

"This book will be an important resource for those that seek to understand the fundamentals of Zimbabwe's new constitutional law, particularly the application and enforcement of the socio-economic and cultural rights enshrined under the Constitution's Declaration of Rights. Personally I know Justice Alfred Mavedzenge as one of the emerging Constitutional and Administrative law specialists in the Southern Africa region. Zimbabwe should pride itself for having this new generation of patriots like Justice Alfred Mavedzenge and Douglas Coltart, who are not only well skilled but have the right passion and conviction to use their skills and knowledge to empower their fellow citizens through such excellent research and analysis."

Honourable Justice Oagile Dingake, High Court of Botswana

"Zimbabwe has been in search of a new national value system. The new constitution imposes a burden for a new national governance architecture to move from the constitution to constitutionalism. Legal protection of human rights in particular economic, social and cultural rights is a burden thrust on us. The authors of this book are young people with big ideas! Their contribution to the knowledge industry leaves us in no doubt that Zimbabwe can bridge the gap between human rights standards and practice. In a very clear and simple way, this book unpacks some of the fundamental rights enshrined under Zimbabwe's new constitutional dispensation."

Arnold Tsunga, Africa Director for International Commission of Jurists

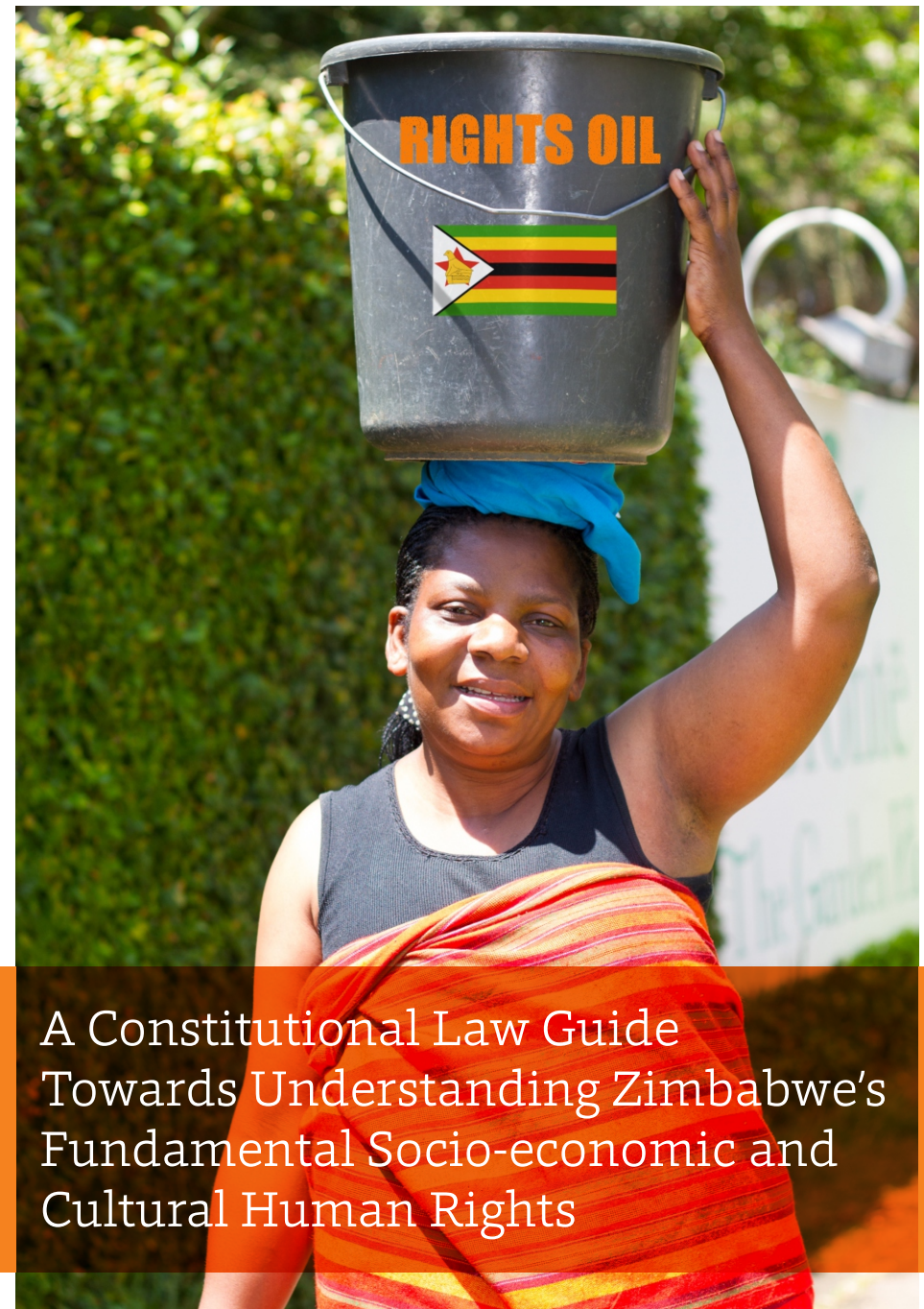


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ISBN 978-0-7974-6081-2



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A Constitutional Law Guide Towards Understanding Zimbabwe's Fundamental Socio-economic and Cultural Human Rights

Justice A. Mavedzenge and Douglas J. Coltart

**A CONSTITUTIONAL LAW GUIDE TOWARDS UNDERSTANDING ZIMBABWE'S FUNDAMENTAL
SOCIO-ECONOMIC AND CULTURAL HUMAN RIGHTS**

By

Justice Alfred Mavedzenge

And

Doug J Coltart

In association with the International Commission of Jurists and the Zimbabwe Human Rights
Association

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ISBN 978-0-7974-6081-2

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Dedicated to

The veterans and founding fathers of our Liberation struggle - Chairman Hebert Wiltshire
Tapfumanei Chitepo and Father Zimbabwe Joshua Mqabuko Nyongolo Nkomo

Table of Contents

Foreword	1
Preface	2
About the Authors	3
CHAPTER 1: KEY CONSTITUTIONAL PRINCIPLES	5
1.1 Introduction	5
1.2 Judicial Independence and Impartiality	5
1.3 Fundamental Rights and Freedoms	12
1.4 Constitutional Supremacy and Limited Government	13
1.5 Constitutional Separation of Powers	14
1.6 The Rule of Law	15
1.7 Judicial Review	17
1.8 Transparency and Accountability	18
1.9 Regular, Free and Fair Elections	19
1.10 Multiparty Democracy	20
1.11 Independent Constitutional Institutions	22
CHAPTER 2: DEFINING SOCIO-ECONOMIC AND CULTURAL RIGHTS	23
2.1 Introduction	23
2.2 Socio-Economic and Cultural Rights are Fundamental Human Rights	23
2.3 Legal Protection	11
2.4 Which Economic, Social and Cultural Rights?	11
CHAPTER 3: APPLICATION AND ENFORCEMENT OF THE DECLARATION OF RIGHTS	13
3.1 Introduction	13
3.2 Application	13
3.3 Rights bearers under the Declaration of Rights	14
3.4 Duty bearers in terms of the Declaration of Rights	14
3.5 The constitutional duty to respect, protect, promote and fulfill fundamental rights	15
3.6 Enforcement of the fundamental rights and freedoms	16
3.6.1 Introduction	16
3.6.2 Locus Standi	16
3.6.3 Person acting in their own interests	16
3.6.4 Person acting on behalf of another person	17
3.6.5 Person acting as a member or in the interests of a group or class of persons	17
3.6.6 Person acting in public interest	18
3.6.7 Association acting in the interests of its members	19
CHAPTER 4: INTERPRETING THE DECLARATION OF RIGHTS	20
4.1 Introduction	20
4.2 Guiding principles	20
4.3 International and Foreign Law Considerations	21
4.4 Provisions of the Constitution	21
CHAPTER 5: CONSTITUTIONAL REMEDIES AGAINST THE INFRINGEMENT OF SOCIO-ECONOMIC AND CULTURAL RIGHTS	15
5.1 Introduction	15
5.2 Declaration of Invalidity	15
5.3 Declaration of Rights	17
5.4 Compensation	17
5.5 Prohibitive Interdict	17
5.6 Mandamus	18
5.7 Structured Interdict	18

