Lancaster House Constitution, introduced in 1980, the office of the Ombudsman was created with the overall mandate of investigating complaints made by the public against public authorities. The Constitution provided that the Ombudsman was empowered to investigate complaints against action taken by any employees of the government. There was a serious limitation in that the Ombudsman could not investigate members of the defence force, police force or employees of local authorities. This was a major drawback on the effectiveness of that office in protecting the public from human rights violations and abuse. The Ombudsman Act (Chapter 10:18) was replaced by the Public Protector Act (Chapter 10:18) which transferred the functions of the Ombudsman to the Public Protector. However, the mandate and powers of the office remained largely similar. Under the 2013 Constitution, the Public Protector Act was repealed.

It is debatable whether it was advisable to abolish the office of the Public Protector and give all of its functions to the Zimbabwe Human Rights Commission. There were fears that the ZHRC would struggle to deal with 'ordinary' human rights cases due to its huge additional task of dealing with cases of bureaucratic injustice. Feltoe allays those fears by asserting that the 2013 Constitution does expressly guarantee the right to administrative justice, and this right has thus been brought within the mainstream of fundamental rights in the Declaration of Rights.[5] In this sense, the Zimbabwe Human Rights Commission is perhaps the correct agency to deal with violations of this right.

In the 2013 Constitution, the provisions relating to the ZHRC which were introduced by Amendment No. 19 were carried over. The new Constitution retained the Zimbabwe Human Rights Commission among five other independent commissions. The Zimbabwe Human Rights NGO Forum of Zimbabwe called the setting up of the Commission a "commendable milestone for Zimbabwe in its bid to address human rights violations".[6] Indeed the setting up of the ZHRC in the form it was established was a good development for the protection and enforcement of human rights in

[4] The Global Political Agreement was signed in 2008 by the three major political parties (ZANU PF and two MDC formations), after intense electoral violence during the 2008 presidential election and subsequent run off after defeat of the incumbent and failure of the candidate with highest votes to reach benchmark votes for a presidential plebiscite.

[5] G. Feltoe, *A Guide to Administrative and Local Government Law in Zimbabwe*, Online Open Access Publishing, Harare, 2017 p.22.

[6] Zimbabwe Human Rights NGO Forum, *The Role of the Zimbabwe Human Rights Commission*, Human Rights Bulletin 66, p. 1, available at <http://www.hrforumzim.org/wp-content/uploads/2012/03/The-role-of-the-human-rights-commission-66-WT-20337.pdf>.

Zimbabwe. The Commission allows the public to access both human rights and administrative justice cheaply and easily.

It is important to highlight that the enabling legislation for the Commission, the Zimbabwe Human Rights Commission Act [Chapter 10:30] was promulgated in 2012 before the current Constitution was adopted in 2013. Since the enabling Act preceded the Constitution, there is therefore need for alignment of the ZHRC Act to the Constitution so as to factor in changes such as the abolishment and transfer of the Public Protector's mandate to the ZHRC. To date, the Act has not been amended to give effect to this additional mandate. Instead of giving effect to the Public Protector mandate through its inclusion in the ZHRC Act, government sought to amend the Constitution so as to revert to the old position where the Public Protector's Office was a separate institution, through Constitutional Amendment Bill HB-2-2020. However, the Amendment Bill was rejected by citizens during public consultations on the basis that it was not prudent for government to establish a new institution yet it was failing to adequately resource the existing Independent Commissions.[7]

3 The International Framework for National Human Rights Institutions

Some of the key international instruments and principles which guide the work of NHRIs such as the ZHRC are the Charter of the United Nations, Universal Declaration of Human Rights (UDHR), Vienna Declaration and the Paris Principles. Article 1 of the United Nations Charter established the United Nations and bestowed upon it the responsibility to promote and encourage respect for human rights and fundamental freedoms for all, without distinction. The Charter also requires United Nations member states to put in place progressive measures for realisation of human rights. Establishment of NHRIs is one such measure for advancing human rights.

The Vienna Declaration and Platform of Action reiterates the relevance of NHRIs in human rights governance. Part 1, paragraph 27 of the Vienna Declaration states that every state should provide an effective framework for remedies to redress human rights grievances and violations. NHRIs are part of the framework for securing appropriate redress for violations of human rights. Section 243 (1)(g) of the Zimbabwean Constitution is in line with the Vienna Declaration. It provides that one of the functions of the ZHRC is to secure appropriate redress, including recommending prosecution of offenders, where human rights or freedoms have been violated. Of importance is paragraph 36 of the Vienna Declaration which encourages the establishment and strengthening of national institutions, having regard to the principles relating to the status of national institutions (Paris Principles).

The Paris Principles provide significant guidance and direction on the establishment of national human rights institutions in general and also outlines the standards and principles that NHRIs must follow in order to function effectively.[8] Most national

[7] A. Chibamu, 'Zimbabweans reject Constitutional Amendment Bill-MPs', *Newzimbabwe*, 12 July 2020, <www.newzimbabwe.com/zimbabweans-reject-constitutional.amendment-bill-mps|>, visited on 24 November 2020.

[8] The principles are discussed fully below when the structure of the ZHRC is analysed.

human rights institutions emerged after the adoption of the Universal Declaration of Human Rights in 1948 and the establishment of the UN Commission on Human Rights. Initially, only a few institutions were established to handle the increasing numbers of human rights instruments. Later between 1990 and 2002, the number of NHRIs rose from eight to 55 in all regions of the world.[9]

National and local human rights commissions have been established in several parts of the world with different success stories. According to Gomez the first human rights commission was set up in Saskatchewan in 1947, and since then several countries have established similar commissions.[10] Human rights commissions gained prominence after the United Nations began to actively promote the concept. This active promotion began in 1991 when the Centre for Human Rights in Geneva organised a consultation on national human rights institutions. The United Nations made a resolution dealing with national institutions for the protection and promotion of human rights in 1991. The resolution was adopted by the General Assembly in 1993 through resolution 48/134.

In Commonwealth countries the impetus for this institution largely emanated from the 1991 Harare Commonwealth Declaration in which Commonwealth heads of government pledged to protect and promote the fundamental political values of the Commonwealth concentrating especially upon "democracy, democratic processes and institutions which reflect national circumstances".[11] The African Charter on Human and Peoples' Rights (ACHPR) provides for the creation of NHRIs by governments in Africa. Article 26 of the ACHPR states:

> 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 rights and freedoms guaranteed by the present Charter* (emphasis added).

Therefore, NHRIs have a solid foundation in the African continent. They are seen as a key element in the promotion and protection of human rights. Indeed, taking into account Africa's democratic governance record, wars, environmental challenges and lack of rule of law, there is a strong justification for vibrant NHRIs in Africa.

It must be noted that NHRIs occupy a very special role in that on the one hand they have characteristics that closely resemble those of non-governmental organisations and on the other hand they are a public body created and funded by the government. As a consequence they have been on the receiving end of some attacks. Dickson captures this sentiment in this way:

> Human rights commissions (HRCs) around the world occupy a curious position. … On the other hand, they are perceived by some as being too close to government to adopt a totally objective

[9] C. Dadzie, *The Role of the Commission of Human Rights and Administrative Justice in the Promotion of Good Governance in Ghana*, Unpublished Dissertation, University of Cape Coast, Ghana, 2016, p. 17.
[10] Gomez, *supra* note 3.
[11] Hatchard, *supra* note 1.

stance on human rights issues; non-governmental organizations (NGOs), for instance, are often critical of HRCs for not being radical enough in their pronouncements.[12]

It is submitted that this attack is not fair and justified. A NHRI is not a non-governmental organisation, and its creation alone cannot be a basis for such an attack. After all, NHRIs are not the only institution which is created by the state in this way. For example, courts are an arm of the state but can be independent despite being one arm of the state. As long as guarantees of independence are in place, national human rights institutions can work effectively. In addition, they cannot work in isolation but need the support of other national institutions such as the executive, parliament, the public, civil society and the courts. Equally important for the success of a NHRI is the culture of a given nation. A culture that supports and respects the protection of human rights can equally support the success of a human rights commission.

4 The Case of Ghana's Commission of Human Rights and Administrative Justice

Ghana's Commission of Human Rights and Administrative Justice (CHRAJ) was established in 1993 under the 1992 Constitution of Ghana by Act 456. CHRAJ is the national institution for the protection and promotion of fundamental rights and freedoms and administrative justice in Ghana. CHRAJ combines the work of the Anti-Corruption Agency, the Ombudsman and the Human Rights Commission under one umbrella. The Commission on Human Rights and Administrative Justice exists to enhance the scale of good governance, democracy, integrity, peace and social development by promoting, protecting and enforcing fundamental human rights and freedoms and administrative justice for all persons in Ghana. Section 218 of the Constitution provides the functions of the Commission.

The CHRAJ investigates complaints of human rights violations, denial of the enjoyment of a right, inappropriate administrative actions and decisions of public institutions and public officials and corruption in public institutions or by public officials.[13] In Ghana no institution, body or person is excluded from the Commission's jurisdiction. This in part reduces the impact of possible political interference. This is a provision that deserves emulation by many African countries including Zimbabwe. The fact that no institution, body or person is insulated from the scrutiny of the Commission points to how serious the people of Ghana view the Commission. It also means that no person can escape scrutiny by raising the cloak of their official title or office. However, for due process reasons the Commission cannot investigate a matter which is pending before a court or judicial tribunal. The CHRAJ cannot be involved in a matter involving the relations or dealings between the government and any other government or an international organisation or a matter relating to the exercise of the prerogative of mercy. These exceptions are understandable and accord with ordinary constitutional provisions in democratic societies.

[12] B. Dickson, 'Human Rights Commissions: A Unique Role to Play, Now and in the Future', 27:3 *Human Rights* (Summer 2000) p. 19, at p. 24

[13] Section 218 (a)–(c) of the Constitution of Ghana.

Any person complaining of a human rights abuse, administrative injustice as well as corrupt practices of public officials in Ghana can file a complaint free of charge. Complaints can be lodged via phone, email, post and fax or in person at any of the Commission's offices in Ghana. CHRAJ has offices in a number of provinces and districts of Ghana. Section 10 of the Commission on Human Rights and Administrative Justice Act, 1993 provides that "there shall be established in each Region and District of Ghana Regional and District branches respectively of the Commission". Complaints can also be submitted through the online form. From the available options of communication with the Commission, it is apparent that there is a great degree of informality in the manner in which complaints can be made. This helps in making the CHRAJ accessible to all citizens. In terms of the remedies that CHRAJ can provide to the public, they are wide and varied. CHRAJ is also empowered to resolve complaints through negotiation and compromise.[14] CHRAJ can make recommendations for corrective action, and if the recommendations are not complied with within three months, CHRAJ can enforce its recommendations through the courts.[15]

4.1 *Analysis of CHRAJ's Framework*

A number of positives can be drawn from the both the legal framework setting up CHRAJ as well its mode of operation. Iyer noted that CHRAJ was established in an environment where corruption, a dearth of accountability and infringements of justice were common under past authoritarian and civilian regimes.[16] The Commission gained a reputation of independence within a short space of time even though it was operating in an environment where it lacked resources for operational requirements.[17]

The CHRAJ has scored other major successes in its operations. For example it has handled a huge number of disputes within a short space of time. Dadzie states that between its establishment in 1993 and its tenth year, the CHRAJ received on average over 5,000 complaints annually. About 70 per cent of these complaints were resolved by mediation which has the advantage of being informal, flexible and relatively simple and non-adversarial as compared with the courts' adjudicatory system.[18] The use of mediation and other alternative forms of dispute resolution mechanisms which are more common in private law is a welcome development which can be copied by other nations. Human Rights Watch noted that these services have been found acceptable and welcome by Ghanaians and the accommodating approach has contributed to building public confidence in the

[14] Section 218(d)(i) of the Constitution of Ghana.
[15] Section 218(d)(iii) and (iv) of the Constitution of Ghana.
[16] D. Iyer, *Earning a Reputation for Independence: Ghana's Commission on Human Rights and Administrative Justice*, *1993–2003*, Innovations for Successful Societies, Princeton University, United States of America, 2011.
[17] *Ibid. See also* Dadzie, *supra* note 6, p. 38.
[18] Dadzie, *ibid.,* p. 17.

CHRAJ as a responsive institution.[19] It was therefore a good development in 2016 when the ZHRC adopted regulations through Statutory Instrument 77 of 2016 which allows the resolution of disputes through negotiation, mediation and conciliation.

Just as in many African countries, including Zimbabwe, access to the ordinary courts by ordinary people is very difficult due to the costs associated with doing so. Dadzie addresses the position in Ghana as follows:

> Many Ghanaians still find legal representation for assessing the formal justice system beyond their means. Against this background, the CHRAJ presents a verifiable complement to the courts through its ability to enable many marginalised persons and low or non-income earners obtain access to justice nationwide. NHRIs like the CHRAJ are designed to provide a complement to the judiciary for purposes of increasing access to justice particularly for the indigent and voiceless in society as part of good governance requirements in national development.[20]

With the number of complaints dealt with in Ghana alluded to above this is indeed a reality for Ghanaians. In short the CHRAJ has been accepted as an institution serving the people in Ghana. Acceptance by society is key for the effectiveness of the Commission.

CHRAJ's commissioner and two deputy commissioners, all of whom are appointed by the president, have the same status as Appeals Court and High Court judges in Ghana, with the same security of lifelong tenure.[21] The purpose of the tenure provision is to enable the commissioners to make decisions impartially, without fear of losing their jobs. In a way the provision insulates the commissioners from political interference. In addition, independence of the Commission is guaranteed by section 6 of the Act. These provisions are positive in their impact to the operations of the Commission.

One major weakness of the structure of CHRAJ lies in its multiple functions. The law bundles three different functions into the hands of CHRAJ as a way of limiting the costs of running the unit. Iyer explains this as follows:

> the commission's design limited its reach. CHRAJ combined the mandates of an ombudsman, a human rights commission and an anti-corruption institution under one umbrella. The Committee of Experts had envisioned the extraordinarily broad mandate as a way to keep costs low.[22]

Placing so many functions that are unrelated to each other runs the risk of jeopardising the effectiveness of the body. It may also lead the unit to be overwhelmed by its responsibilities. CHRAJ has a mandate that straddles human rights, administrative inefficiencies and corruption. This is too wide a mandate. Iyer agrees and provides the following illustration:

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[19] Human Rights Watch, *Protectors or Defenders: Government Human Rights Commissions in Africa*, New York, 2001.
[20] Dadzie, *supra* note 6, p. 38.
[21] Sections 3 and 4 of the Act.
[22] Iyer, *supra* note 13, p. 3

> First, the institution's broad mandate resulted in a heavy workload for all employees. For example, in 2002, the 12 lawyers at the commission's main office in Accra handled an average of 200 cases each. The triple mandate of ombudsman, human rights agency and anti-corruption commission created a heavy caseload and a congested docket. In 1993-1994, CHRAJ received 3,197 cases. In 2003, it received 13,726 cases.[23]

While administrative issues may be closely related to human rights matters, the two have little in common with combating corruption other than the mere fact that corruption can result in a denial of human rights protection for citizens. Even if the three areas are related other countries have provided for different bodies to deal with them. That is a better approach. Notwithstanding that challenge the unit appears to have acquitted itself very well in the discharge of its functions.