Table of Contents

CHAPTER 6: LIMITATION OF SOCIO-ECONOMIC RIGHTS	19
6.1 Introduction	19
6.2 Limitation in Terms of a Law of General Application.....	20
6.3 The Test for Proportionality and Fairness.....	20
6.3.1 The Nature of the Right or Freedom in Question: Section 86(2) (a).....	22
6.3.2 The Purpose of the Limitation: Section 86(2) (a)	22
6.3.3 The Nature and Extent of the Limitation: Section 86(2) (c).....	22
6.4 The Need to Ensure that the Enjoyment of Rights and Freedoms by Any Person Does Not Prejudice the Rights and Freedoms of Other: Section 86(2) (d).....	23
6.5 The Relationship between the Limitation and its Purpose: Section 86(2) (e).....	23
6.6 Whether there are any Less Restrictive Means of Achieving the Purpose of the Limitation	23
6.7 Application of Section 86 in Litigating the Declaration of Rights	24
6.8 Limitation of Socio-Economic Rights by Virtue of Special or Internal Limitation Clauses	25
6.8.1 Resource Availability.....	26
6.8.2 Progressive Realization.....	27
6.9 Limitation of Socio-Economic Rights during Public Emergency.....	28
CHAPTER 7: SPECIFIC SOCIO-ECONOMIC AND CULTURAL RIGHTS	30
7.1 Introduction	30
7.2 The Right to Language and Culture	30
7.2.1 Section 63(a) Right to Use Language of Choice	30
7.2.2 Section 63(b) Right to Participate in the Cultural Life of Their Choice.....	31
7.3 The Right to Freedom of Profession, Trade or Occupation	31
7.3.1 Regulating Profession, Trade or Occupation	32
7.3.2 Regulations on Affirmative Action.....	33
7.4 The Right to Freedom from Arbitrary Eviction	33
7.5 The Right to Shelter	35
7.6 The Right to Education	35
7.6.1 Basic Education vs Further Education	36
7.6.2 Basic State Funded Education, including Adult Basic Education	37
7.6.3 Further Education.....	39
7.6.4 Establishment and Maintenance of an Independent Educational Institution ..	40
7.7 The Right to Healthcare	41
7.8 The Right to Basic Health Care Services	42
7.8.1 The Right of Persons Suffering from Chronic Illness to Access Basic Healthcare Services for such Illness	43
7.8.2 Emergency Medical Treatment.....	44
7.9 The Right to Food and Water.....	47
7.9.1 The Content of the Right to Safe, Clean and Potable Water	47
7.9.2 The Content of the Right to Sufficient Food	50
7.9.3 Application of the Right to Food and Water.....	51
7.10 Marriage Rights	54
7.11 The Right to Receive Social Security from Government	55
REFERENCES	58

Foreword

The Constitution of Zimbabwe adopted in 2013 represents a major milestone in the development of constitutional democracy in Zimbabwe. Notwithstanding the various challenges that confronted the constitution making process, the new Constitution remains special for the simple reason that unlike the former Constitution, the citizens of this country directly and actively participated in its negotiation, drafting and adoption. There was no external influence in the writing of this new Constitution. I was honored to be one of the legal drafters together with my esteemed colleagues, Mrs. Priscilla Madzonga and Mr. Brian Crozier.

Essentially this new Constitution envisages a departure from the old constitutional order that was characterized by a narrow Declaration of Rights to a new era that is not only characterized by an expanded Declaration of Rights but a constitutional dispensation founded on such critical principles as the rule of law, separation of powers, government accountability, good governance and respect for fundamental rights of all persons in Zimbabwe. On its own, the adoption of a new Constitution does not in any way guarantee this departure as envisaged under the new Constitution. Successful transformation of governance in line with the spirit, object and purport of the new Constitution largely depends on the political will to implement the new Constitution as well as the readiness by the citizens to engage with their new Constitution. Such engagement can only be possible if there is sufficient research and analysis which interrogates the various constitutional principles enshrined in the Constitution. Inspired by the desire to provide such literature, Justice Alfred Mavedzenge and Douglas Coltart have made a bold and timely intervention by authoring this book. Through this book, they have provided a good starting point in terms of developing literature that seeks to interpret not just the specific socio economic and cultural fundamental rights provided for under the new Constitution but the key principles that define our new constitutionalism. Socio economic and cultural rights are a new creature introduced by the Constitution. Many of us will struggle to understand what these rights mean in terms of our day to day lives. Government officials, our courts, students and lawyers will struggle to give meaning to these rights. However, this book makes a good attempt at providing a critical discussion on the application, scope and content of these rights. I have no doubt that this book will provide some of the answers that we may have pertaining to the meaning and interpretation of the socio-economic rights enshrined in the Constitution. It is my hope that our courts, students, lawyers and other stakeholders will find this book useful as they seek to engage with the new Declaration of Rights. It is also my hope that Justice Alfred Mavedzenge and Douglas Coltart as well as other scholars in this field will develop and produce more such useful materials which will help our people to understand the new Constitution.

Justice Moses Chinhengo

Former Judge of the High Court of Zimbabwe, former Judge of the High Court of Botswana, Commissioner, International Commission of Jurists; Co-founder of Africa Institute of Mediation and Arbitration (AIMA)

Preface

The newly adopted Constituion of the Republic of Zimbabwe ushers in a new constitutional dispensation based upon a set of key constitutional principles. Such principles include the rule of law, judiciary independence, multipartism, government transparency and accountability, respect for fundamental human rights, constitutional supremacy and the doctrine of limited government, judicial review and constitutional separation of powers. Whilst it is true that these principles were provided for under the old Constitution, this book notes that the new Constitution has widened and deepened the scope of these principles. For instance, the new Constitution introduces a constitutional dispensation based upon a wider Declaration of Rights, which unlike the previous one, provides for socio-economic and cultural rights as fundamental rights. The first chapter of this book briefly discusses how these constitutional principles are provided for under the new Constitution of Zimbabwe and how they should shape the new constitutionalism in Zimbabwe. The book proceeds to identify the socio-economic and cultural rights provided for under the new Constitution of the Republic of Zimbabwe. The book also discusses the principles guiding the interpretation of the Declaration of Rights, enforcement as well as limitation of these rights and possible remedies against the limitation of these socio-economic and cultural rights.

With reference to international law, decisions of superior foreign courts, the Zimbabwean jurisprudence as well as relevant academic works, this book provides a commentary on each socio-economic right; discussing the general meaning, scope and content of each of these rights. In examining the content and scope of these rights, this book extensively relies on academic works, international and foreign law because the Zimbabwean jurisprudence on these rights is still very young since the new Constitution is just one year old at the time of publishing this book. However, the local jurisprudence has been used as far as possible in providing these commentaries.

It is our hope as authors of this book that this will be a useful tool in guiding lawyers, government officials, students, the judiciary and citizens as they seek to engage with and enforce the Declaration of Rights, particularly the socio-economic and cultural rights enshrined therein.

Justice Alfred Mavedzenge

Doug Coltart

26 September 2014

About the Authors

Justice Alfred Mavedzenge

Justice Alfred Mavedzenge is a 30 year old Constitutional and Administrative Lawyer trained at the University of South Africa (UNISA), University of Pretoria Centre for Human Rights and Governance and the University of Cape Town (UCT). He holds a Masters of Laws Degree: Constitutional and Administrative Law, Bachelor of Laws Degree and a General Certificate in Good Governance. Justice Alfred Mavedzenge also holds a Bachelor of Arts Degree in African Languages and Culture obtained from the Midlands State University, being his first degree. Inspired by his first name 'Justice', he has been an avid campaigner for justice and human rights since his early days at Victoria High School in Masvingo, Zimbabwe. He continued with human rights advocacy as a member of the Student Representative Council during his bachelor studies at the Midlands State University. Previously, Justice Mavedzenge has worked for the Combined Harare Residents Association as the Programmes Manager, Pact Zimbabwe as a Democracy and Governance Programme Officer. Currently he works with Freedom House Southern Africa as a Senior Programme Officer for the Southern Africa Rule of Law program. He is pursuing doctoral studies and his thesis revolves around exploring the role of the new Constitution in protecting fundamental human rights in Zimbabwe. Justice is a proud father of a lovely son named Israel Tavanashe Mavedzenge. He credits the Almighty God, his late parents Medaldo Nyikadzino Mavedzenge and Letwin Hlalanini as well as Blazio Zivengwa Mavedzenge, Isaac Maphosa, Romualdo Tapfuma Mavedzenge for inspiration in his life and career.

Doug Coltart

Douglas Coltart is a Zimbabwean Lawyer, legal researcher and human rights activist. He holds a Bachelor of Arts Degree in History and an LLB from the University of Cape Town (UCT). While at UCT, he was actively involved in student politics and human rights advocacy, especially on issues relating to Zimbabwe. Since returning to Zimbabwe he has worked in private legal practice and has continued with research on human rights issues. Apart from socio-economic rights, his research interests also include women's rights and the impact of the Constitution on Zimbabwe's criminal law.

CHAPTER 1: INTRODUCTION TO THE KEY CONSTITUTIONAL PRINCIPLES ANCHORING THE NEW CONSTITUTION OF ZIMBABWE

1.1 Introduction

The current Constitution of Zimbabwe, known as The Constitution of Zimbabwe Amendment (No.20) came into force on 22 May 2013, following a referendum in which 94.49% of the participating citizens voted in favour of the new constitution. The writing of this constitution was led by the three political parties¹ in the then Government of National Unity (GNU), through an inter-party parliamentary committee. The drafters of this constitution were Retired Judge of the High Court of Zimbabwe Justice Moses Chinhengo, Senior Legal practitioner Priscilla Madzonga and Senior Legal draftsman and Lawyer Brian Crozier. This constitution seeks to usher in a new constitutional democratic dispensation based on supremacy of the constitution, the rule of law, respect and protection of fundamental human rights and freedoms, regular free and fair elections and multiparty democracy.²

This book seeks to provide a commentary on the interpretation of the socio-economic and cultural rights enshrined under the Constitution's Declaration of Rights. In order to appropriately understand the meaning and scope of the socio-economic rights enshrined under the Zimbabwean Declaration of Rights, it is important to provide a brief discussion of the key principles upon which the new constitutionalism in Zimbabwe is based. Fundamentally, this will help provide legal context for the accurate interpretation of the enshrined socio-economic and cultural rights.

1.2 Judicial Independence and Impartiality

Judicial independence is a principle which requires that the judiciary branch of government must 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.³ Judicial impartiality is the principle that the judiciary must apply the law without fear, favour or prejudice.⁴ In a constitutional democracy such as the one envisaged by the new Constitution of Zimbabwe, an independent and impartial judiciary is essential for the task of

¹ These are the Zimbabwe African National Patriotic Front (ZANU PF) led by President Robert Mugabe, the Movement for Democratic Change (MDC-T) led by the then Prime Minister Morgan Tsvangirai and the Movement for Democratic Change (MDC) led by Professor Arthur Mutambara and later on by Professor Welshman Ncube.

² See section 3 of the Constitution of Zimbabwe Amendment (No.20) relating to '*founding values and principles*'.

³ Diescho J.B., The paradigm of an independent judiciary: Its history, implications and limitations in Africa. In Horn N and Bosl (eds). *The Independence of the Judiciary in Namibia* (2008) at 18.

⁴ Diescho J.B., The paradigm of an independent judiciary: Its history, implications and limitations in Africa. In Horn N and Bosl (eds)., *The Independence of the Judiciary in Namibia* (2008) at 18.

applying and upholding the constitution.⁵ Essentially this is a sensitive task that involves applying the law to adjudicate disputes, reviewing the constitutionality of law

⁵ Wesson M and Du Plessis M., Fifteen years on: central issues relating to the transformation of the South African Judiciary (2008) 24 *South African Journal for Human Rights* 188.

and conduct, including the conduct of other branches of government.⁶ As such, an independent and impartial judiciary is perhaps the most important check and balance on executive and legislative power, the transgression of constitutional limits and the protection of fundamental rights and freedoms.⁷ Thus an independent judiciary is seen as a defender of the constitution from attacks emanating from the executive and the legislature. In order to perform this delicate task, the judiciary must be able to exercise fidelity to the law and therefore must operate in such a manner that it is independent of influences from any other institution or persons but is subject only to the constitution and the law.

A judiciary that is not independent renders the checks and balances implicit in the democratic system ineffectual.⁸ Thus the independence and impartiality of the judiciary is essential for the survival and proper functioning of all the other constitutional mechanisms for the protection of democracy such as constitutional supremacy, separation of powers, the rule of law and fundamental human rights which are discussed later on in this chapter. The constitution may provide for these mechanisms but their effectiveness in protecting democracy lies in their enforcement. Thus such mechanisms are only able to facilitate the protection of constitutional democracy as long as the judiciary is independent and impartial enough to apply them when adjudicating legal disputes. For instance, a comprehensive and extensive bill of rights remains meaningless unless the judiciary is able to apply it when called upon to do so by the affected citizens.⁹ Equally, a constitution may declare itself or certain constitutional values supreme but such supremacy can only facilitate the protection of democracy against manipulation by the executive if the judiciary is capable of applying and insisting on the observance of the supremacy of the constitution. Thus the effectiveness of all the mechanisms that are put in place through a constitution, to protect human freedom and democracy is dependent on the strength of the judiciary and the strength of the judiciary largely depends on its independence and impartiality. This is why some scholars have described the independence and impartiality of the judiciary as the anti-thesis of arbitrary rule and a cornerstone of constitutional democracy.¹⁰

The new Constitution of Zimbabwe essentially provides for the independence and impartiality of the judiciary through various sections notably section 164 which clearly provides that, the courts are independent and subject only to the constitution and the law, which they must apply impartially, expeditiously, without fear, favour or prejudice. Section 180 outlines an elaborate, transparent process with checks and balances to ensure that impartial judges are appointed.¹¹

⁶ Currie et. al. *The New Constitutional and Administrative Law* (2001) at 95.