Another weakness of CHRAJ lies in its limited number of commissioners. Three commissioners provided for by section 216 of the Constitution as read with section 2 of the Act are too limited a number. While CHRAJ has done well despite this challenge, the best is to expand the number of commissioners to a minimum of around five or six. A wider number of commissioners would help in the operations of the Commission. For example if two commissioners cannot attend a meeting for whatever reason, it would mean that the remaining commissioner cannot have a meeting. Having slightly more members will help in achieving a quorum despite missing other members.

The CHRAJ in its 2010 annual report complained of poor funding, coupled with inordinate delays in releasing budgeted funds. The Commission noted that this had often delayed investigations and implementation of planned programmes. In addition, lack of adequate resources has led to a high rate of staff attrition among the professional class and poor infrastructural and logistical support. The Commission in the report cautioned that this state of affairs would have an effect on the quality of work as well as the general output of the Commission. This challenge appears to be a general challenge in African institutions. Moreover, in the same report, the Commission acknowledged that they received financial and technical support from the Royal Dutch Embassy and DANIDA in 2010.[24] Reliance on donor support raises a number of concerns for institutions of this nature. There is a justifiable fear that once donors play a significant role in support of such institutions, they could end up dictating the agenda of the NHRI. At the end of the day this could potentially affect the independence of a commission.

5 The Zimbabwe Human Rights Commission

The Zimbabwe Human Rights Commission is provided for in section 242 of the Constitution. The Commission is made up of a chairperson and eight other members appointed by the president from a list of 12 nominees. The chairperson is appointed

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[23] *Ibid*., p. 9.

[24] CHRAJ, *Seventeenth Annual Report 2010*, available at <www.theioi.org/downloads/1i6fp/Ghana_CHRAJ_Annual%20Report_2010_EN.pdf> (accessed 25 September 2018).

in consultation of the Judicial Services Commission and the Committee on Standing Rules and Orders of Parliament. Members of the Commission are chosen for their integrity and experience in the promotion of human rights. To provide for the procedures of the Commission as well as making further provision for the Commission, Parliament enacted the Zimbabwe Human Rights Commission Act (Chapter 10:30) in 2012. This Act supports the Constitution in regulating the functions and mandate of the ZHRC.

The nomination process has challenges in that the president and politicians have enormous power in the appointment process. Sarkin argues forcefully that the role of Parliament and the president should be reduced. He raises the fear that the present dispensation creates a situation of horse trading of candidates for their political persuasion as opposed to their suitability. In addition, he says that the fact that the president chooses eight candidates from a list of candidates rather than simply appointing those candidates sent to him further exacerbates the influence of politics in the process. In his view there should be no room for the president to pick and choose candidates referred to him.[25] While a valid point, the other side of the argument is that Parliament represents all people of Zimbabwe, and hence its involvement is justifiable in a democratic society.

The ZHRC has a general mandate of promoting awareness and respect for human rights and the realisation of such rights in Zimbabwe. Section 243 lays out a number of powers for the Commission, which upon close reading are indeed wide and diverse. Sarkin has a problem with this diversity of responsibilities of the Commission. He believes that too many responsibilities may clog the Commission from properly carrying out its core work of protecting human rights. He says that giving the Commission so many functions can dilute its abilities with respect to its core human rights functions. He suggests as an alternative establishing an Ombudsman, and an office that inspects prisons and other places of detention.[26] The criticism while justified can be answered very well. The fear that the Commission runs the risk of being distracted from its core functions by other activities is genuine but as long as those other activities deal with human rights then it is the responsibility of the Commission to act on them. But to an extent the criticism is valid. Just as in the Ghanaian Commission, there are too many responsibilities that are not core human rights protection matters.

The Commission is mandated in terms of section 323 of the Constitution to submit an annual report to Parliament. The weakness of that requirement is that the report has to be submitted through the line minister. The problem of the requirement is that the minister may delay or stop a report from being sent to Parliament for any reason. This opens the whole process to political interference. This may therefore become a stumbling block to the work of the Commission.

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[25] J. Sarkin, *Assessing Independent Commissions in the COPAC Draft Constitution of Zimbabwe*, IDASA, An African Democracy Institute, 2012.

[26] *Ibid.* It appears that government was of the same view. A constitutional bill was prepared but the public opposed the process.

5.1 *Analysis of the Structure of the ZHRC*

This section appraises the strengths and weaknesses of the structure of the ZHRC on the basis of the following attributes: independence, accessibility, accountability and mandate. It is a positive development that Zimbabwe decided to establish a human rights commission created by the Constitution of the land. Being a constitutional body the Commission has a certain degree of legal stability and protection. Unlike an ordinary statute, constitutional provisions are more difficult to amend or repeal. The formalities and processes required for amending the Constitution are more stringent as provided for in section 328 of the Constitution. Hatchard agrees that, "unlike many offices of the ombudsman, all the NBHRCs are established by the national constitution. This gives them a greater measure of protection against attempts to undermine their activities or even to legislate them out of existence."[27] Chiduza cautions that the fact that the Constitution established a fully operational human rights commission with enabling legislation does not automatically guarantee the effective protection and promotion of human rights. The fear held being that the institution could just be a window dressing created without a real intent to promote and protect human rights. Chiduza believes that "the success of the ZHRC in effectively protecting and promoting human rights goes deeper than its mere establishment".[28] Indeed a number of factors, such as legal, political, financial and social, have a bearing on the performance of a body such as the ZHRC.

5.1.1 Independence

Independent commissions such as the ZHRC must be independent and not subject to direction or control of any person or authority. One fundamental requirement set out in the Paris Principles is that NHRIs must be independent of the state. Section B(1) of the Paris Principles stipulate that:

> (1) The composition of the national institution and the appointment of its members, whether by means of an election or otherwise, shall be established in accordance with a procedure which affords all necessary guarantees to ensure the pluralist representation of the social forces (of civilian society) involved in the promotion and protection of human rights, particularly by powers which will enable effective cooperation to be established with, or through the presence of, representatives of:
>
> (a) Non-governmental organisations responsible for human rights and efforts to combat racial discrimination, trade unions, concerned social and professional organisations, for example, associations of lawyers, doctors, journalists and eminent scientists;
> (b) Trends in philosophical or religious thought;
> (c) Universities and qualified experts;
> (d) Parliament;
> (e) Government departments (if these are included, their representatives should participate in the deliberations only in an advisory capacity).

It is crystal clear that there is emphasis is on total independence of the institution from political interference as well as the need to cater for all sectors of society in the

[27] Hatchard, *supra* note 1. NBHRCs stands for 'new breed human rights commissions'.
[28] Chiduza, *supra* note 2.

composition of the Commission. An autonomous NHRI has great advantages and usefulness.

In this regard section 235 of the Zimbabwean Constitution provides that:

> (1) The independent Commissions –
> (a) are independent and are not subject to the direction or control of anyone;
> (b) must act in accordance with this Constitution; and
> (c) must exercise their functions without fear, favour or prejudice; although they are accountable to Parliament for the efficient performance of their functions.
> (2) The State and all institutions and agencies of government at every level, through legislative and other measures, must assist the independent Commissions and must protect their independence, impartiality, integrity and effectiveness.
> (3) No person may interfere with the functioning of the independent Commissions.

It follows that from a legal point of view that the Commission has independence. The Constitution gives the Commission separate legal personality and as such makes it capable of making its own decisions. In addition, Chapter 18, Part 1 of the Constitution further attempts to insulate independent commissions from interference. These are good provisions which attempt to create independence and to insulate the commissions and the office holders from interference. Independence come in many different forms; it can be legal, operational, financial (resource), among other forms.

The institution must also be totally independent of other government bodies and departments. Reporting requirements that subsume the Commission to political players or government officials distorts the independence of the body. Likewise, its budget should not be mixed with that of any line ministry of government department. The Human Rights NGO Forum argued that:

> The present Commission as set out in Amendment 19 is not independent and therefore not in line with Paris Principles … Control of the Commission with respect to independence, budgeting, funding and reporting mainly rests with the Minister of Justice …[29]

It is therefore a serious problem if the Commission is or is perceived as an impartial institution. Just like the courts a good perception and respect can only be enhanced if there is a community consensus of ZHRC's independence and impartiality. Therefore, any feeling from whatever quarter that the Commission is not independent creates serious challenges of legitimacy and good will in the eyes of the public.

In the final analysis it is suggested that the Commission should have direct access to Parliament for reporting purposes. Likewise, ZHRC must have a direct vote in the national budget which is not reported or submitted through a line ministry.

5.1.1.1 Security of Tenure of Commissioners

On the positive side, the Zimbabwe Human Rights Commission Act, in terms of section 20 as read with section 320(1) of the Constitution, guarantees the security of

[29] Zimbabwe Human Rights NGO Forum, *supra* note 4, p. 2.

tenure of members of the ZHRC. Members are appointed for a five-year term which may be renewed for one additional term. At the same time, commissioners can only be removed from office for cause through a process similar to that of the removal of judges. This enables members of the ZHRC to exercise their duties without any fear of being removed from office. Commissioners thus have clearly defined terms of office in order to ensure that they discharge their duties without fear or favour. This arrangement enables commissioners to act independently of any outside influence as their offices are not threatened. This is at par with the position in Ghana's CHRAJ.

This is as near as possible with the requirements of the Paris Principles in section B(3) where it says:

> (2) In order to ensure a stable mandate for the members of the national institution, without which there can be no real independence, *their appointment shall be effected by an official act which shall establish the specific duration of the mandate.* This mandate may be renewable … (emphasis added)

This principle requires that the term of office must be clear from inception so that members can exercise their functions independently without fear.

The only weakness that has been raised with the Zimbabwean provisions is the immense power wielded by the president in the appointment and removal process. The president is the one who has power to suspend a commissioner and to appoint the tribunal which determines the suitability of a member to continue to hold office. Chiduza provides examples in South Africa and Namibia where other bodies such as parliament are involved in the appointment and removal process of commissioners.[30] Indeed, a situation where one individual and a political player for that matter wield a lot of power in the appointment and removal of members of an independent commission is not justifiable by any standard. Hatchard shares the same misgiving. He notes that it is problematic that there is no opportunity for input from organs of civil society in the appointment process.[31] This is contrary to the Paris Principles, which in section B(1) recommends that the appointment procedure must involve the "pluralistic representation of the social forces (of civilian society) involved in the protection and promotion of human rights". The absence of any participation by civil society in the appointment process of the Commission is thus a major flaw if regard is had to the requirements of the Paris Principles.

ZHRC commissioners normally scrutinise government or public authorities' conduct in their daily work. As an interested party it is too much to give the president such powers. A better approach would be to share that power between the office of the president and the House of Assembly which after all represents all people. The Malawian example where civil society is involved in the process of appointment of commissioners may be a good case study.

[30] Chiduza, *supra* note 2.
[31] Hatchard, *supra* note 1, p. 33

Tandiri[32] has argued that it would have been better if there was only one term for the Commissioners. Commissioners who hope to be retained in the Commission for a second term may try to please the executive to secure a second term of office by limiting their criticism of the executive. As a result they may not be as vocal in their first term as a way of increasing their chances of re-appointment. A one term policy for commissioners may resolve this challenge completely.

5.1.1.2 Financial Independence

It is a requirement of the Paris Principles that NHRIs must be independent in terms of resources available to them in the sense that they must have adequate budgets to support their needs. In this respect section B(2) of the Paris Principles provide that:

> (3) The national institution shall have an *infrastructure which is suited to the smooth conduct of its activities, in particular adequate funding*. The purpose of this funding should be to enable it to have its own staff and premises, *in order to be independent of the Government and not be subject to financial control which might affect its independence* (emphasis added).

In this regard section 322 of the Constitution provides that "Parliament must ensure that sufficient funds are appropriated to the Commissions to enable them to exercise their functions effectively". While a good provision on the face of it, in reality the ZHRC faced resource challenges during its formative years leading to the frustration of some of its commissioners. The ZHRC did not receive a direct budget from the fiscus in the early years. Instead, the Commission received its vote via the Ministry of Justice. As a result of this arrangement, the Commission during its formative years (that is between 2012 and 2014) had resource challenges. Out of a budget requirement of USD 7.5 million, Treasury only released USD 600,000 in August 2014. These challenges were widely reported in the print media in 2014. Commenting on this aspect Chiduza appropriately noted that:

> For the ZHRC to discharge its duties effectively, the government needs to ensure that the Commission has adequate resources, its members are adequately remunerated, that the institution itself is financially independent, and that any public funds should not be under the direct control of the government. However, due to the severe economic challenges in Zimbabwe, the ability of the ZHRC to function effectively has been adversely affected over the years. Such challenges have had a negative impact on the Commission, with the former Chairperson, Reg Austin, resigning and citing operational challenges, including lack of staff, office space, and the absence of political will. At the time of his resignation the former commissioner also stated that the Commission had "no budget, no accommodation, no mobility, and no staff".[33]

The financial challenges alluded to above are serious and point to a bad situation that prevailed at the Commission. These challenges hampered the proper function and discharge of the mandate of the institution. It must be stated that the period 2012 to 2014 coincided with a difficult economic period for the nation at large. Some of the

[32] D. Tandiri, 'Analysing the Mandate and Independence of the Zimbabwe Gender Commission', Midlands State University, 2018 pp. 16–32
[33] Chiduza, *supra* note 2.

resource challenges of the Commission at that time have to be understood with that background in mind. However, from 2016 onwards the situation improved for the better, and the challenges of office space, secretariat, staff and other operational resources took a turn for the better. This was after the attainment of financial vote status of ZHRC and other Chapter 12 Commissions in the year 2016.[34]

As a final note in relation to the above, a number of approaches can be used to assist the ZHRC in garnering resources for its use outside of the fiscus. If the Commission has financial autonomy, it can raise funds from grants and donors. The legal framework should allow the institution to fund raise and seek assistance where necessary. Granted, care would be needed to ensure that in doing so ZHRC remains impartial and accountable to Zimbabwe.

5.1.2 Accessibility

A human rights commission must be accessible to the public, particularly the downtrodden and vulnerable groups of society such as women, mentally challenged, children, minority groups and the disabled. These disadvantaged groups normally bear the brunt of human rights abuses and hence require the services of national human rights institutions more than any other groups.[35] This fact suggests that the ZHRC must be easily approachable in terms of processes, composition and geographical reach. Section 22 of the Act recognises this fact. A situation where the offices of the Commission are located only in the cities with no local offices in the provinces is not good enough, just like a situation where the printed materials are in one language. To date the Commission has offices in Harare and Bulawayo. To that extent ZHRC is very far behind the position found in Ghana where they have local offices in all the national districts.

Accessibility can also be affected by modes of communication adopted by the Commission. Information in the vernacular and local languages concerning the Commission improves on the accessibility of the institution. Accessibility is closely connected to availability of resources. Financial and other resources are critical in ensuring accessibility and availability of services to the public. It is notable that the ZHRC has established an interactive website which is easy to use. To its credit it has carried out some visible awareness campaigns including road shows in towns and some growth points.

The ZHRC needs to improve its level of accessibility by: opening more offices in the provinces and in some cases in the districts, having a more diverse staff population and raising awareness on the existence of the institution. Awareness raising is critical for the Commission to be effective in discharging its human rights promotion and protection mandate. The lawmaker imposed the requirement for a devolved office set up in order to improve on accessibility. Section 22 of the Act provides that the Commission "shall endeavour to establish a principal office and offices at provincial,

[34] Annual Report of the Zimbabwe Human Rights Commission, 2016, p. 7.
[35] *See*, for example, the case of Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of *Endorois Welfare Council v. Kenya,* 276/2003.

district and other administrative levels as it considers fit for the better performance of its functions". This provision is similar to section 10 of the CHRAJ Act. The ZHRC should try as much as possible to establish offices in the districts. Such devolved offices can be very simple and manned by one paralegal who receives complaints and passes them on to specialists in Harare and Bulawayo. These offices can be attached to existing public buildings like court houses, schools, government offices and police stations. This will reduce the cost of accessing the ZHRC to members of the public.

5.1.3 Accountability

The ZHRC is a public body which must be accountable to the people of Zimbabwe. Hatchard advocates for a system of checks and balances where someone is responsible for "guarding the guard". He notes that the independence of the commission does not include insulating it from a regular review (although not supervision) of its activities.[36] This observation is eminently sensible. If public accountability is not infused in the operations of ZHRC, then there could be a risk that the public does not receive the best service.

The legal framework in Zimbabwe is very clear that the Commission has an obligation to account to Parliament through the provision of certain reports to Parliament and other bodies. In terms of section 8 of the Act, the Commission has an obligation at the end of each financial year to submit to the minister an annual report of its operations. The Commission may submit any additional reports to the minister relating to the operations of the Commission. The Minister has a duty to table before Parliament any report submitted to her or him by the Commission.

Sections 244 and 323 of the Constitution further address other related reporting obligations. It is clear that the Commission has a responsibility to submit reports to regional and international human rights bodies. These requirements are in line with the Paris Principles section A(3)(a). The Paris Principles require that NHRIs should be responsible for the submission to government, parliament and any other competent body reports on any matters concerning the promotion and protection of human rights. In accordance with the Paris Principles such reports shall relate to: recommendations on the creation or amendment of any legislative or administrative provisions, including bills and proposals; any situation of violation of human rights; human rights in general and on more specific matters; and proposals to put an end to human rights violations. It follows that the responsibility to account to the public via parliament has its roots in the international framework of the operations of NHRIs.

The only blame that can be given to these reporting requirements in the case of Zimbabwe is that the Commission's reports to Parliament are submitted via the responsible minister. This a long and winding reporting mechanism. This a weakness in the structure of the reporting system that deserves a relook. The danger with this approach is that the minister can deliberately sit on the report submitted to him if he or she does not want the contents of the report to become public knowledge. While

[36] Hatchard, *supra* note 1.

the provisions seems to suggest that the minister has no discretion once he receives a report, in reality the process can be abused. A better approach would have been one where the Commission chairperson was given direct access to present the report to Parliament. This way the opportunity to sabotage the report on the part of the minister would be non-existent. In any case, the chairperson of the Commission stands in a much better position to speak to and defend if necessary the report of the Commission than a minister of government. Better still, the legal provisions ought to have provided for direct access of the Commission to a parliamentary portfolio committee to apprise Parliament of its functions. In practice, though, despite the absence of an enabling provision in our law, this arrangement is still possible through the robust portfolio committee system being used in the Zimbabwean Parliament. Codifying the provision in the law would make our law and practice better.

5.1.4 Mandate

The overall mandate of the ZHRC as a Commission for Human Rights is to promote, protect and enforce human rights. As public protector, the ZHRC promotes and protects the right to administrative justice which is enshrined in section 68 of the Constitution. A cursory glance at all these functions of the Commission shows that they are numerous and diverse but they can be collapsed around three programme areas of: complaints handling and investigation, monitoring and inspections as well as education, promotion and research. Since inception, ZHRC has been carrying out human rights education and public awareness as well as carrying out investigations and conducting inspections and monitoring of places of detention and care institutions and producing investigation and monitoring reports, with recommendations for various duty bearers and stakeholders.

In terms of investigations, ZHRC has investigated cases of different violations such as abductions, torture, security sector brutality, property rights (non-payment/delay in payment of pensions and land disputes), violations of electoral rights, evictions, demolitions and discrimination in allocation or distribution of resources including food aid and agricultural inputs. The same applies to inspections and monitoring of places of detention and care institutions, where prisons, police cells, refugee camps, Covid-19 quarantine and isolation centres as well as care institutions for children, older persons and mental patients have been inspected and monitored to assess compliance with minimum standards for such institutions. Recommendations have been made for the purposes of providing redress to aggrieved complainants and ensuring adoption of a human rights-based approach to treatment of detainees and inmates of detention facilities and care institutions. In reality where recommendations are not adopted the Commission has the leeway to approach the courts for enforcement of its decisions. The case of *Democratic Alliance v. Speaker of the National Assembly and Ors*[37] is a good example of how NHRIs have done it in other countries. In this case the Commission was able to stand up against the executive and parliament.

[37] (2016) ZACC 11.

The powers of the Commission are provided in section 243 of the Constitution. In addition, the nature of the remedies and or interventions that the ZHRC can provide is an indicator of its effectiveness. From the powers given to the Commission one can assess whether the ZHRC is a watchdog that has teeth that can bite. Hatchard believes that the most striking difference between an ombudsman's office and that of a human rights commission concerns their remedial powers. Traditionally, an ombudsman's office is restricted to making recommendations to resolve complaints whereas national human rights institutions enjoy considerably wider powers, including the power to enforce their own decisions. Therefore, the ability to provide remedies and to enforce those remedies is a hallmark of a functional human rights commission.[38] On the face of it, the ZHRC seems to lack the latter powers, and its powers are comparable to that of a traditional ombudsman's office.

In the case of Zimbabwe, the Commission has very wide powers including those to promote human rights, investigate cases and to provide some remedies such as recommending prosecution of offenders and "directing the Commissioner-General of Police to investigate cases of suspected criminal violations". The power to direct the Commissioner-General of the Police is indeed an important power. Section 243 of the Constitution of Zimbabwe which provides the powers of the Commission states:

> 1. The Zimbabwe Human Rights Commission has the following functions--
> a. to promote awareness of and respect for human rights and freedoms at all levels of society;
> b. to promote the protection, development and attainment of human rights and freedoms;
> c. to monitor, assess and ensure observance of human rights and freedoms;
> d. to receive and consider complaints from the public and to take such action in regard to the complaints as it considers appropriate;
> e. to protect the public against abuse of power and maladministration by State and public institutions and by officers of those institutions;
> f. to investigate the conduct of any authority or person, where it is alleged that any of the human rights and freedoms set out in the Declaration of Rights has been violated by that authority or person;
> g. to secure appropriate redress, including recommending the prosecution of offenders, where human rights or freedoms have been violated;
> h. to direct the Commissioner-General of Police to investigate cases of suspected criminal violations of human rights or freedoms and to report to the Commission on the results of any such investigation;
> i. to recommend to Parliament effective measures to promote human rights and freedoms;
> j. to conduct research into issues relating to human rights and freedoms and social justice; and
> k. to visit and inspect--
> i. prisons, places of detention, refugee camps and related facilities; and
> ii. places where mentally disordered or intellectually handicapped persons are detained;
>
> in order to ascertain the conditions under which persons are kept there,

[38] Hatchard, *supra* note 1.

and to make recommendations regarding those conditions to the Minister responsible for administering the law relating to those places.

2. The Commissioner-General of Police must comply with any directive given to him or her by the Zimbabwe Human Rights Commission under subsection (1)(h).

Section 4 of the Zimbabwe Human Rights Commission Act further provides for the functions of the ZHRC. It is apparent from section 243 that the Commission is empowered to protect and promote human rights of the people of Zimbabwe at all levels by among other things receiving complaints from the public, investigating allegations of breach of freedoms, securing appropriate redress and directing certain officials to carry out investigations on suspected criminal violations of human rights. Section 243(1) (d) empowers the Commission to investigate any complaints received by it. The nature of the complaints received is not specified in the section, leaving it open to the Commission to investigate any complaints received by it. This is good as it does not limit or direct the Commission to particular acts or complaints. The only drawback is that the section does not empower the Commission to carry out investigations at its own motion,[39] a situation that is prevalent in other commissions elsewhere. The section can, however, be used to support a complaint lodged by civil society on behalf of other people such as children, the mentally challenged or those who for any reason may not want to be at the forefront of a complaint. The section does not seem to suggest that the complaint must be made by the person affected personally. In practice ZHRC has acted on complaints made by others on behalf of the affected persons. For example the case relating to identity documents referred in the next section was refereed by a civil society organisation.

In terms of section 243(1)(k)(i) and (ii) the Commission has the power to visit places of detention, refugee camps and places where intellectual incapacitated persons are detained to assess the conditions of detention at those centres. The Commission can then present recommendations to the minister responsible for those facilities. The list of activities that the Commission carries out is indeed wide. Sarkin is of the view that these wide functions are detrimental to the prospect of proper discharge of functions since the ZHRC could be inundated by responsibilities.[40] This position is similar to the Ghanaian experience which has also been blamed for being too diverse. In particular, he suggests that the function to inspect places of detention and refugee camps could easily be dealt with by other bodies.[41] While this observation is true sight should not be lost to the fact that places of detention for the mentally incapacitated, refugee camps and prisons raise a number human rights issues with regard to the standards found there. It is submitted that this function cannot be segregated from the general human rights responsibility of the Commission. Mentally challenged people, prisoners and refugees for example deserves protection as they fall in a special category of vulnerable people who can easily be abused by

[39] However, section 4(d) of the Act provides that the Commission should ensure and provide appropriate redress for violations of human rights and for injustices. Section 15 of the Act allows the Commission to act on its own motion in order to redress human rights violations.
[40] Sarkin, *supra* note 22.
[41] *Ibid.*

authorities without any chance of that abuse becoming public knowledge. Despite this fact, this set-up still poses operational challenges for the Commission.

What requires more scrutiny is the remedies and activities that the Commission can play in cases where they find violation of rights. The Commission can, in accordance with section 243(1)(f) and (g), investigate and must also "secure appropriate redress, including recommending prosecution of offenders". This is a good provision which does not go far enough since the Commission is limited to providing recommendations and does not allow it to act on its own. It can, however, be argued that securing 'appropriate redress' empowers the Commission to take whatever steps it deems necessary to redress a human right violation. This may include carrying out a hearing of a case. This is because providing recommendations is just one of the redresses that the Commission can provide. However, granting the ZHRC clear power to hear and determine cases would have been a better arrangement than the present scant provisions on the matter. The approach in Uganda where the Commission is given direct powers to hear cases and to provide several remedies such as interdicts, releasing a detained person or the payment of compensation would have been better. Hatchard justifies granting human rights commissions such hearing powers on the following grounds:

> The judiciary is not necessarily equipped to handle such matters for, despite increasing judicial activism in Commonwealth African countries, there still remains the prospect of judges observing self-limitations that insulate them from dealing with troubling issues with human rights dimensions. In addition, the cost, delays, procedural complexities and strict rules of evidence make it impractical to expect the courts to act alone as 'guardians of human rights'. As a result, the NBHRCs enjoy a range of other remedial powers including bringing proceedings to a court on behalf of complainants and bringing proceedings to restrain the enforcement of legislation or regulation by challenging its validity.[42]

The drawback of such a situation is that of creating a parallel process of handling human rights cases. Citizens would have a choice between the ordinary courts and the Commission. That approach has its own challenges, such as observing the separation of powers principles. This is because the Commission could hypothetically start by investigating a case then finally sit in judgement over the same case. Such a situation is hardly ideal and may have implications on the rule of law and fairness.

By contrast section 243(1)(h) is better phrased in so far as it requires the Commission to direct the Commissioner-General of Police to investigate cases of suspected criminal violations, and the Commissioner-General of Police is bound to report to the Commission on the findings of the investigation. This provision is binding and leaves the Commissioner-General without any discretion in the process. The only challenge will be where the police carry out the investigations but do so in a shoddy way so that no case will be sustainable in court from such investigations. Again, giving the Commission criminal investigation powers would have been contrary to the Constitution; hence this requirement was an acceptable compromise.

[42] Hatchard, *supra* note 1, p. 42.

In any event, the Commission as a body would not have the necessary expertise in carrying out such investigations on its own.

One interesting observation on the powers of the Commission is that there is no office or person which is immune from investigation and other powers of the Commission. Both the Constitution of Zimbabwe and the ZHRC Act do not contain any specific restriction upon who can be investigated. Unlike in ordinary civil process where the president has immunity from civil prosecution, there is no similar provision in terms of suspected human rights violations. This position can be defended in that any person can be the cause of human rights violations; hence excluding certain persons or offices can lead to a situation where the rights of the people will be at the mercy of such offices or persons. The situation as it is in the Constitution is therefore good for the protection of human rights in the country.

6 Achievements of the ZHRC

Despite the initial challenges that the Commission faced at inception, the ZHRC has been able to weather them with the passage of time. The resource challenges were abated to such an extent that the Commission now has its own offices and a functional secretariat. From an access point of view the Commission has to date established an interactive website from which citizens can lodge complaints from anywhere in the world. This is a very good development that makes the ZHRC accessible to the public. After all internet access is key in the digital environment of today's world. Despite the presence of the Commission's offices being in Harare and Bulawayo, a presence on an internet platform ensures access to a larger audience. It also allows a wider number of people to interface with the Commission. Indeed the complaints have been increasing incrementally from 2015 to 2019.