⁷ Olivier L., *Constitutional Review and Reform and Adherence to Democratic Principles in Constitutions in Southern African Countries* (2007) OSISA at 43.

⁸ Goredema C. Whither Judicial Independence in Zimbabwe? In Raftopoulos, B. and Savage, T. (eds.), *Zimbabwe: Injustice and Political Reconciliation*, (2005) Harare, Weaver at 100.

⁹ Ibid.

¹⁰ Diescho J.B., The paradigm of an independent judiciary: Its history, implications and limitations in Africa. In Horn N and Bosl (eds). *The Independence of the Judiciary in Namibia* (2008) at 19.

¹¹ Section 189 of the Constitution of Zimbabwe Amendment No. 20 (2013).

1.3 Fundamental Rights and Freedoms

The new Constitution of Zimbabwe enshrines respect and protection of fundamental rights and freedoms as one of the founding constitutional values and principles.¹² Fundamental rights can be defined as those entitlements which are due to a human being because he or she is a human being and these can be divided into civil liberties as well as socio-economic and cultural rights.¹³ In contemporary democratic constitutions, fundamental rights are usually provided for under the Bill of Rights. Under the Constitution of Zimbabwe, the Declaration of Rights found under Chapter Four serves as the Bill of Rights. In a constitutional democracy, the Bill of Rights functions as a constitutional measure of protecting individuals by means of guaranteeing them fundamental rights which they can invoke to protect themselves and their democracy from manipulation especially by government.¹⁴ For instance, political rights can be invoked to enforce one's democratic right to participate in electoral processes.¹⁵

There is a gradual movement in contemporary constitutionalism to ensure that constitutions provide for both civil liberties and socio-economic and cultural rights because of the realization that the provision of both types of fundamental rights is at the core of the protection and implementation of democracy.¹⁶ Thus some scholars have argued that, socio-economic rights are an essential mechanism for enforcing social justice, and the achievement of social justice is a necessary condition for sustainable constitutional democracy.¹⁷ For instance, socio-economic rights can be invoked in order to ensure that government uses national resources to improve the socio-economic welfare of its people.¹⁸ Meeting the welfare needs of the people is critical for purposes of building sustainable democracy. Where there are no constitutional mechanisms to enforce social justice, the citizens' welfare may be ignored, and the people could turn against their government or each other, leading to the breakdown of the entire political system.¹⁹ Thus the provision of both civil liberties and socio-economic rights is a necessary mechanism for supporting and protecting democracy.

¹² See section 3(1) (c) of the Constitution of Zimbabwe Amendment (No.20).

¹³ Pollis A., A new Universalism. In Pollis A. and Schwab P (eds), *Human Rights: New perspectives, New realities* (2000) Lynne Rienner Publishers at 10.

¹⁴ Becker 'What is Democracy' 2008 at 5. Available at: <http://library.fes.de/pdf-files/bueros/madagaskar/05860.pdf>

¹⁵ Conte A. and Burchill R., *Defining Civil and Political Rights: Jurisprudence of the United Nations Human Rights Committee* 2 ed (2013) Ashgate Publishing, Ltd at 3-4.

¹⁶ Olivier L., *Constitutional Review and Reform and Adherence to Democratic Principles in Constitutions in Southern African Countries* (2007) OSISA at 47.

¹⁷ Diescho J.B. The paradigm of an independent judiciary: Its history, implications and limitations in Africa. In Horn N and Bosl (eds). *The Independence of the Judiciary in Namibia* (2008) at 27.

¹⁸ Liebenberg S., The right to social assistance: the implications of 'Grootboom' for policy reform in South Africa 17 *South African Journal on Human Rights* (2001) 232-257 at 256.

¹⁹ Diescho J.B., The paradigm of an independent judiciary: Its history, implications and limitations in Africa in Horn N and Bosl (eds)., *The Independence of the Judiciary in Namibia* (2008) at 27.

These socio-economic and cultural rights are discussed in greater detail in the chapters that follow in this book.

The new Constitution of Zimbabwe provides for an extensive Declaration of Rights that guarantees both civil liberties and socio-economic and cultural rights.²⁰ However, it is important to point out that the Declaration of Rights allows discrimination against certain social groups of the Zimbabwean population. For instance, section 78(3) prohibits marriage between persons of same sex and therefore allows for discrimination against this social group on the basis of sexual orientation.

1.4 Constitutional Supremacy and Limited Government

The edifice of constitutional democracy is founded on the subordination of the exercise of governmental power to established legal rules in the constitution.²¹ Constitutional supremacy is therefore a principle that elevates the constitution to the level of being the supreme law of the land unto which all other laws and conduct must conform to.²² In essence, this is a principle of constitutionalism whose implication is to put government and every citizen below the constitution such that no one can claim to be above the constitution.²³

In a constitutional democracy, it is important that the constitution be the supreme law of the land because ideally a constitution is an expression of values and principles by which the people would like to be governed.²⁴ Thus by insisting on constitutional supremacy, those values and principles are raised to the level where they become the standards against which all other laws and conduct is measured. Assuming that these values and principles are democratic, their supremacy facilitates the protection of human rights and democracy because undemocratic laws and decisions will be invalidated for their want of constitutionality if such laws and conduct is challenged in the relevant courts of law.

The concept of limited government requires the constitution to limit government's powers to those provided for under the constitution and law, and requires such power to be exercised in the manner prescribed under the constitution.²⁵ In other words, government must not have any other powers other than or beyond those provided for under the law. As the popular saying goes, power tends to corrupt, and absolute power corrupts absolutely and as such it is safer to limit governmental powers than to give governments a free reign.²⁶ The idea of

²⁰ Chapter 4 of the Constitution of Zimbabwe Amendment Act No. 20 (2013).

²¹ Diescho J.B., The paradigm of an independent judiciary: Its history, implications and limitations in Africa in Horn N and Bosl (eds), *The Independence of the Judiciary in Namibia* (2008) at 40.

²² Currie et. al. *The New Constitutional and Administrative Law* (2001) at 21 and 74.

²³ Linington G, Reflections on the Significance of Constitutions and Constitutionalism for Zimbabwe. In Masunungure E. V. and Shumba J. M. (eds.), *Zimbabwe: Mired in Transition*, (2012), Harare, Weaver Press at 63.

²⁴ Currie et. al., *The New Constitutional and Administrative Law* (2001) at 24-25.

²⁵ Ibid at 10-11.

²⁶ Becker 'What is Democracy' 2008, 4. Available at: <http://library.fes.de/pdf-files/bueros/madagascar/05860.pdf>

limited government is therefore a constitutional measure which can be used to check against or prevent possible arbitrary rule by the government of the day.

Through sections 2 and 3(1)(a), the new Constitution of Zimbabwe declares itself as the supreme law of the Republic of Zimbabwe and requires all other laws and practices to be consistent with it. Section 3 gives supreme legal status to national democratic values such as respect for the rule of law, human rights and multi-partyism and as such, all other laws and practices are required to be consistent with those values and principles. Section 110(1) provides for limited government by requiring that, the powers of the President are limited to those provided for under the Constitution as well as legislation. In a constitutional democracy such as Zimbabwe, legislation is supposed to provide the President with only such powers that are necessary to actualize or deliver on his or her constitutional duties.