Section 3(2) as read with the first schedule, paragraph 7 of the Zimbabwe Human Rights Commission Act provides for the establishment of human rights thematic committees which are referred to as thematic working groups (TWGs). The committees focus on various human rights thematic areas such as children's rights, gender equality and women's rights, special interest groups (such as youths, persons with disabilities, older persons and minority groups), environmental rights, international treaties and agreements and capacity building. TWGs comprise of various stakeholders representing state and non-state institutions who converge to share ideas and implement activities which facilitate promotion and protection of rights which fall under the committees' thematic areas. This is in line with the Paris Principles which require NHRIs to be pluralistic.[43]

In terms of the effectiveness of the TWGs, the Committees face budgetary constraints which limit their vibrancy in the promotion and protection of the various rights they were delegated to specialise on. Another challenge is the lack of commitment by members of the TWGs. Some of the member organisations do not send in representatives to meetings while others do not maintain consistency in terms of representation to the TWGs. They rotate representatives, bringing in new

[43] *Annual Report of the Zimbabwe Human Rights Commission*, 2016, p. 45.

representatives at each meeting. The new representatives often lack background on the operations of the TWGs, thus reducing their value to the TWGs. When it comes to implementation of the TWGs work plans, some member organisations fail to initiate or implement activities which they committed to undertake, thus derailing attainment of expected outputs and outcomes of the TWGs.[44] Another area of concern is that TWGs do not have a dedicated secretariat to coordinate and implement its activities. The committees are served by a secretariat from the Programmes Department which is already overwhelmed by departmental work. Despite these challenges the creation of the TWGs is a positive move which extends the human rights protection space in Zimbabwe.

Furthermore, since 2016 more and more Zimbabweans have become aware of the ZHRC as a human rights watchdog.[45] This can be credited to the Commission's awareness campaigns in all the provinces of the country. Complaints and other requests for assistance increased within this period. According to the ZHRC website in 2016 the ZHRC carried out one investigative report, while the number rose to four for 2017 and shot to five investigative reports by June 2018. Of course the rise of the investigations in 2018 can also be attributed the general elections that took place in the year. Indeed, out of the five complaints made by 26 June 2018, three of the cases were related to the elections. In general, though, the rise of the complaints and investigations made is a good indication on the efficacy of the ZHRC as a body and the methods they use to reach the public. A survey of the complainants' shows that the bulk of them were rural people complaining about discrimination on issues such as the allocation of food aid and farming inputs by traditional leaders and evictions from land without due process. This therefore means that while there are no brick and mortar offices in the rural areas, the rural people are still able to access the ZHRC for redress of their complaints. This is a great achievement on the part of the Commission since institutions of this nature should benefit the ordinary members of our societies who cannot otherwise vindicate their rights through the courts on their own.

The Zimbabwe Human Rights Commission in 2018 successfully intervened in the case of 94 Hopley[46] residents who were being denied their right to acquire national identity documents and birth certificates on the alleged basis that they were aliens. This was in the context where Zimbabweans were registering as voters for general elections. The ZHRC wrote to the Registrar General to issue the required documentation. A total of 94 residents were able to use that intervention to obtain the identity documents and ultimately to register as voters in the elections.[47]

The ZHRC through regulations has somewhat 'expanded' the remedies it can provide to complainants. Part IV of the Zimbabwe Human Rights Commission

[44] *Annual Report of the Zimbabwe Human Rights Commission*, 2017.
[45] *See* the 2015, 2016 and 2017 ZHRC annual reports.
[46] Hopley is a settlement in Harare.
[47] ZHRC, *Zimbabwe Human Rights Commission Newsletter*, 19 April 2018, available at <http://kubatana.net/2018/04/19/zimbabwe-human-rights-commission-newsletter/> (accessed 25 September 2018).

(General) Regulations, 2016[48] makes provision for resolution of complaints through negotiation, conciliation or mediation. This is another positive development which enables the public to have their complaints raised with the ZHRC system resolved through alternative dispute resolution (ADR) methods such as negotiation and conciliation. Negotiation and mediation are generally confidential approaches to resolving disputes. Confidentiality can make the disputing parties easily find common ground. This is particularly so where the parties want to maintain a relationship after the resolution of the dispute. Many scholars point out that ADR is generally accessible, less formal and efficient in terms of time.[49] It is also worth noting that ADR is closely related to the traditional method of resolving disputes in the customary Zimbabwean context. As a result, the availability of these types of remedies makes dispute resolution easier and more accessible to Zimbabweans. The non-adversarial approach of ADR is important and provides greater room for tailor-made remedies by the Commission. In the CHRAJ context 70 per cent of the complaints lodged with that Commission are resolved by mediation.

The ZHRC has collaborated and partnered with similar bodies across the world. For example the Commission is a member of the Global Alliance for National Human Rights Institutions (GANHRI), and ZHRC was accorded 'A' status by this Alliance in 2015. 'A' status means that NHRI is operating in compliance with the Paris Principles. This is assessed by the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights. This status is a considerable achievement for ZHRC and for Zimbabwe at large. Within the African context, the Commission joined the African National Human Rights Institutions (NAHRI) an association of 44 strong NAHRIs. What is critical is to note that associating with these international bodies is not automatic upon application, rather applicants have to meet set criteria in terms of their operations and other considerations before they are admitted into membership. The ZHRC is also a member of the International Ombudsman Institute, a global institute with 28 African members. Membership in these associations helps in relation to capacity building, training and access to key resources such as library materials. These kinds of partnerships help to bridge the knowledge and resource gaps that may exist in the ZHRC. From a human rights point of view it also allows scrutiny of the work of the ZHRC as it associates and works together with similar entities. It also allows the Commission to adopt best practices from these alliances.

7 Conclusion

Zimbabwe did well to establish the ZHRC to help in the protection, promotion and expansion of human rights observation in the country. Being an independent commission set up by the government, the ZHRC is immune to the attacks often

[48] Statutory Instrument 77 of 2016

[49] *See*, among others, R. Matsikidze, *Alternative Dispute Resolution in Zimbabwe: A Practical Approach to Arbitration, Mediation and Negotiation* (Molhurst Printers and Publishers, Harare, 2013) and G. Tredeau, *Integrating Labour Law Policy* (New York, 2002).

raised against civil society organisations involved in the human rights activities in Zimbabwe by some political players. The creation of such an institution through the Constitution of the land is a major achievement which deserves commendation. The ZHRC has had to weather a number of challenges to operate at the optimum level for an institution of that nature. The major challenges and shortcomings observed by commentators revolves around the independence of the body in terms of autonomy, staffing, accountability, budget and other resources necessary for the fulfilment of its full mandate. In addition, the ZHRC does not have power to enforce many of its decisions, relying instead on other bodies such as the police and the courts to do so. This is a challenge if the other bodies or persons tasked with certain human rights responsibilities do not have a human rights protection agenda in their overall mind-set. For example, police can deliberately carry out shoddy investigations on complaints raised to frustrate recommendations from the Commission. They can refuse to cooperate or promise to cooperate but do nothing. Therefore, it can be said with force that the general human rights culture of Zimbabwe has major role to play in the success or failure of the operations of the ZHRC. Some challenges can be resolved easily by simple amendments of the Act and the Constitution while others are connected to the overall socio-economic performance of the whole country. Such challenges can be resolved when the fortunes of the country change. Despite some of these teething challenges, the Zimbabwe Human Rights Commission has generally performed its mandate well despite a difficult operating environment.

18 An Overview of the African Human Rights System

Tarisai Mutangi*

1 Introduction

Although the global discourse on human rights continues to shift from standards-setting to implementation of human rights commitments, Africa remains the centre-stage of human rights violations now exacerbated by the Covid-19 global pandemic, thus justifying calls for a reformed system of human rights protection that can adequately respond to these new challenges across the continent. Since 1981 when the African Charter on Human and Peoples' Rights (ACHPR) was adopted under the auspices of the Organization of African Unity (OAU), institutions and organs of the now Africa Union remain seized with inundating demands to mainstream and improve the situation of human rights. Conflict are currently raging in countries such as Central Africa Republic and Burundi thereby generating new violations and exerting pressure on existing mechanisms for the protection of human rights. One violation or another of the fundamental rights and freedoms protected by the key human rights treaties in Africa is ever-present in African societies thereby begging the question as to the extent to which African states are committed to promoting and protecting human rights first at the national level and then at the international level when national systems are either unwilling or unable to do so.

This chapter therefore aims at reviewing the African human rights system with a strong focus on demonstrating its legislative and institutional framework for the protection of human rights on this continent. The chapter will begin with the history of the system, and move on to examine the legislative framework of the system – with a focus on the African Charter on Human And Peoples' Rights (African Charter), the African Charter on the Rights and Welfare of the Child (African Children's Charter) and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women (Maputo Protocol). This is followed by a comprehensive examination of the soft law principles contained in non-binding documents.[1]

The final part of this chapter focuses on the institutional frameworks that make it possible to interpret and expand on the binding treaties (frameworks) and principles contained in the non-treaty documents. The African Commission on Human and Peoples' Rights (the African Commission) and the African Court on Human and Peoples' Rights (the African Court) are mandated to oversee the implementation of the African Charter and the Maputo Protocol. Further, the chapter focuses on the role of the African rapporteurs and working groups and the committees.

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[1] *See* <http://www.achpr.org/files/specialmechanisms/cpta/rig_practical_use_book.pdf> (accessed on e 18 December 2017).

2 Historical Background

The debate around cultivating a culture of human rights in Africa was conceived at the first congress of African Jurists in Lagos, Nigeria, in 1961.[2] During that period, African states did not make serious efforts to promote this concept through the Charter of the Organization of African Unity due to the fact that the Charter did not impose explicit obligations on member states to ensure the protection of human rights.[3] In spite of the absence of a clear human rights mandate, the OAU through the Charter committed to addressing a number of human rights issues such as decolonisation, self-determination and ending apartheid.[4] The OAU during that time paid little attention to the gross human rights violations perpetrated by dictatorial regimes in Africa against their own citizens. To this end, Gwananas[5] argues that the institution largely focused on socio-economic issues. This was due largely to the OAU's preference to focus on socio-economic development issues, territorial integrity, cooperation and state sovereignty over human rights protection, as well as firm reliance on the principle of non-interference in the internal affairs of member states as reflected in the OAU Charter.

The idea of the Law of Lagos was revisited at the First Conference of Francophone African Jurists held in Dakar, Senegal, in 1967.[6] The process of developing the African Charter of Human and Peoples' rights went through a series of seminars and conferences held at different levels in some cases organised by the International Commission of Jurists and in other cases the United Nations Human Rights Commission which set up an *ad hoc* working group that was charged with the duty of assisting in the creation of a regional human rights system for Africa.[7]

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[2] The International Commission of Jurists in 1961 sponsored a conference on the Rule of Law in Lagos, Nigeria, where a resolution entitled the Law of Lagos was accepted. Also reprinted in M. Hamalengwa *et al.* (eds.), *The International Law of Human Rights in Africa* (1988) p. 37.

[3] Charter of the Organisation of Africa Unity (1963/1963), adopted in Addis Ababa, Ethiopia, on 25 May 1963 and entered into force on the 13 September 1963.

[4] Article 2(d) of the Charter of the OAU 1963.

[5] B. Gawanas, *The African Union: Concepts and Implementation Mechanisms Relating to Human Rights*, available at: <http://www.kas.de/upload/auslandshomepages/namibia/Human_Rights_in_Africa/6_Gawanas.pdf> (accessed on the 18 December 2017).

[6] Human and Peoples' Rights in Africa and the African Charter Report of a conference held in Nairobi from 2–4 December 1985 convened by the International Commission of Jurists, <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/1986/04/Africa-human-and-peoples-rights-conference-report-1986-eng.pdf>. "On the occasion of the mission to President Senghor of Senegal, he asked to be given a draft resolution for submission to the next meeting of the Heads of State of the OAU. It was this resolution, which led to the appointment of a Committee of Experts to draft what became the African Charter of Human and Peoples' Rights. The Rapporteur of the Committee was Judge Keba Mbaye, who was the President of the ICJ and of the follow-up Committee to the Dakar seminar. This Charter was adopted unanimously at the meeting of the Heads of State under the chairmanship of President arap Moi in Nairobi in 1981."

[7] <http://www.achpr.org/instruments/achpr/history/> (accessed 10 October 2017).

3 Legislative Framework

Every human rights system prides itself in adopting legal instruments that define the scope of fundamental human rights and freedoms applicable in that system. The African system is no exception in this regard. This part focuses on the key human rights legal instruments adopted by the AU that constitute the basis for the normative framework of rights and freedoms in Africa. Only key instruments are briefly discussed here to give guidance on the themes and sectors where African human rights instruments apply. In any event, the legislative framework also pre-empts the institutional framework to be discussed later in this chapter. The instruments do not only provide for rights and freedoms but also establish institutions charged with supervision of implementation of human rights obligations subscribed to by member states upon ratifying these instruments.

3.1 *African Charter on Human and Peoples' Rights (Banjul Charter)*

Almost universally ratified by AU member states, the African Charter is the leading instrument in the promotion and protection of human rights in Africa.[8] To date, 54 African states[9] have ratified the Charter, which is a revolutionary treaty in that it covers aspects of socio-economic rights in the same breath as civil and political rights. In contrast, the United Nations treaties were unable to combine the different categories of human rights in one treaty and opted for a diffused approach. However, each approach has its own pros and cons, which is not relevant to the current discussion. The Charter contains qualities that distinguish its influence to the regional protection of human rights on the continent. This is due to the fact that it reflects the challenges that the continent grapples with and integrates both civil and political rights and economic, social and cultural rights within one document. This aspect makes the Charter stand out as opposed to other international instruments that preferred the diffused approach to human rights.

The inclusion of socio-economic rights is a notable achievement taking into account that national constitutions of various African states have not yet included them as justiciable rights. The African Commission in the *Social and Economic Rights Action Centre and Another v. Nigeria* case[10] underlined that socio-economic rights are a

[8] <http://www.achpr.org/instruments/achpr/accessed> (accessed 10 October 2017). Since the adoption of the Banjul Charter, African states have enacted other treaties focusing on protecting human rights. These treaties are the African Charter on the Rights and Welfare of the Child, the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.

[9] <http://www.achpr.org/instruments/achpr/ratification/> (accessed 10 October 2017).