1.5 Constitutional Separation of Powers

Constitutional separation of powers is the idea that the State must be divided into three arms namely the executive, the judiciary and the legislature.²⁷ These three arms must operate independent of each other but must have powers to check and balance against each other.²⁸ Thus separation of powers creates a system of checks and balances amongst the three branches of government, which protects democracy by making sure that power is not concentrated in one institution or one person, but is distributed across the government. The checks and balances system may lead to greater accountability between the three arms of government, and such accountability helps check against abuse of power.²⁹

Broadly speaking, there are two types of separation of powers. Separation of powers can be 'strict' whereby the executive and the legislature are completely separated from each other and there is no overlap in terms of functions or personnel.³⁰ Alternatively, it can also be 'partial' in which case, some degree of functional and personnel overlap between the executive and the legislature is allowed.³¹ The partial version of separation of powers is more effective as it allows smooth coordination of government functions and promotes checks and balances between the three arms.³² The 'strict' version has a tendency of leading to deadlocks between the executive and the legislature and this prevents government from taking action especially when faced with a crisis.³³ This is why contemporary democratic constitutions would rather provide for the partial separation of powers in order to allow government to discharge its duties but in a manner that is accountable and subject to internal checks by other branches of government.

²⁷ Malherbe R., *Constitutional Law* (2009) Durban: Butterworths at 78.

²⁸ Ville M.J.C., *Constitutionalism and the separation of powers* (1967) Oxford University Press at 13.

²⁹ Currie et. al., *The New Constitutional and Administrative Law* (2001) at 91.

³⁰ Barber N.W., Prelude to Separation of powers (2001) 60 *The Cambridge Law Journal* 59- 60.

³¹ Currie et. al., *The New Constitutional and Administrative Law* (2001) at 95.

³² Ibid.

³³ Ibid fn 28 above.

The new Constitution of Zimbabwe formally provides for partial separation of powers through section 88 (2) which vests executive authority in the President and Cabinet, while section 162 vests judicial authority in the courts. Section 116 vests legislative authority in both the Parliament and the President, although the President cannot perform primary law-making functions. Through section 134, the President is delegated with the authority to enact subsidiary legislation which must be consistent with the original legislation passed by Parliament and the constitution. Thus in terms of the constitution, the legislative authority given to the President is controlled by the legislature and the constitution itself.

1.6 The Rule of Law

At the philosophical, level there are different schools of thought as to what the rule of law encompasses.³⁴ However the rule of law is essentially a doctrine which requires that all citizens and their government be bound by the same laws and be protected by the same standards or rules; which are interpreted by the same principles at all times, and as fairly as possible.³⁵ In *Commissioner of Police v Commercial Farmers Union* 2000 (1) ZLR 503 (HC) 2000 (1) ZLR p503, Chinhengo J underscored this view when he held that the crux of the matter when it comes to the doctrine of the rule of law is that ‘...everyone must be subject to a shared set of rules that are applied universally and which deal on an even-handed basis with people and which treat like cases alike.’

Most of the constitutional law scholars concur with the view expressed by Chinhengo J in *Commissioner of Police v Commercial Farmers Union* that ‘the rule of law... [must] be viewed as a national or societal ideal.’³⁶ The rule of law is a necessary condition for sustainable constitutional democracy.³⁷ Rosenfield (2001) argues that, the rule of law is a cornerstone of contemporary constitutional democracy as it plays a dual role of protecting the normative values of a constitutional democracy against manipulation and it also functions as a vehicle for the enforcement of the same normative values.³⁸

For instance in South Africa, the protective role of the rule of law was demonstrated in the case of *Democratic Alliance v President of the Republic of South Africa* (263/11) [2011] ZASCA 241, where the court used the concept of the rule of law to find that the President had

³⁴ See the ruling of Chinhengo J in *Commissioner of Police v Commercial Farmers Union* 2000 (1) ZLR 503 (HC) 2000 (1) ZLR page 22

³⁵ Diescho J.B., The paradigm of an independent judiciary: Its history, implications and limitations in Africa in Horn N and Bosl (eds), *The Independence of the Judiciary in Namibia* (2008) at 27.

³⁶ *Commissioner of Police v Commercial Farmers Union* 2000 (1) ZLR 503 (HC) 2000 (1) ZLR p503

³⁷ Diescho J.B. The paradigm of an independent judiciary: Its history, implications and limitations in Africa. In Horn N and Bosl (eds). *The Independence of the Judiciary in Namibia* (2008) at 25.

³⁸ Rosenfield M., The Rule of Law and the Legitimacy of Constitutional Democracy (2001) 74 *Southern California law Review* 1307.

acted in a manner that was likely to undermine democracy through weakening the institutional independence of the country's National Prosecuting Authority.³⁹

Sometimes government undermines democracy by abdicating from its responsibilities, for example they fail to implement policies that lead to realization of human rights.⁴⁰ In such cases, the principle that court decisions must be complied with (which is an integral part of the doctrine of rule of law) functions as a mechanism for the enforcement of democratic values and principles which government would have otherwise sought to leave unimplemented. Thus through the rule of law, government may be compelled to enforce or implement democratic values and principles such as respect and fulfillment of fundamental human rights.

For purposes of constitutional design, there are two schools of thought on the definition of the rule of law. The first one is the formal perspective of the rule of law which emphasizes that government action(s) must be based on the law and must be carried out in conformity with the procedural requirements of the law.⁴¹ This is the principle of legality which does not concern itself with the substance of the law but is focused on ensuring that government acts according to the law.⁴² The other school of thought is the material side from which Dyzenhaus (2007) argues that the rule of law must not only be defined from a formalistic point of view but its substantive side is even more important.⁴³ Again in *Commissioner of Police v Commercial Farmers Union*, Chinhengo J underscores this point when he held that '*the rule of law which is divorced from justice and just laws becomes a hollow concept*'.⁴⁴ Thus the law in terms of its content must be just and promote the normative values of democracy which include (though not limited to) democratic accountability, transparency, political pluralism and tolerance as well as fundamental human rights. Both the formal and material aspects of the rule of law are critical for purposes of protecting and enforcing the constitutional democratic system.⁴⁵ The formalistic side of the rule of law ensures that government decisions are in conformity with the law (principle of legality) while the material side ensures that the law itself is consistent with the entrenched constitutional democratic values and principles.⁴⁶

In its preamble, the new Constitution of Zimbabwe acknowledges the need to '*entrench democracy, good, transparent and accountable governance and the rule of law*'. Furthermore, the new Constitution entrenches the rule of law as a foundational value through

³⁹ *Democratic Alliance v President of the Republic of South Africa* (263/11) [2011] ZASCA 241; para 27-41.

⁴⁰ See *Treatment Action Campaign v Minister of Health* CCT 8/02 where Government was indicted against failure to take adequate measures to ensure the fulfillment of the right to adequate healthcare.

⁴¹ Craig P., *Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework*, (1997) 21 *Public Law* at 467.

⁴² Currie et al. *The New Constitutional and Administrative Law* (2001) at 76.

⁴³ Dyzenhaus D., *The pasts and future of the rule of law in South Africa*. 124 *South African Law Journal* (2007) 734-761 at 736.