[10] Communication 155/96, *Social and Economic Rights Action Centre and Another v. Nigeria*, 15th Activity Report, (2001) AHRLR 60 (ACHPR 2001), para. 68: "The uniqueness of the African situation and the special qualities of the African Charter imposes upon the African Commission an important task. International law and human rights must be responsive to African circumstances. Clearly, collective rights, environmental rights, and economic and social rights are essential elements of human rights in Africa. The African Commission will apply any of the diverse rights contained in the African Charter. It welcomes this opportunity to make clear that there is no right in the African Charter

vital part of the Charter. It also underscored the importance of treating human rights as indivisible. Violation of socio-economic rights would inevitably result in violation of some civil and political rights depending on the circumstances of each case. Nonetheless, in terms of Article 27 of the African Charter, both categories of human rights in the Charter are circumvented with claw-back clauses that subject the enjoyment of these rights to domestic laws. In *Media Rights Agenda and Others v. Nigeria*,[11] the African Commission made it clear that the term 'law' is not equivalent to domestic law, finding that any limitation of Charter rights must be compatible with standards of international law.[12] In other words, limitations to the exercise of human rights often spelt out in domestic law must conform to international standards of imposing reasonable conditionalities to the exercise of human rights.

The Charter contains two different types of rights and freedoms. The first are the rights that apply to each human being as an individual person. Moreover, the second type is 'peoples' rights' or 'collective rights', which apply to a people as a collective. This exemplifies the impression that rights are not only individualistic but are also collective in nature. Not many human rights systems have adopted this approach to human rights architecture. There is a philosophical approach to human rights in Africa centred on community orientation. The individual is a unit in the greater scheme of the environment called a community. The communal approach lies at the heart of African sociology and anthropology, which is reflected in the instruments. The right of 'peoples' to self-determination is one such right that has been contentious, bringing to bare the question as to who qualifies as a 'people'. As the concept of 'people' is not defined in the Charter, it may be interpreted as referring to the inhabitants or nationals of a state or to smaller units – religious, ethnic or linguistic minorities – within a state. The African Commission has refrained from explicitly accepting that this provision entitles minority groups to special status as it would legitimate claims to secession. Kiwanuka argues that a "person is not regarded as an isolated and abstract individual" but an integral member of a group animated by a spirit of solidarity.[13] He further quotes the rapporteur's report stating "man is a part and parcel of the group, some delegation concluded that individual rights could be

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that cannot be made effective. As indicated in the preceding paragraphs, however, the Nigerian Government did not live up to the minimum expectations of the African Charter." The Communication is available at
<http://www.achpr.org/files/sessions/30th/comunications/155.96/achpr30_155_96_eng.pdf> (accessed 10 October 2017).

[11] (2000) AHRLR 200 (ACHPR 1998).

[12] 105/93-128/94-130/94-152/96: Media Rights Agenda, *Constitutional Rights Project, Media Rights Agenda and Constitutional Rights Project / Nigeria*, para. 66. According to Article 9(2) of the Charter, law may restrict dissemination of opinions. This does not mean that national law can set aside the right to express and disseminate one's opinions; this would make the protection of the right to express one's opinions ineffective. To allow national law to have precedent over the international law of the Charter would defeat the purpose of the rights and freedoms enshrined in the Charter. International human rights standards must always prevail over contradictory national law. Any limitation on the rights of the Charter must be in conformity with the provisions of the Charter. Please visit <http://www.achpr.org/files/sessions/24th/comunications/105.93-128.94-130.94-152.96/achpr24_105.93_128.94_130.94_152.96_eng.pdf> (accessed 1 October 2017).

[13] R. N. Kiwanuka, 'The Meaning of "People" in the African Charter on Human and Peoples' Rights', 82:1 *The American Journal of International Law* (January 1988) pp. 80–101.

explained and justified only by the rights of the community".

To the credit of the uniqueness of the African human rights system, the Charter further incorporates 'duties' that individuals owe to each other and to society in general.[14] These provisions are a manifestation of the significance that Africans place on congruent relationships within the family and in the broader society. These duties, however, do not affect the rights and freedoms contained in the Charter, nor are they conditional to the enjoyment of any rights and freedoms in the Charter. It is important to also note that individual and collective rights are often differentiated as either civil and political rights or economic, social and cultural rights. Some of the individual civil and political rights contained within Articles 3–18 of the Charter are the rights to: equality before the law and equal protection of the law (Article 3); the right to the respect of the dignity inherent in a human being and to the recognition of his legal status, liberty and freedom from torture, cruel, inhuman and degrading treatment, slavery and other forms of exploitation (Article 5); a fair trial (Article 7); freedom of conscience and religion (Article 8); freedom of assembly and association with others (Articles 10 and 11); freedom of movement and residence (Article 12); participation in government (Article 13); and non-discrimination against women (Article 18(3)).

Of equal importance to note is that the African Charter does not contain any provisions on derogation by member states from their obligations under the instrument. The African Commission, in the case of *Commission Nationale des Droits de l'Homme et des Libertés v. Chad*,[15] interpreted this silence to mean that derogation from the Charter is not allowed under any circumstances.[16] Nevertheless, the absence of a provision on derogation is not necessarily a prohibition of derogation. This issue is clearly covered in international customary law for states to derogate from treaties, and it remains arguable whether or not the African Charter can retract this entitlement.[17]

Being the key human rights instrument in the African system, AU policy organs have developed a practice of adopting 'protocols' whenever the need to introduce new human rights norms arises. As will be discussed in detail below, the assumption is that all these new standards ought to have been part of the African Charter hence they can only be contained in an instrument that in a way pays 'allegiance' to the African Charter. Further, the other reason could be the desire not to fragment oversight institutions responsible for supervising implementation of international human rights oversight institutions. Nonetheless, these protocols are available for ratification by each AU member state after which they become binding on those states.

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[14] *See* Articles 27–29 of the African Charter.
[15] Ninth Activity Report, (2000) AHRLR 66 (ACHPR 1995).
[16] *Cf.* with derogations provisions contained in Article 6 of the ICCPR.
[17] R. Higgins, 'Derogations under Human Rights Treaties', 48 *British Yearbook of International Law* (1976–1977) p. 281.

3.2 *African Charter on the Rights and Welfare of the Child*

The African Charter on the Rights and Welfare of the Child (hereafter African Children's Charter)[18] represents one of the sectorial instruments focusing exclusively on children. Article 2 thereof defines a child as a human being below the age of 18 years old. The preamble to this Charter sums up the environment in which an African child exists and articulates it as follows:

> **NOTING WITH CONCERN** that the situation of most African children, remains critical due to the unique factors of their socio-economic, cultural, traditional and developmental circumstances, natural disasters, armed conflicts, exploitation and hunger, and on account of the child's physical and mental immaturity he or she needs special safeguards and care,
>
> **RECOGNIZING** that the child occupies a unique and privileged position in the African society and that for the full and harmonious development of his personality, the child should grow up in a family environment in an atmosphere of happiness, love and understanding …

The Children's Charter is the first child rights treaty to be adopted at the regional level. It is the first regional instrument that recognizes the child 'as a possessor of certain rights and makes it possible for the child to assert those rights in domestic judicial or administrative proceedings'. It could be considered as an 'innovation in the arena of children's rights' since it was the first time that any regional human rights system adopted a treaty focusing on the protection and promotion of children's rights. It was also the first time that a document pronounced its supremacy over harmful traditional, customary or cultural practice.

Inasmuch as these adverse factors may also manifest in communities outside of Africa, AU member states articulated the circumstances of an African child in those words. These words are the premises upon which the rest of the provisions in the Charter are built. The rights and freedoms are couched in such a way that they address the adverse environment in which the child finds itself. In other words, this 'African environment' justifies AU member states in adopting an African instrument notwithstanding being state parties to the UN Convention on the Rights of the Child (UNCRC). The principles that form the basis of the Charter are non-discrimination, participation,[19] the best interests of the child[20] and survival and development.[21] More specifically on the rights and freedoms covered, the African Children's Charter prohibits child marriage, child labour and child abuse. It also addresses children rights related themes such as juvenile justice, armed conflict, adoption, drug abuse, sexual exploitation and human trafficking, just to name a few. Perhaps fundamental to the survival and development of a child are the rights to a name, birth registration

[18] The Charter was adopted in Addis Ababa, Ethiopia, on 11 July 1990, and entered into force on 29 November 1999. As of 10 October 2017, 41 member states of the AU have signed and ratified the Children Charter and nine have only signed the Charter.
[19] *See* Article 3 of the Charter.
[20] Article 4 of the Charter.
[21] Article 5 of the Charter.

and nationality.[22] The practice of child soldiers is one evil that has been documented in Africa. It happens when children are conscripted into armed formations such as belligerent groups and in some cases the national army and the children are directly involved in hostilities. Article 22(2) affirms this position by requiring state parties to take all necessary measures to ensure that no child shall take a direct part in hostilities and refrain in particular from recruiting any child.

Figure: Uniqueness of the African Children's Charter

1.	Makes no distinction between civil and political rights, and economic, social and cultural rights
2.	Defines a child as 'every human being below the age of 18 years' irrespective of whether they have attained majority before 18 years
3.	Protection extends beyond territory
4.	In addition to states, other actors have the obligation to not discriminate against the child
5.	Includes ethnicity as a ground for non-discrimination
6.	Protects the child against apartheid and discrimination
7.	Considers best interests of the child as THE primary consideration
8.	Expressly proclaims supremacy over any custom, tradition, cultural or religious practice that is inconsistent with the rights of the child
9.	Protects the child from harmful social and cultural practices
10.	Expressly prohibits child marriage and the use of children in armed conflict
11.	Adopts a more contextualized approach to education
12.	Imposes an obligation on states to ensure that girls who become pregnant before completing their education have an opportunity to continue with their education
13.	Expressly mentions female, gifted and disadvantaged children in the context of the right to education
14.	Frames the right to health more comprehensively
15.	Imposes an obligation on states to prevent the use of children in all forms of child begging
16.	Ground-breaking provisions relating to juvenile justice
17.	Elaborates on the responsibilities of the child
18.	Covers not only child refugees but also internally displaced children

3.2.1 Origin and Drafting

The idea of a separate treaty on the rights of the child at the African level originated from the need to address specific issues and realities of the African child. In the Preamble to the African Children's Charter, it is noted that the African child needs

[22] Article 6 of the Charter. *See also* General Comment No. 1 on this Article. In that General Comment the Committee emphasised that birth registration is one of the most effective methods of reducing statelessness in children.

"special safeguards and care" because of "unique factors", including "natural disasters, armed conflicts, exploitation and hunger". It also seeks to adopt an African approach to human rights of children. It thus takes into consideration the "values of African civilization, which should inspire and characterize their reflection on the concept of the rights and welfare of the child". The adoption of the Charter was also necessitated by the need to cure the apparent exclusion of African states in the drafting of the CRC. Only three African states participated in the initial stages of CRC drafting while nine of them were part of the working group by 1989.

The proposal to draft the Charter was first discussed in 1988 during a meeting organized in Nairobi, Kenya, on 'Children in Situations of Armed Conflict in Africa'. One of the objectives of the meeting was to consider whether it was necessary to supplement the then Draft CRC with a regional pendant. Subsequent to this meeting, a working group to draft a treaty for children's rights in Africa was created. Civil society organisations, led by the African Network for the Prevention and Protection against Child Abuse and Neglect, had major inputs to the drafting process. Government experts subsequently made inputs into the draft, before the OAU Secretary General scrutinised it. The OAU Council of Ministers then considered and forwarded it to the Assembly of Heads of States and Government for adoption.

3.2.2 Trends in Ratification

The majority of African states have ratified the Children's Charter. With 49 ratifications, there are only five AU member states that are yet to ratify the treaty, namely, Democratic Republic of Congo (DRC), Morocco, Sahrawi, Somalia, South Sudan and Tunisia. Of these five states, only Sahrawi has not ratified the CRC, as it is not a UN member.

The ratification of the Children's Charter had a slow start. Seychelles was the first to ratify the treaty in February 1992, followed by Mauritius and Burkina Faso in the same year. It then took nine years for it to receive 15 ratifications, the minimum number required for entry into force. By the end of the first decade (1990-1999), 16 states had ratified the Charter. The pace of ratifications picked up significantly in the next decade. Between the years 2000 and 2009, 29 more states became party to the treaty. This could be explained by the operationalization of the Committee, which undertook advocacy missions and campaigns to states to encourage them to ratify the Charter. In the last decade (2010-2019), four new states ratified the treaty. Amid all these events, Zimbabwe ratified the African Children's Charter on 19 January 1995.

3.3 *The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (the Maputo Protocol) was adopted in Maputo, Mozambique, in July 2003 and entered into force in November 2005. The African Women's Protocol has

been ratified by 36[23] of the 54 African Union member states, the latest of which are Cameroon, Guinea and Swaziland. Several states are in various stages of its domestication and implementation. The proposal behind the enactment of the Protocol was the recognised and urgent need to ensure that mechanisms are put in place to compensate and protect the rights that are afforded to women by the African Charter on Human and Peoples' Rights. While Article 2 of the African Charter guarantees non-discrimination based on sex, equality before the law and the elimination of discrimination against women, it does not articulate specific violations of women's rights which result from discrimination against women in an African context.

However, the preamble captures the state of mind of the African heads of state and government at the time of its adoption. They considered that Article 18 of the African Charter on Human and Peoples' Rights calls on all states parties to eliminate every discrimination against women and to ensure the protection of the rights of women as stipulated in international declarations and conventions.[24] Member states also recognised the crucial role of women in the preservation of African values based on the principles of equality, peace, freedom, dignity, justice, solidarity and democracy, [25] but still remained concerned that:

> despite the ratification of the African Charter on Human and Peoples' Rights and other international human rights instruments by the majority of States Parties, and their solemn commitment to eliminate all forms of discrimination and harmful practices against women, women in Africa still continue to be victims of discrimination and harmful practices.[26]

As to content, the African Women's Protocol is comprehensive in that it provides for civil and political rights, economic, social and cultural rights and group rights in a single document. Probably its best asset is to enshrine these rights and freedoms modified to speak to the context of African women and not generalised as a 'one-size-fits-all' document. Commitment to the African context separates this instrument from other sectoral instruments such as the Convention on the Elimination of All Forms of Discrimination against Women.

It is the first international treaty to provide for health and reproductive rights under Article 14 thereof. Furthermore, the Protocol is also a first to, in the same Article, refer to HIV/AIDS in the situation of sexual and reproductive health rights in Article 14(d) and (e). This provision is as articulate as it is accurate in mentioning areas where a typical African woman has little or no control in terms of decision-making in the home or community. These aspects of sexual and reproductive health rights include:

i) the right to control their fertility;
ii) the right to decide whether to have children, the number of children and the spacing of children;
iii) the right to choose any method of contraception;

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[23] <http://www.achpr.org/instruments/women-protocol/> (accessed 10 October 2017).
[24] *See* para. 3 of the preamble to the African Women's Protocol.
[25] *See* para. 10 of the preamble to the African Women's Protocol.
[26] *See* para. 12 of the preamble to the African Women's Protocol.

i) the right to self-protection and to be protected against sexually transmitted infections, including
ii) HIV/AIDS;
iii) the right to be informed on one's health status and on the health status of one's partner, particularly if affected with sexually transmitted infections, including HIV/AIDS, in accordance with internationally recognised standards and best practices.

With the aid of General Comment No. 2 on Article 14.1 (a), (b), (c) and (f) and Article 14.2 (a) and (c) of the African Women's Protocol,[27] the African Commission went into detail providing the normative content of the right to health and reproductive rights to guide states in terms of fulfilling their respective obligations under the provision. Again looking at the African context of women, a case in point is the legal prohibition of female genital mutilation in Article 5(b); the authorisation of abortion in cases of sexual assault, rape, incest and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the fetus in Article 14.

The African Women's Protocol further addresses protection from harmful traditional practices such as polygamy, inheritance, economic empowerment (Article 5); right to peace (Article 10); women in armed conflict (Article 11); right to education (Article 12); right of widows to inheritance (Article 20); and special protection of women with disability (Article 23). Notably, the Women's Protocol also introduces intersectionality by recognising that certain women suffer multiple forms of discrimination, and accordingly separate provisions for widows and elderly women are included.

The Protocol signs off up by making reference to the duty of state parties to provide effective remedies in the aftermath of a violation of 'any woman' rights. Such remedies must be 'appropriate' and "determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by law".[28] As to its implementation, the Protocol recognises the competence of the African Commission to receive and consider state reports from state parties in terms of Article 62 of the African Charter and vests in the African Court on Human and Peoples' Rights the competence to interpret the Protocol.[29]

4 Soft Law

The jurisdiction of the African Commission to develop soft law results from Article 45(1)(b) of the African Charter on Human and Peoples' Rights, which entitles it to "formulate and develop rules and principles that address legal problems regarding the enjoyment of human and peoples' rights". As a legal instrument complementary to the African Charter, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa also falls under the Commission's

[27] *See also* General Comments on Article 14(1)(d) and (e) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa; General Comment No. 3 on The African Charter On Human And Peoples' Rights: The Right To Life (Article 4); General Comment No. 4 on the African Charter on Human and Peoples' Rights: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (Article 5).
[28] *See* Article 25(2) of the African Women's Protocol.
[29] *See* Articles 26 and 27 of the African Women's Protocol.

interpretative jurisdiction. Article 1 of the Banjul Charter[30] obliges states parties to recognise the rights, duties and freedoms by undertaking necessary measures to "adopt legislative, or other measures to give effect" to rights duties and freedoms enshrined in the Charter. In order to assist the states in fulfilling this obligation, the African Commission on Human and Peoples' Rights has sought to elaborate on the scope and content of some of the rights contained in the African Charter through the adoption of 'soft law'.

4.1 *Resolutions*

Resolutions[31] address matters of procedure, but often they serve to further define standards set by binding legal instruments. The Charter empowers the African Commission under Article 45 to "formulate and lay down principles and rules aimed at solving legal problems relating to human and peoples' rights". In accordance with this provision, the Commission adopts resolutions to address diverse human rights issues. These resolutions could generally be classified into three categories: thematic, administrative and country specific resolutions.

A thematic resolution is a resolution that expounds in greater detail specific human rights topics or specific substantive rights that are covered in the African Charter. The specific role of this type of resolution is to define a state's obligation in respect of such right. The resolution aims to reiterate the standards that have been clearly set out in the Charter. Since 1988 the African Commission has passed a number of thematic resolutions covering a wide range of themes including the death penalty; indigenous peoples; situation of women and children;[32] socio-economic and cultural rights; HIV/AIDS;[33] electoral process and good governance; prisons; freedom of association; and fair trial.

The second type of resolution is the administrative resolutions that deal with the Commission's procedures, internal mechanisms and relationship between the Commission and other organs of the AU, intergovernmental organisations, national human rights institutions (NHRIs) and NGOs. These include the resolutions on the appointment and mandate[34] of special rapporteurs and working groups, resolutions on the criteria for grant of observer status to NGOs and affiliate status to NHRIs, and the resolution on the protection of the name, acronym and logo of the Commission.

The last and final type of resolution is the country-specific resolution. This kind of resolution addresses pertinent human rights concerns in member states. This category of resolution has proven very useful whenever there are widespread

[30] African Charter on Human and Peoples' Rights (1981/1986).
[31] <http://www.achpr.org/files/pages/resolutions/recomres_codified_1988_2017_eng.pdf> (accessed 10 October 2017).
[32] ACHPR /Res.66 (XXXV)04: Resolution on the Situation of Women and Children in Africa.
[33] Resolution on the HIV/AIDS Pandemic –Threat against Human Rights and Humanity, ACHPR/Res.53(XXIX)01.
[34] Resolution on the Renewal of the Mandate of the Chairperson and Members of the Working Group on the Death Penalty, Extrajudicial, Summary and Arbitrary Killings in Africa, ACHPR/Res.251 (LIV) 2013.

violations in a member state but no individual has submitted any communications to the Commission in respect of those violations. It is important to highlight that the Commission has passed specific resolutions to address the human rights situation in Sudan, Uganda, Zimbabwe,[35] Ethiopia, Eritrea, Somalia,36 Kenya, DRC, Côte d'Ivoire, Comoros, Libya, Tunisia, Guinea Bissau, Liberia, Burundi, Rwanda, and many other countries.

4.2 *Declarations, Principles and Guidelines*

Declarations are non-binding instruments adopted by the AU heads of state and government on a thematic area prior to the adoption of binding instruments. Declarations are a demonstration of awareness of an issue of concern at the highest level in decision-making but also show resolve to develop common interest in the issue and to adopt a binding instrument at the appropriate future time. Human rights institutions within the African human rights system do not make much use of these declarations. The African Commission has since issued the Kigali Declaration,[37] the Pretoria Declaration on Economic, Social and Cultural Rights in Africa[38] and the Declaration on Gender Equality in Africa.[39]

However, treaty bodies have often utilised principles and guidelines to develop human rights jurisprudence based on key human rights instruments discussed above. The African Commission has so far issued over 20 principles and guidelines on various issues within the human rights dialogue. The very first document was the Guidelines on National Periodic Reports issued by the body in 1989,[40] with the latest adoptions being the State Reporting Guidelines and Principles on Articles 21 and 24 of the African Charter relating to Extractive Industries, Human Rights and the Guidelines on the Right to Water in Africa, 2019. Several other principles and guidelines were adopted in-between since 1989 that have changed the way we look at some colonial legacies. For instance, the Principles on the Decriminalisation of Petty Offences in Africa is one such set of principles that seeks to change the way certain offences in national legislation should be viewed vis-à-vis rights protected in key human rights instruments,[41] so as to ensure interpretation and enforcement by state parties of criminal laws and by-laws in compliance with Articles 2, 3, 5 and 6 of the African Charter. This is an important source of human rights law in Africa although regarded as non-binding.

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[35] Resolution on the Human Rights and the Humanitarian Situation in Zimbabwe, CHPR/Res.138(XXXXIV)08.
[36] Resolution on the Human Rights Situation in Somali, ACHPR/Res.137(XXXXIV)08.
[37] Adopted on 8 May 2003.
[38] Adopted on 17 September 2004.
[39] Adopted on 8 July 2004.
[40] Adopted by the African Commission on 14 April 1989. These Guidelines were adopted at the Fifth Ordinary Session of the Commission, in April 1989, and were attached to the Commission's Second Annual Activity Report 1988–1989.
[41] Adopted by the African Commission at its meeting at its 61st Ordinary Session, held from 1 to 15 November 2017, in Banjul, Gambia.

5 Institutional Framework

This is a compilation of institutions established by the three key treaties to oversee their implementation. They were deliberately set up to breathe life into and monitor the implementation of regional treaties and ensure adherence to the guidelines include the African Court of Human and Peoples' Rights (African Court) and quasi-judicial bodies, namely, the African Commission and the African Committee of Experts. These bodies are mandated to oversee the implementation of the African Charter, African Women's Protocol and the African Children's Charter.

5.1 *African Commission*

The African Commission was established to promote, protect and interpret the rights enshrined in the Banjul Charter. The jurisprudence of this Commission has been a great resource for national jurisdictions especially in the expansion of human rights concepts and principles. The state reporting mechanism[42] has provided an opportunity for constructive dialogue and review between civil society and their governments, and has enabled member states to keep stock of their human rights achievements and challenges. The Commission is the main human rights body that is mandated to hold public sessions twice a year at which states' compliance with the African Charter on Human and Peoples' Rights is reviewed. Preceding these sessions, human rights defenders[43] gather at the NGO Forum to discuss human rights concerns and urge the Commission to take action. Such engagement is key to strengthening the African human rights system.

The African Charter in Article 30 establishes the Commission and gives it the mandate to promote human and peoples' rights and ensure their protection in Africa. Under Article 31, the African Charter sets the parameters under which individuals should be selected as commissioners. These include: the highest reputation, high morality, integrity, impartiality and competence in matters of human and peoples' rights. Preference is given as regards legal experience and that they serve on the Commission in their personal capacity, which means they are not serving as representatives of their governments or countries. The 11 commissioners serve on a part-time basis and the permanent secretariat, based in Banjul, The Gambia, plays an important role. A secretary heads the Commission's secretariat.

The Commission serves a protective mandate in which aggrieved parties may submit

[42] The treaty bodies monitor the extent of compliance by states parties with their obligations under the human rights treaties through a system of state reporting by the principal mechanism.

[43] Human rights defenders are defined foremost by their efforts to stop human rights abuses and make sure that everyone has access to their universal rights. They come from all walks of life. A defender's human rights work might be fulfilled through their job – they could be a community worker, teacher, lawyer, journalist or activist working for human rights change. Equally, they may defend human rights in a voluntary capacity, separate to their profession. The Declaration on Human Rights Defenders refers to individuals, groups and associations contributing to the effective elimination of all violation of human rights and fundamental freedoms of peoples and individuals. Human rights defenders can be any persons or groups of persons working to promote human rights ranging from intergovernmental organisations based in the world's largest cities to individuals working within their local communities.

complaints alleging the violation of provisions of the Charter. The individuals that can file complaints include state and non-state actors by initiating cases and communications before the Commission. A state party to the African Charter may submit a complaint that another state party is in violation of the African Charter ('inter-state communication'). The African Charter also permits the submission of a complaint by an individual or NGO ('individual communication').

The African Charter has therefore granted the African Commission the ability to deliberate on both 'inter-State' and 'individual' communications in respect of all states parties. In the history of the Commission only one inter-state communication has been submitted to the Commission. This is due to the fact that African states have been reluctant to interfere in the 'domestic affairs' of other states. Based on the pushback that human rights continue to face in Africa, evidenced in the continued closure of the space for civil society and the small role human rights plays in foreign policy and international relations, this procedure is not likely to be used by the members of the African Charter.

The African Charter also authorises the Commission to consider complaints from individuals whose rights under the Charter have been violated. The Commission is a quasi-judicial body, and its decisions do not carry binding force and are merely of persuasive authority. Over the years, the Commission in considering individual complaints has developed significant jurisprudence that interprets the provisions of the Charter.

The Commission also has special investigative powers with respect to emergency situations or special cases which reveal the existence of a series of serious and massive human rights violations. Article 59 of the Charter states that if the Commission decides to publish its decisions or annual activity report, it must submit them for consideration by the AU Assembly. It is important to highlight that the Charter does not necessarily require it to do so. In terms of process, the Assembly usually concludes its consideration by authorising or withholding authority for publication of the report or decisions. The decisions are thus included in the Commission's activity reports to the AU Assembly.

Before the AU replaced the OAU, the Assembly did not take much notice of these decisions and approved the Commission's activity reports without much debate. Since 2002, especially with the increased pushback on human rights many more African governments have become intolerant and sensitive to criticism or condemnation by the Commission, leading to more rigorous and politically coloured discussions of the activity reports at the Executive Council, to which the Assembly delegated its authority to consider the Commission's annual reports. A case in point was the decision of the Executive Council that prevented the publication of a decision against Zimbabwe contained in the Commission's 20th Activity Report. This unfortunate decision by the Executive Council tends to undermine the role of the Commission by giving the Zimbabwean government another opportunity to comment on the case, although it has already participated in the hearing of the matter.

Article 45 of the African Charter clearly states the role of the Commission to include the promotion of human and peoples' rights and in particular:

i) To collect documents, undertake studies and researches on African problems in the field of human and peoples' rights, organize seminars, symposia and conferences, disseminate information, encourage national and local institutions concerned with human and peoples' rights, and should the case arise, give its views or make recommendations to Governments;
ii) To formulate and lay down, principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms upon which African Governments may base their legislations;
iii) To co-operate with other African and international institutions concerned with the promotion and protection of human and peoples' rights;
iv) To ensure the protection of human and peoples' rights under conditions laid down by the Charter;
v) To interpret all the provisions of the present Charter at the request of a State party, an institution of the OAU or an African Organisation recognised by the OAU; and
vi) To perform any other task which may be entrusted to it by the Assembly of Heads of State and Government.

It is clear from the list of competences of the African Commission that the mandate is broadly ambitious. While the Commission has extensively utilised the rest of the aspects of its mandate, very little use has been made of the final two competences. Paragraph (v) appears to imply the Commission's competence to "interpret all the provisions of the present Charter at the request of" to mean that it may issue advisory opinions. By their very nature, advisory opinions constitute authoritative interpretations of the Charter and other instruments.

5.2 *Special Mechanisms under the African Human Rights System*

In order to supplement its original mandate, the African Commission established other mechanisms within its structures, which included the positions of the special rapporteurs. These are experts in specific human rights themes appointed to carry out specific terms of reference. So far those appointed include the Special Rapporteur on Extra-Judicial, Summary and Arbitrary Executions in Africa (in 2005), the Special Rapporteur on Prisons and Conditions of Detention in Africa (in 1996), the Special Rapporteur on the Rights of Women in Africa (in 1999), the Special Rapporteur on Freedom of Expression in Africa (in 2004) and the Special Rapporteur on Human Rights Defenders in Africa (in 2004). These experts could be drawn from within the Commission itself or externally sourced on account of unique expertise. They are however required to report on their work to the African Commission for policy reasons.