⁴⁴ *Commissioner of Police v Commercial Farmers Union* 2000 (1) ZLR 503 (HC) 2000 (1) ZLR p503

⁴⁵ Dyzenhaus D. *The pasts and future of the rule of law in South Africa* (2007) *South African Law Journal* at 736

⁴⁶ Currie et al. *The New Constitutional and Administrative Law* (2001) at 78 and 81.

section 3 (1) (b), and through section 44, it imposes a duty on all organs of the state to uphold fundamental rights. Section 2(1) of the Constitution requires all laws and conduct to be consistent with the provisions of the Constitution, including the values and principles enshrined therein. Section 90 imposes a general duty on the President to uphold the constitutional values, including the rule of law, while section 164 (3) imposes a duty on all organs of the state to respect the rule of law by obeying the decisions of the courts. Section 68 constitutional right to administrative justice stands out as the biggest constitutional entrenchment of the doctrine of the rule of law by virtue of giving the courts the power to review both the procedural and substantive fairness of conduct by organs of the State. Thus by and large, the new Constitution of Zimbabwe provides for both the substantive and formalistic requirements of the doctrine of the rule of law.

1.7 Judicial Review

Judicial review refers to the institutional arrangements whereby courts of law exercise the power to examine the constitutional validity of the decisions of the legislature, the executive and administrative agencies of the state.⁴⁷ Governments 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.⁴⁸ In terms of the principle of judicial review, it is possible to challenge the constitutionality and therefore the validity of any law or conduct before a competent court and where the law or conduct is found to be unconstitutional, the court can declare it invalid and therefore of no legal force.⁴⁹ Judicial review is therefore a critical mechanism for the protection and enforcement of democratic values and norms which otherwise may be sacrificed or ignored by politicians in the executive and the legislature. In most cases, particularly in a one party dominant democracy where a single party controls both the legislature and the executive, the citizens have had to rely on judicial review to stop the executive and the legislature from conniving to abuse power to the detriment of such normative values of democracy like fundamental human rights.⁵⁰ Thus, judicial review is one of the critical restraint mechanisms which citizens can use to protect democracy especially in the absence of other checks and balance mechanisms like legislative oversight or the oversight conducted by independent constitutional institutions. In fact, in contemporary democracies like South Africa, such checks and balance mechanisms like legislative oversight, civil society and independent constitutional institutions have had to resort to

⁴⁷ Diescho J.B. The paradigm of an independent judiciary: Its history, implications and limitations in Africa. In Horn N and Bosl (eds). *The Independence of the Judiciary in Namibia* (2008) at 39.

⁴⁸ Nwabueze B., *Judicialism and Good governance in Africa*, (2009) Nigerian Institute of Advanced Legal Studies at 91.

⁴⁹ Ibid 93.

⁵⁰ Choudhry S., 'He had a mandate: The South African Constitutional Court and the African National Congress in a dominant party democracy' (2009) 2 *Constitutional Court Review* 18.

judicial review in order to protect and defend their own oversight role and independence which is always under threat from the manipulative tendencies of the executive.⁵¹ Thus, democracy is vulnerable without the power of the courts to determine the constitutionality and validity of laws and decisions made by government. Even the entrenchment of such principles like constitutional supremacy and the rule of law would be meaningless without giving the judiciary the mandate to review the constitutionality of laws and government conduct. Judicial review should therefore be viewed as a significant mechanism through which all other constitutional principles can be enforced or applied.

The new Constitution of Zimbabwe gives the judiciary the mandate to review the constitutionality of laws and government decisions.⁵² The Constitution also created the Constitutional Court and designated it as the chief guardian of the Constitution.⁵³ However the effectiveness of judicial review will largely depend on the willingness of citizens to challenge the decisions and laws made by government and the ability of the judiciary to adjudicate independently and impartially.

1.8 Transparency and Accountability

Transparency and accountability are two different but complementary fundamental principles of governance. Government transparency is the idea that State institutions must discharge their duties in a manner that is open to the public and other State institutions. As such, the public must have timely and sufficient access to accurate information on what the Government is doing.

Government accountability refers to the *'the obligations of State agencies and public enterprises who have been trusted with the public resources, to be answerable [for] the fiscal and the social responsibilities that have been assigned to them'*⁵⁴. According to the World Bank, the concept of government accountability involves two aspects namely answerability and enforcement.⁵⁵ Answerability refers to the obligation of the State institutions and public officials to provide information about their decisions and actions and to justify them to the public.⁵⁶ Public access to information held by the State is therefore critical for the public to be able to hold or enforce government accountability. Thus both transparency and accountability are underpinned by public access to information that is in the hands of the State.

⁵¹ See *Justice Alliance of South Africa v President of the Republic of South Africa* CCT 53/11 (2011) ZACC para 23 and *Mario Gaspare Oriani- Ambrosini MP v Maxwell Vuyisile Sisulu, MP Speaker of the National Assembly* CCT 16/12 (2012) ZACC para 27.

⁵² See sections 167(2) (d) and 167 (3) of the Constitution of Zimbabwe Amendment No.20, (2013).

⁵³ *Ibid* section 167.

⁵⁴ See Black's Law Dictionary 2nd Edition

⁵⁵ See the World Bank Note accessible on

http://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CBsQFjAA&url=http%3A%2F%2Fsitesources.worldbank.org%2FPUBLICSECTORANDGOVERNANCE%2FResources%2FAccountabilityGovernance.pdf&ei=khnRU_mLF8fm7AbTn4CoAw&usq=AFQjCNGQayhe8R1xYT9FFe1xVKrxACOAtg

⁵⁶ *Ibid*

Essentially, the new Constitution of Zimbabwe envisages open and democratic governance. The concept of open and democratic governance requires that government must conduct its business in a manner that is transparent and must always account for its decisions and conduct.⁵⁷ Information that is held by State institutions is not acquired for the benefit of officials or politicians but for the public as a whole, and the public should be able to request that information whenever they need it especially for purposes of holding the government accountable. Subject to a few exceptions such as those relating to protecting state security and personal privacy, governmental powers must be exercised in a manner that is open to public scrutiny.⁵⁸

The preamble to the new Constitution of Zimbabwe recognizes the need to entrench transparent and accountable governance in Zimbabwe. Section 3 (2) (g) of the Constitution provides that transparency and accountability shall be one of the principles of governance binding all State institutions at all levels of government. Furthermore, section 62 of the Constitution provides for the right of access to information, including information that is held by State institutions. Section 9 of the Constitution obliges the State to adopt and implement policies and legislation to develop accountability and transparency in all institutions of government. Section 194 (1) (h) of the Constitution obliges all State institutions to ensure that in their operations, transparency is fostered by providing the public with timely, accessible and accurate information. The net effect of all these provisions of the Constitution is that, transparency and accountability has been entrenched as part of the fundamental principles of governance that must be respected and adhered to by all institutions of the State.

Accountability by State institutions can be horizontal or vertical. The new Constitution of Zimbabwe provides for both types of accountability. Horizontal accountability is the idea that State institutions must account to each other.⁵⁹ Through the entrenchment of a system of checks and balances, the new Constitution of Zimbabwe has provided for such horizontal accountability.⁶⁰ Vertical accountability is the idea that citizens must be able to directly demand accountability from State institutions. The new Constitution provides for vertical accountability by giving Zimbabwean citizens the right to access any information held by the State in so far as that information is required for purposes of public accountability⁶¹ Furthermore, the new Constitution provides for vertical accountability through section 194(1) (h) which obliges State institutions to ensure that transparency is fostered by '*providing the public with timely, accessible and accurate information.*'

1.9 Regular, Free and Fair Elections

⁵⁷ Currie et al. *The New Constitutional and Administrative Law* (2001) at 89.

⁵⁸ See section 62(1) of the Constitution of Zimbabwe.

⁵⁸ Olivier L. *Constitutional Review and Reform and Adherence to Democratic Principles in Constitutions in Southern African Countries* (2007) at 39

⁵⁹ See fn 55

⁶⁰ See for instance section 119 (3) relating to the mandate given to Parliament to demand accountability from all other institutions of the Government. See also section 167(3) relating to the power of the Constitutional Court to review constitutionality of laws and conduct. See also Chapter 12 on the role of Independent Commissions.

⁶¹ See section 62(1) of the Constitution of Zimbabwe.

Rousseau argues that the essence of democracy is that the people are the sovereign or highest authority in the state, and they enter into a social contract with their government through which they give the government the mandate to exercise powers on their behalf.⁶² In contemporary constitutional democracies, ideally the people exercise such sovereignty through an election whereby they give persons of their choice the mandate to govern. Thus regular, free and fair elections are an important part of democracy. Former President of the United States of America Abraham Lincoln's famous quote '*Government of the people by the people for the people*' best captures the aspect of democracy which demands that the people should decide whom they want as their government.⁶³ A government can only be a government by the people if in the first place that government has been chosen by the people themselves. Elections are the means through which people are able to decide who they want as their governor. Elections are therefore a mechanism through which the idea of government by popular sovereignty is implemented.⁶⁴ It is important that such elections be held in between constitutionally defined intervals, and they should be conducted in a manner that is free of any fraud, violence or any other form of coercion and disenfranchisement.

Through section 155 (1), the new Constitution of Zimbabwe prescribes principles of democratic elections which every election in Zimbabwe must adhere to. Sections 238 and 239 provide for the establishment and functions of an independent election management body, in line with the democratic principle that democratic elections must be managed by an independent body. Sections 156 and 155(2) respectively prescribe strict democratic guidelines under which elections must be conducted and obliges government to undertake legislative and other measures to ensure that all elections are managed in a manner that fully adheres to the prescribed principles of democratic elections. However the effectiveness of the constitutional provisions on free and fair elections will depend on civic activism in terms of challenging the validity of government decisions as well as those of the election management bodies, and the ability of the courts to unpold and enforce the constitution without fear or favour. To evaluate how far the Zimbabwean judiciary has done so far on this aspect, one needs to look at the judgements in *Jealous Mbizvo Mawarire v Robert Gabriel Mugabe* CCZ1/13, *Morgan Tsvangirai v Chairperson of the Zimbabwe Electoral Commission* EC 27/13 and *Nixon Nyikadzino v President of the Republic of Zimbabwe and Others* CCZ34/13. The attitude of the courts will also come under spot light in the upcoming case of *Justice Alfred Mavedzenge vs the Chairperson of the Zimbabwe Electoral Commission*.

1.10 Multiparty Democracy

A multi-party system is a political system that allows and encourages the general constituency to form political parties and each party has an opportunity to compete for votes

⁶² Malherbe R., *Constitutional Law* (2009) Durban: Butterworths at 75.

⁶³ Keane J., *Democracy: The Rule of Nobody?* (2004) Wissenschaftszentrum Berlin für Sozialforschung at 2. Available at: http://johnkeane.net/wp-content/uploads/2011/01/rule_of_nobody.pdf (accessed on 24 October 2013).

⁶⁴ Malherbe R., *Constitutional Law* (2009) Durban: Butterworths at 74.

from the enfranchised constituents.⁶⁵ Multipartyism therefore requires the constitution to guarantee the formation and promote the free participation of multiple political parties in the political system.⁶⁶ The existence of multiple political parties provides alternatives for the people during elections. As Olivier (2007) argues, a single party political system represents a single choice for a voter, which in effect is no choice at all.⁶⁷ A multi-party system provides a voter with a choice at the ballot, of which the idea of a choice is the essence of democracy.⁶⁸ By presenting the electorate with viable alternative choices, multipartyism makes elections meaningful and presents an opportunity for alternation of governing parties, which is something very critical for both the test and survival of democracy.⁶⁹ If a party remains in power for too long and without a viable opposition, such a party has a tendency of degenerating into a dictator.⁷⁰

Furthermore, the existence of multiple political parties promotes political participation since political parties function as platforms which the citizens can use to participate or demand to participate in political processes.⁷¹ Constitutional law scholars also argue that, political competition that is created through the existence of multiple political parties will enhance government accountability in the sense that, such political competition enhances the effective functioning of separation of powers between branches of government.⁷² The effectiveness of a system of checks and balances depends on the level of competition between the branches of government and such competition is partly determined by whether or not those branches are controlled by different political parties.⁷³ Where different political parties control the executive and the legislature, there is likelihood of vibrant legislative oversight on the executive because the legislature is likely to be independent and eager to expose any abuse of authority by the executive.⁷⁴ Thus a multiparty system enhances and protects the democratic principle of accountability through stimulating political competition.

Through section 3 (2) (a), the new Constitution entrenches a multi-party democratic political system as a sacrosanct element of Zimbabwe's politics. Political rights provided for under section 67 are one of the constitutional measures for the establishment and protection of the envisaged multi-party democratic political system. Thus the new Constitution of Zimbabwe does formally provide for a multi-party democratic political system as a mechanism of protecting and sustaining constitutional democracy in Zimbabwe. However for such a

⁶⁵ Olivier L., *Constitutional Review and Reform and Adherence to Democratic Principles in Constitutions in Southern African Countries* (2007) OSISA at 35.

⁶⁶ Malherbe R., *Constitutional Law* (2009) Durban: Butterworths at 122.

⁶⁷ Olivier L., *Constitutional Review and Reform and Adherence to Democratic Principles in Constitutions in Southern African Countries* (2007) OSISA at 35

⁶⁸ Ibid

⁶⁹ Walker N., *Constitutionalism and the Incompleteness of Democracy: An Interactive Relationship* (2010) 3 *Netherlands Journal of Legal Philosophy* at 227.

⁷⁰ Ferim V., *Flaws in Africa's dominant one party democracies: The case of Cameroon and South Africa*. 4:1 (2010) *CJDHR* 28-41 at 29.

⁷¹ Malherbe R., *Constitutional Law* (2009) Durban: Butterworths at 121.

⁷² Levinson D., *Separation of parties, not powers*. 119 (1) *Harvard Law Review* (2006) 1-73 at 4.

⁷³ Ibid 73.

⁷⁴ Malherbe R., *Constitutional Law* (2009) Durban: Butterworths at 122.

political system to be established, there must be strong mechanisms of applying and upholding the entrenched constitutional principles and such mechanisms include an impartial and independent judiciary and a truly independent election management body.⁷⁵

1.11 Independent Constitutional Institutions

Independent constitutional commissions are bodies that are established in terms of the Constitution and their key responsibility is to protect, respect, promote and foster the constitutionally entrenched democratic values and principles. They are referred to as ‘independent commissions’ because they must discharge their functions free from any form of interference or influence by anyone or any arm of government. Rather these institutions operate subject to the law only.⁷⁶ Therefore, their independence is in respect of interference from other arms of government but not the Constitution itself.

Such constitutional bodies differ from one jurisdiction to the other in terms of how they are established or constituted, their powers and functions. Through chapter 12, the new Constitution of Zimbabwe provides for such institutions, their powers and functions. Section 232 (a)-(e) identifies them as the Zimbabwe Electoral Commission, the Zimbabwe Human Rights Commission, the Zimbabwe Media Commission, the Zimbabwe Gender Commission and the National Peace and Reconciliation Commission. Section 233 of the new Constitution provides for a list of objectives which must guide the operations of these commissions.