Part of the role of the African Commission also includes the appointment of working groups that consists of one or more commissioners as well as members of civil society organisations or other sectors joining as experts. Another distinction between special rapporteurships and working groups is that the latter are usually appointed for a specific *ad hoc* purpose. Examples of working groups of the African Commission are those on indigenous peoples/communities in Africa and on the implementation of the Robben Island Guidelines, among others.

5.3 *African Court on Human and Peoples' Rights*

The Protocol to the African Court on Human and Peoples' Rights was adopted in Ouagadougou, Burkina Faso, on 9 June 1998 and entered into force on 25 January 2004.[44] The Protocol has been signed and ratified by 52 and ratified by 30 countries and five countries have neither signed nor ratified the instrument.[45] Article 34(6) of the Protocol states that state parties may also make an optional declaration accepting the competence of individuals and NGOs with observer status before the Commission to submit cases *directly* to the Court. As at December 2020, only six state parties to the Protocol had made the declaration recognising the competence of the Court to receive cases from NGOs and individuals.[46] The Court was established in order to complement the protective mandate of the Commission. Its decisions are final and binding on state parties to the Protocol.

The Court consists of 11 judges elected by the AU Assembly from a list of candidates nominated by member states of the AU. The judges are elected in their personal capacity but no two serving judges shall be nationals of the same state. Due consideration is also given to gender and geographical representation[47] when nominations and appointments are made. The judges are elected for a period of six years and are eligible for re-election only once. Only the president of the Court holds office on a full-time basis. The other ten judges work part-time. The first judges of the Court were sworn in on 1 July 2006. The seat of the Court is Arusha, Tanzania.

5.4. *Complementarity between the African Commission and the African Court*

The purpose for the establishment of the African Court is to complement and re-enforce functions of the Commission, particularly its protective mandate. The concept of complementarity in the context of the African human rights system focuses on the relationship between the African Court and the African Commission and has caused a bit of operational anxiety between the two institutions for some recordable time. The aspect of complementarity is introduced in the preamble to the African Court Protocol in which the Court will complement and reinforce the functions of the African Commission. Article 2 relating to the relationship between the African Court and the African Commission emphasises that the Court shall "complement the protective mandate" of the African Commission. Article 8 of the Protocol relating to the 'Consideration of Cases' requires the Court to bear in mind "the complementarity between the Commission and the Court" in making its rules of procedure. In these three provisions, the concept of complementarity entered into the discourse on the African human rights system, but the principle is given more expression in the Rules of Procedure of the two bodies, that articulate circumstances where cases may be

[44] <http://www.achpr.org/files/instruments/courtestablishment/achpr_instr_proto_court_eng.pdf> (accessed 10 October 2017).
[45] <http://www.achpr.org/instruments/court-establishment/ratification/> (accessed 10 October 2017).
[46] The number has gone down after a number of states withdrew their declarations over past two years including Rwanda, Tanzania, Cote D'ivoire and Benin.
[47] Africa is divided into Southern, Northern, Eastern, Western and Central for purposes of regional representation.

referred between the Commission and the Court. The challenge that complementarity poses for the African human rights system is the determination of what functions should be undertaken by which institution(s). Generally, there appears to be an assumption that whenever there is a two-tier system comprised of a judicial body and a quasi-judicial body, the task of adjudication naturally rests with the judicial body.

It is important to emphasise that the Court's jurisdiction applies only to states that have ratified the Court's Protocol. The Court may entertain cases and disputes concerning the interpretation and application of the African Charter, the Court's Protocol and any other human rights treaty ratified by the state concerned. The Court may also render advisory opinion on any matter within its jurisdiction. The AU, member states, its organ and any other organisation recognised by the AU may from time to time request the advisory opinion of the Court. The Court is also authorised to promote amicable settlement of cases pending before it. The Court can also interpret its own judgment.

This therefore allows the Court to enjoy a two-tier competence, namely, the contentious[48] and advisory jurisdictions.[49] On ratifying or acceding to the African Court Protocol, a state subjects itself to both facets of the Court's jurisdiction. The African Court is a pure judicial body. Like many other international judicial institutions, access to the Court is restricted. States dominate the right of access in terms of Article 5 of the African Court Protocol. The Commission, and with extension, the African Committee of Experts have access to the Court. Article 5(3) of the African Court Protocol contemplates access to the Court by individuals and NGOs subject to provisions of Article 34(6) of the same Protocol. These provisions directly affect individual access to the African Court. Individuals and NGOs can only lodge complaints with the African Court upon lodging of a declaration by the state of nationality that the state acknowledges the competence of the African Court to preside over complaints filed by individuals or NGOs. Such a declaration could be lodged by a state simultaneously with ratification or accession or at any other time. The absence of this declaration impedes individual access to justice by failing to invoke the jurisdiction of the African Court.

Judgments of the African Court are binding on parties to the dispute, with an orientation effect on the rest of the states in the African human rights system. This means that other states not parties to a dispute that has triggered a judgment are expected to orient their actions in line with the jurisprudence of the Court in that judgment without necessarily having to wait to be sued before the same Court. In terms of Article 28 of the Court Protocol, judgments of the Court are final and not subject to appeal, although the Court could revise or interpret its decision on discovery of new facts. Parties are entitled to reasons for the judgment which is read out in open court. The judgment could be composed of the majority's findings as well as dissenting opinions or judgments if the outcome is not unanimous.

[48] Article 3 of the African Court Protocol.
[49] Article 4 of the African Court Protocol.

Articles 29, 30 and 31 of the African Court Protocol govern enforcement of judgments. It is important to note that the enforcement of international decisions or judgments is complex and problematic. Implementation is highly political and does not follow the usual procedure taken in respect of judgments of national courts. Judgments of the African Court are implemented by states which were parties to the proceedings. Upon ratifying the African Court Protocol, states undertake to comply with the judgments of the Court whose contentious jurisdiction they voluntarily subscribed to. The Executive Council is responsible for overseeing implementation of judgments on behalf of the AU Assembly. The African Court is empowered by Article 31 of the African Court Protocol to report to the AU Assembly cases of non-compliance of states with its judgments. Notwithstanding all these measures, implementation of court decisions has already become a problem.

Where the Court determines that there has been a violation of human and/or peoples' rights, it may issue appropriate orders to remedy the violation, including the payment of fair compensation or reparations. In cases of extreme gravity and urgency, and when deemed necessary to avoid irreparable harm to persons, the Court may adopt such provisional measures as shall be necessary. Following below is a sample of the jurisprudence of the Court for illustrative purposes only.

5.4.1 *Femi Falana v. African Union*

Femi Falani v. African Union[50] dealt with the issue of jurisdiction of the African Court to preside over a case implicating the African Union as an international organisation. Citing the *Reparations* case (ICJ, 1949), the Court held that the AU is an international person: a subject of international law capable of possessing international rights and duties. It stated that international obligations arising from a treaty cannot be imposed on an international organisation unless it is a party to such a treaty or it is subject to such obligations by any other means recognised under international law. In line with Article 34 of the Vienna Convention on the Law of Treaties (VCLT), the Court held that as far as an international organisation is not a party to a treaty, it cannot be subject to legal proceedings implicating rights in an instrument. It concluded that the AU cannot be sued before the Court on behalf of its member states, and that an application filed against an entity other than a state having ratified the Protocol and made the declaration falls outside the jurisdiction of the Court. The Court concluded that it was therefore unnecessary to examine the admissibility of the application and the merits of the case.

5.4.2 *African Commission on Human and Peoples' Rights v. Republic of Kenya*

In *African Commission on Human and Peoples' Rights v. Republic of Kenya*[51] the African Court held that Kenya violated the Ogiek peoples' rights to land, religion, culture, development and non-discrimination. The African Court further held that the state violated the rights of the Ogiek people because Kenya had expelled them from

[50] Application No. 001/2011.
[51] Application No. 006/2012.

their ancestral land against their will, without prior consultation or compensation. The Ogiek are forest-dwelling people who live in the Mau Forest, one of Kenya's largest water catchment areas. They argued that eviction would prevent them from using and maintaining ownership of their ancestral land on which they rely for their social, economic and cultural existence.

The African Court held that Kenya was in violation of Article 14 of the African Charter (right to property, including communal ownership of land) because the eviction notices issued to the Ogiek were not proportionate to the state's justification that eviction is necessary to protect the natural ecosystem in the region. The Court found that the state failed to present evidence showing that if the Ogiek were to continue to reside on the land it would harm the natural ecosystem, and other evidence showed that environmental harm in the area has been linked to other factors and the activities of other groups and entities, including the government. Next, the African Court held that the state violated Article 2 (right to be free from discrimination), concluding that the state discriminated against the Ogiek based on their ethnicity or 'other status' when it refused to recognise and grant them the same rights as similar groups due to their way of life as hunters and gatherers.

The African Court also found a violation to the right to freedom to practice religion, which includes the right to worship and to engage in rituals and ceremonies, and further that their religious practices were inextricably linked with the land and the environment and that an interference with their connection to the land placed severe constraints on their ability to practice religious rituals in violation of Article 8 of the African Charter. The African Court explained that the right to culture under Article 17(2) and (3) is of an individual and collective nature and that it requires protection of the cultural heritage that is essential to preserve traditions. It found that Kenya interfered with the Ogiek's cultural rights and that the state's justification that the interference with their cultural rights was necessary to preserve the natural ecosystem was not proportionate as the evidence did not show a connection between the Ogiek's presence in the area and environmental degradation. The African Court also found a violation to the right to economic, social and cultural development protected under Article 22 of the African Charter given Kenya's practice of evicting the Ogiek without engaging in effective consultation and without involving them in the development of health, housing, and social programmes affecting them. Finally, the African Court concluded that the state violated Article 1 of the African Charter by not implementing legislation or other measures to give effect to the rights enshrined in the articles that the African Court found the state was in violation of: Article 2, 8, 14, 17(2) and (3), 21 and 22.

The African Court did not find a violation of the right to life because it did not find a causal connection between the evictions and the deaths alleged to have occurred as a result. In doing so, the Court distinguished between the physical and existential understanding of the right to life or, put differently, the "classical meaning of the right to life and the right to decent existence of a group". The African Court later ruled on forms of reparations and on costs in a separate ruling.

These few cases go far in terms of showing the difficult cases the African Court has already dealt with, and probably the reasons behind lack of appetite by states to ratify the African Court Protocol and lodge the Article 34(6) declaration. Nonetheless, the Court has huge potential in terms of defining the parameters of rights and freedoms protected in the key human rights instruments under its interpretative mandate. Yet this potential is undermined by low ratification and lodgement of declaration, and non-implementation where decisions have been issued on the merits.

5.5 *African Children's Committee*

The African Children's Charter establishes the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee) in Part II thereof. The mandate of the Committee is to promote and protect the rights and welfare of the African child. Article 33(1) states that experts are also expected to be of high morality, integrity, impartiality and competence in matters of children's rights. The Committee comprises 11 members elected by the AU Assembly for a term of five years. The mandate of the Committee is to promote and protect the rights stipulated in the African Children's Charter, monitor its implementation and interpret its provisions. State parties to the African Children's Charter are required by Article 43 to submit periodic state reports setting out measures they have adopted to implement the provisions of the Charter.

Article 32 of the African Children's Charter establishes the Committee of Experts on the Rights and Welfare of the Child (hereinafter Committee). The Committee was established in order to promote and protect the rights and welfare of the child. The Committee consists of 11 independent and impartial members serving in their individual capacity.

Article 42 of the African Children's Charter sets out the mandate of the Committee. The functions of the Committee include the need to promote and protect the rights enshrined in this Charter and in particular to collect and document information, organise meetings, encourage national and local institutions concerned with the rights and welfare of the child and where necessary give its views and make recommendations to governments; formulate and lay down principles and rules aimed at protecting the rights and welfare of children in Africa; cooperate with other African, international and regional institutions and organisations concerned with the promotion and protection of the rights and welfare of the child; and to monitor the implementation and ensure protection of the rights enshrined in the Charter.

The African Children's Charter provides for the following two procedures: the *reporting procedure:* every state party undertakes to submit reports on the measures it has adopted to give effect to the provisions of the Charter within two years of the entry into force of the Charter, and thereafter every three years (Article 43(1)). The second procedure is the *complaints procedure:* the Committee may receive communications from any person, group or NGO recognised either by the OAU, a member state or the United Nations relating to any matter covered by the African

Children's Charter (Article 44). Lastly, the Committee may resort to any 'appropriate method' of investigating any matter falling within the ambit of the Charter. It shall further submit regular reports on its activities to the Ordinary Session of the Assembly of Heads of State and Government every two years; a report shall be published after having been considered by the Assembly as stated in Article 45 of the African Children's Charter.

The Committee is also competent to receive communications from individuals, groups, non-governmental organisations (NGOs) and state parties complaining of violation of the African Children's Charter against any particular state party. Illustratively, the Committee received its very first individual complaint in the case of *Hansungule & Ors (On behalf of children of Northern Uganda) v. Uganda.*[52] The case alleged massive and systematic violations of rights of children in Northern Uganda as a consequence of an internal armed conflict between the Lord's Resistance Army, a belligerent militia outfit seeking to topple government of the day since 1986. The conflict had resulted in abduction of children into the militia group among violations of socio-economic rights to education, healthcare and development. The case was finalised in 2013 with the Committee finding Uganda in violation of a number of provisions of the African Children's Charter and made specific recommendations including putting in place programmes and policies to reform and rehabilitate affected children. The implementation of these recommendations is underway but moving painstakingly slow.

The case of *The Nubian Community in Kenya v. The Republic of Kenya*[53] dealt with the right to birth registration and nationality of a supposedly minority community in Kenya. The Committee dealt with the allegations that Kenya had failed to register and provide nationality to children of Nubian descent resident within its territory. The Committee held Kenya to be in violation of the African Children's Charter. It held as follows:

> ... Although states maintain the sovereign right to regulate nationality, in the African Committee's view, state discretion must be and is indeed limited by international human rights standards, in this particular case the African Children's Charter, as well as customary international law and general principles of law that protect individuals against arbitrary state actions. In particular, states are limited in their discretion to grant nationality by their obligations to guarantee equal protection and to prevent, avoid, and reduce statelessness.

The individual complaints procedure of the Committee has great potential in terms of developing a jurisprudence that speaks to the circumstances of an African child. As more and more cases are brought before it, the Committee now has to prepare to deal with issue of non-implementation of its recommendations – a problem that confronts almost every international human rights tribunal. Although the problem persists, there is hope that implementation will improve on account of the Committee's innovative engagement strategies with member states by creating a platform where states can update the Committee on progress made in terms of implementation of decisions in which they were parties. One such strategy is the

[52] Communication No. 001/2005.
[53] Communication No. 317 / 2006 – *The Nubian Community in Kenya v. The Republic of Kenya*.

adoption of Guidelines on Compliance Hearings.[54] These will assist the Committee to convene formal meetings with relevant state parties to discuss progress and challenges relative to implementation of decisions against a particular state party.

The Committee has issued only a few decisions on individual communication procedure as well as general comments. This is explained by the fact that it is a relatively new institution but with great potential for the protection of human rights in Africa. Children's rights are least contested among human rights and often draw immediate response from stakeholders in order to quickly remedy the violation. They are unique in that delayed implementation of children's rights may retard the development agenda of a child with such devastating consequences in that once deprived of a right a child may not be able to recover the loss as he or she quickly matures into an adult. The Committee stands in the gap to ensure that the rights and welfare of African children are jealously promoted and protected.

The Committee has also developed a number of General Comments.[55] These are authoritative interpretations of treaty provisions by the institution established to overseer their implementation as a method of work to assist states in giving effect to these rights and freedoms. The Committee has so far issued over five General Comments articulating the nature of state party obligations in areas such as armed conflict, right to a name and nationality, rights of children of incarcerated primary care givers, child marriages (jointly issued with the African Commission), responsibilities of the child and Article 1 of the African Children's Charter. These General Comments are an invaluable source of African jurisprudence on the rights and welfare of the child, which drew inspiration from other human rights systems across the globe.

6 Conclusion

The importance of strengthening institutions that further the African human rights agenda cannot be overstated. It has been demonstrated that Africa already has key human rights instruments that are designed to confront and deal with situations specific to African people. The key instruments have also established robust institutions to oversee implementation by states with their obligations under the key instruments. These institutions, namely, the African Court, the African Commission and the African Children's Committee have wide mandates that are complimentary but wide enough to enable effective promotion and protection of human rights in Africa. However, the promotion and protection of human rights in Africa should be regarded as a multi-stakeholder affair. It is important to have a stronger civil society that continues to utilise the African human rights system. The fact that state and non-state actors continue to disregard human rights and governments undermine decisions of national courts provides an opportunity to strength the regional

[54] These are guidelines in the form of rules adopted by the Committee to regulate the process where the Committee formally meets with a state party to engage it on progress the state would have made in terms of implementing decisions of the Committee. The Guidelines will form part of the Committee Rules of Procedure on Individual Complaints Procedure.

[55] <https://www.acerwc.africa/general-comments/>, accessed on 20 January 2021.

mechanism. This chapter therefore has taken an overview journey into the history of the of the African human rights system, the legislative framework with a focus on the African Charter, the African Children's Charter and the African Women's Protocol followed by a brief examination of the soft law principles contained in non-treaty documents.

On its part, the Covid 19 pandemic has intensified violations of fundamental human rights and freedoms across the continent as government continue to adopt measures to contain the spread of the virus. The impact of the pandemic has literally touched on all generations of human rights such as civil and political rights (freedoms of assembly and association; right to vote; freedom of movement; freedom of religion and culture etc), socio-economic and cultural rights (right to health; right education; right to work and practice of profession), among others. It is necessary that the African human rights system quickly adapts to deal with these new human rights challenges introduced by pandemic.

The final part of this chapter focused on the institutional frameworks that make it possible to interpret and expand on the legally binding treaties and principles contained in the non-treaty documents. The African Commission and the African Court are mandated to oversee the enforcement of the African Charter and the African Women's Protocol. It is therefore hoped that this overview has provided readers with an opportunity to have an understanding of the African system and engage the system to strengthen the continent's ability to advance a strong human rights agenda in a time when there is a pushback on democratic principles and human rights throughout Africa.

19 Conclusion and Way Forward

Admark Moyo*

1 Conclusion

This anthology has analysed the fundamental principles upon which the country is founded. The analysis encompasses, among others, the scope of founding principles such as the supremacy of the Constitution, democracy, accountability and openness. Apart from this, the book examined the significance of national objectives, international law and foreign in the interpretation and application of human rights to concrete disputes or allegations of violations of rights. The book also discussed the rules governing the limitation of rights and the centrality of proportionality in this exercise. Apart from these preliminary chapters, the anthology analysed the different types of rights that are protected under the Constitution. However, the analysis was largely biased towards two sets of rights: first, the socio-economic rights protected in the Constitution, and, second, the rights of persons in situations of vulnerability. While the areas covered by the anthology are crucial in advancing democracy and promoting a human rights culture, there are significant gaps in the areas covered. Going forward, efforts should be directed at not only expanding the types of rights examined in the anthology, but also on highlighting some of the practical issues that must be addressed to ensure that people have access to rights and the resources required to exercise them.

2 Way Forward

2.1 *Literature on the Role of Independent and Other Commissions*

Looking into the future, it is important for the academia, practicing lawyers and independent think tanks to build evidence and knowledge resources on constitutionalism, the rule of law and human rights in Zimbabwe. This anthology is just an introductory attempt to examine the inherent link between the basic tenets of the country's nascent constitutional democracy, the enjoyment of human rights and some of the systems established to enforce human rights. Even so, there are important fields of study that were not discussed in the book. These include the role of other independent commissions in fostering the culture of human rights across the country. The Zimbabwe Gender Commission, the Zimbabwe Media Commission, the National Peace and Reconciliation Commission and the Zimbabwe Electoral Commission all play monumental roles in advancing different sets of rights and fostering tolerance between people or entities with divergent views in their spheres of activity.

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In addition, there are other key players – that are not necessarily independent – such as the Zimbabwe Anti-Corruption Commission, the National Prosecuting Authority, the Auditor General, the Police Service, and many others. These institutions are largely responsible for ensuring that other players are held accountable for their actions, including through prosecution in the domestic courts or producing the evidence needed to secure a conviction for criminal violations of rights. Going ahead, it vital to have knowledge resources clarifying not only the roles of these institutions in promoting human rights but the legal status of reports that are produced by them and independent commissions. For instance, while the Auditor General has revealed countless cases of mismanagement of public finances by government departments and functionaries, it remains unclear whether the evidence in the reports produced by this important office can be used to secure a conviction in separate proceedings arising from the misuse of public funds.

2.2 *Spotlighting Freedom Rights*

This book has not discussed any of the freedom rights protected in the Constitution. The preceding chapters analyses the scope of freedom rights, particularly the broad array of civil and political rights that are protected in the Declaration of Rights. Going forward, it is vital to put the spotlight on these rights, especially given their role in promoting democracy, making the government accountable to the people and enhancing responsiveness by state functionaries. There is dire need for knowledge resources explaining the ambit of such rights as: the freedom from torture or cruel, inhuman or degrading treatment or punishment; freedom from slavery or servitude; freedom from forced of compulsory labour; freedom of assembly and association; freedom to demonstrate and petition; freedom of conscience; freedom of expression and the media (including journalistic and academic freedom); freedom of profession, trade or occupation; freedom of movement and residence; the right to personal liberty; the right to privacy; the right of access to information; freedom to make political choices; and the right to stand for election for public office and, if elected, to hold such office.

These freedom rights are expressly protected in the Declaration of Rights, but there is lack of clarity on what they mean for the vertical relationship between the state and citizens; and for the horizontal relationship between private persons. That these civil and political freedoms perform an integral purpose in fuelling the optimal functioning of a democratic state is beyond question, but it remains to be seen whether state institutions will create the requisite space to allow the general public to enjoy these constitutional promises and guarantees. Given that civic space has been shrinking since the adoption of the Constitution in 2013, it seems that government respect for these rights will be limited as time unfolds. During the COVID-19 pandemic, civil rights and political freedoms have been severely infringed by rules restricting freedom of movement and prohibiting gatherings of relatively limited numbers of people.

The freedoms of assembly, demonstration and petition, the freedom of movement, the freedom of expression and many others have been negatively affected by stay

at home orders and the prohibition of mass gatherings during the pandemic. Even though there are many vacant seats in local authorities and the House of Assembly, bye elections have never been conducted since the pandemic began. Some sections of society have argued that this constitutes a violation of citizens' right to choose their representatives, creates space for authoritarian tendencies and, accordingly, undermines the legitimacy of the government, especially given that other countries in the region and across the world have arranged for elections to take place even at the height of the pandemic. For our purposes, it is concerning that the negative impacts of some of the restrictions that have been introduced to respond to COVID-19 are likely to remain intact well beyond the life of the pandemic.

2.3 *Beyond Legal Protection of Rights, Towards Implementation*

It is patent that the Constitution has an expansive Declaration of Rights that protects a wide range of rights, including civil and political rights as well as socio-economic and cultural rights. In addition, Zimbabwe is a state party to many treaties and conventions that impose on the state negative and positive duties to respect, protect and promote human rights. Going ahead, it is vital to accelerate efforts to promote the enforcement and enjoyment of all rights protected in the Declaration of Rights. Given that many people living in remote parts of the country are not aware of the rights conferred on them by the Constitution, it is imperative for organs of the state, the Zimbabwe Human Rights Commission, other independent commissions and non-state actors to engage in constitutional literacy awareness programmes across the country. The nature and scope of this duty is spelt out in great detail in the Constitution itself. Under section 7(a)-(c) thereof, the state is legally bound to promote public awareness of the Constitution by carrying out the following positive measures:

a. translating it into all officially recognised languages and disseminating it as widely as possible;
b. requiring the Constitution to be taught in schools and as part of the curricula for the training of members of the security services, the Civil Service, and members and employees of public institutions; and
c. encouraging all persons and organisations, including civic organisations, to disseminate knowledge and raise awareness of the Constitution throughout society.

If these activities are given the full attention and implementation they deserve, many individuals and communities will be capacitated to stand up against violations of their rights and claim remedies for such violations. More importantly, however, the framers of the Constitution recognised the significance of translating the constitutional provisions into all languages. They recognised that human rights and fundamental freedoms should be accessible if they are to make a difference in the lives of the general public who rarely understand the English language. In addition, the multi-sectoral, multi-disciplinary and multi-stakeholder approach that is foreseen and required by the Constitution fosters coordination and collaboration (between key stakeholders) in implementing constitutional literacy programmes in a manner that leaves a genuine mark on communities. Without concerted efforts to enhance public

access of the Constitution and the law, constitutional rights largely remain as 'paper law', especially in remote parts of the country where both state and non-state actors are basically absent.

2.4 *Budgeting for Human Rights Implementation*

To achieve maximum impact and ensure that all citizens live a minimally decent life and have a chance to achieve their full potential, the state should aggressively increase its budgets for key sectors that have a real impact on people's lives. Without the required money to make the realisation of human rights a reality, discussions about state obligations in fulfilling such rights remain largely abstract. To this end, it is important for the state to adopt reasonable policy and budgetary measures to ensure that the resources required to meet the basic and urgent needs of the poor are set aside as one of the priorities of every government in this country. There is tangible evidence, from budgets at all levels of government, that the funding for education, health care, social security and social assistance, food aid and many other social services have been shrinking over the years, even as the national population continues to grow. This is unfortunate and regrettable.

Given that the majority of the people are poor and look forward to assistance from the state, it is important for policy makers and senior leadership in government to prioritise poverty reduction and service delivery across all tiers of government. While expanding budgets for sectors that are key to human development is important, the state should ensure that independent commissions and other watchdog entities such as the office of the Auditor General and the National Prosecuting Authority are given enough space to perform their functions autonomously. This improves budget accountability by state functionaries and ensures that 'few dollars fall through' the cracks of the administrative system. In addition, civil society organisations can play an important function, both in complementing the state's social provisioning efforts and carrying out budget tracking activities to 'follow the money' and expose departments that are not performing their functions effectively and efficiently due to corruption and maladministration.

2.5 *Strong Institutions*

To deliver human rights to the general public, there is need to build strong institutions that are fully equipped to defend and enforce such rights. At the heart of any functional human rights system are strong institutions that exercise their duties without fear, favour or prejudice. This reality arises from the fact that weak institutions are easily manipulated to make decisions that advance the interests of the politically connected, the rich and the privileged in society. Accordingly, the entire justice delivery system should be administered by men and women of integrity who undergo thorough training and understand the centrality of independence in the way they perform their functions. From traditional courts to the police, the prosecutors, the courts, national human rights institutions and other commissions, all justice delivery actors should be fit and proper persons who behave ethically and respond

professionally to claims of violations of rights. With untrained or unprofessional staff, justice delivery institutions commit secondary victimisations of survivors of violations of rights, discourage survivors from coming forward to report cases and create a culture of impunity for such violations.

At the heart of strong institutions should be courts that are independent, impartial and effective since the courts are the ultimate arbiters on whether or not a violation has taken place and, if so, what the appropriate remedy will be in the circumstances. To this end, the Constitution emphasises that "neither the state nor any institution or agency of the government at any level, and no other person, may interfere with the functioning of the courts".[1] It emphasises that court orders and decisions must be obeyed and that the state must take legislative and other measures to ensure the independence, impartiality, accessibility and effectiveness of the courts.[2] These provisions underline the role of the courts in crafting effective remedies for infringements of rights. They also send a message that without effective remedies for their breach, human rights and fundamental freedoms are not worth the paper they are written on. Nonetheless, the same principles of impartiality, independence and effectiveness are equally relevant to the manner in which all public functionaries and entities should function when resolving human rights violations. Going ahead, it is important for all institutions created to enforce human rights, particularly the courts and independent commissions, to be strong to claim their independence to decide disputes without interference from the political organs of the state. Without strong institutions, the Constitution and the rights contained therein will be mutilated and trampled upon at will.

[1] Section 164(2)(a) of the Constitution.
[2] *Ibid*., section 164(2)(b) and (3).

SELECTED ASPECTS OF THE 2013 ZIMBABWEAN CONSTITUTION AND THE DECLARATION OF RIGHTS

Second Revised Edition

Edited by Admark Moyo

This anthology is a product of the Zimbabwe Human Rights Capacity Development Programme, which is financed by the Swedish International Development Cooperation Agency and implemented by the Raoul Wallenberg Institute of Human Rights and Humanitarian Law (RWI) together with its Zimbabwean partners. This second revised edition of the anthology examines the nature and scope of selected aspects of the 2013 Zimbabwean Constitution and the Declaration of Rights. Composed of 19 chapters examining the constitutional landscape for the protection of human rights in Zimbabwe, the book is designed for a broad audience consisting of undergraduate and postgraduate students, academia, civil society organisations, legal practitioners, judges, key government ministries, institutions and agencies, among many others. The book explains the scope of several provisions of the Constitution and their implications for the conduct of both state and non-state actors. While it does not, for instance, explain the nature and content of all the rights in the Declaration of Rights, the chapters that form part of this volume nonetheless provide to its readers invaluable guidance on the scope of specific provisions of the Constitution.

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