Independent Constitutional Commissions facilitate the protection of the democratic political system from manipulation by government because they act as part of a system of checks and balances against possible abuse of power by government and they monitor the general implementation of government policy.⁷⁷ For instance the Zimbabwe Human Rights Commission is mandated to monitor and assess the observance of human rights.⁷⁸ Amongst other things, this commission is mandated to check against decisions by government which may undermine the democratic system through violating human rights. Independent constitutional institutions are therefore a necessary element of the constitutional infrastructure of a democracy, and as such it is important that the constitution entrenches their independence and give them effective powers to act as robust oversight institutions for purposes of protecting democracy. Sections 233 and 235 of the new Constitution of Zimbabwe respectively mandate these institutions to promote constitutional democracy, and oblige the State to support these institutions to discharge their functions impartially and effectively.

⁷⁵ Diescho J.B., The paradigm of an independent judiciary: Its history, implications and limitations in Africa in Horn N and Bosl (eds), *The Independence of the Judiciary in Namibia* (2008) at 41.

⁷⁶ Law refers to the Constitution, legislation and any other form of law, of which such law must be consistent with the Constitution.

⁷⁷ Currie et. al. *The New Constitutional and Administrative Law* (2001) at 90.

⁷⁸ See Section 233 (a) and (c) of the Constitution of Zimbabwe.

CHAPTER 2: DEFINING SOCIO-ECONOMIC AND CULTURAL RIGHTS

2.1 Introduction

“What freedom has our subsistence farmer? He scratches a bare living from the soil provided the rains do not fail; his children work at his side without schooling, medical care, or even good feeding. Certainly he has freedom to vote and to speak as he wishes. But these freedoms are much less real to him than his freedom to be exploited. Only as his poverty is reduced will his existing political freedom become properly meaningful and his right to human dignity become a fact of human dignity.”
Julius K. Nyerere, former President of Tanzania

The phrase “socio-economic rights” is generally used as shorthand for economic, social and cultural rights. In this book, the phrase ‘socio-economic rights’ is used as the short name for social, economic and cultural rights. Socio-economic rights are defined differently in different contexts, but essentially these are fundamental human rights that provide legal protection for certain economic, social and cultural interests. Using this definition as a point of departure, the following paragraphs provide more detail on what socio-economic and cultural rights entail.

2.2 Socio-Economic and Cultural Rights are Fundamental Human Rights

Firstly, socio-economic rights are fundamental human rights. This is important to acknowledge and emphasise, right from the start because of the fact that socio-economic rights have not always been recognised as fundamental human rights. For instance, the previous Constitution of Zimbabwe did not provide for these rights as fundamental rights.

At an international level, the traditional distinction between so-called ‘first generation’ rights – civil and political rights – and ‘second generation’ rights – economic, social and cultural rights illustrates the reluctance by some States to recognise socio-economic rights as fundamental human rights. This partly explains why there are two separate international conventions on human rights – the International Convention on Civil and Political Rights (ICCPR) and the International Convention on Economic, Social and Cultural Rights (ICESCR) – rather than a single one.⁷⁹ However, many of the assumptions upon which the decision to adopt two separate covenants were based, have in hindsight proved to be overstated or mistaken.⁸⁰ Subsequently, it has been affirmed through the Vienna Declaration

⁷⁹ Asbjorn E., ‘Economic, Social and Cultural Rights as Human Rights’ in Asbjorn E Catrina K and Allan R.(eds), *Economic, Social and Cultural Rights* (1995) Kluwer Academic Publishes at 11.

⁸⁰ Ibid.

and Programme of Action that all fundamental human rights are ‘universal, indivisible and interdependent and interrelated’, and as such it is impossible to keep them separate.⁸¹

As mentioned earlier on, at the domestic level in Zimbabwe, socio-economic rights had also been side-lined until the adoption of the new Constitution. The Declaration of Rights in the previous Constitution of Zimbabwe (also known as the Lancaster House Constitution) almost

⁸¹ UN General Assembly, *Vienna Declaration and Programme of Action*, 12 July 1993, A/CONF.157/23, available at: <http://www.refworld.org/docid/3ae6b39ec.html> [accessed 14 April 2014].

exclusively protected civil and political rights.⁸² However, under the new Constitution a whole host of justiciable socio-economic rights are enshrined in Chapter four and are expressly recognised as justiciable ‘fundamental human rights’.⁸³

What does it mean for socio-economic rights to be recognised by the constitution as justiciable fundamental human rights? It means that they are derived from the “inherent dignity of the human person”⁸⁴ and that they are fundamental to living “fully human lives”.⁸⁵ All people are entitled to these rights simply because of the fact that they are human beings. This is stated clearly in the International Covenant on Economic, Social and Cultural Rights (ICESCR) which speaks of the ‘inalienable rights of all members of the human family’.⁸⁶ However, both the ICESCR and the new Constitution of Zimbabwe do allow for the restriction of the categories of persons in whom certain socio-economic rights can vest. The ICESCR provides that ‘developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals’.⁸⁷ In that vein, the new Constitution of Zimbabwe restricts certain socio-economic rights such as the right to ‘have access to basic health-care services’ to citizens and permanent residents of Zimbabwe.

2.3 Legal Protection

Socio-economic and cultural rights provide *legal protection* for people’s economic, social and cultural interests such as housing, food, water, family, profession, education, health, language and cultural practices. The socio-economic rights enshrined under the Zimbabwean Declaration of Rights are modelled around these interests.

2.4 Which Economic, Social and Cultural Rights?

In defining the scope of this study, the guiding principle has been to look at those rights enshrined in the Constitution of Zimbabwe that are also provided for under the International Covenant on Economic, Social and Cultural Rights (ICESCR). Regard has also been given to the African Charter on Human and Peoples’ Rights.

In line with that guiding principle, the *economic rights* discussed include the right to freely choose a profession, trade or occupation but do not include what might be considered traditional economic rights such as property rights and the right to freedom of contract as these rights are not included in the ICESCR. *Social rights* comprise the majority of the content of this study. These include the right to education, the right to health care, and the

⁸² The only arguable exception is the inclusion of the right to property under the former Declaration of Rights which might be considered an economic right.

⁸³ The title of section 44 speaks of the duty to respect “fundamental human rights and freedoms.”

⁸⁴ See the Preamble to the International Covenant of Economic, Social and Cultural Rights.

⁸⁵ Office of the UN High Commissioner for Human Rights ‘Economic, Social and Cultural Rights: Handbook for National Human Rights Institutions’ at vii.

⁸⁶ See the Preamble to the International Covenant on Economic, Social and Cultural Rights

⁸⁷ See Article 2(3) of the International Covenant on Economic Social and Cultural Rights.

right to food and water amongst other rights. There are some fundamental rights which are sometimes considered social rights, such as the right to privacy and the right to freedom from unfair discrimination, which are not included within the scope of this book as they are not included in the ICESCR. The *cultural rights* which will be discussed include the right to language and culture.

All in all, this book provides a commentary on the scope and content of the following eight socio-economic and cultural rights enshrined under the Declaration of Rights:

- Freedom from arbitrary eviction
- Right to education
- Right to health care
- Right to food and water
- Marriage rights
- Freedom of profession, trade and occupation
- Freedom of language and culture
- Right to social security

CHAPTER 3: APPLICATION AND ENFORCEMENT OF THE DECLARATION OF RIGHTS

3.1 Introduction

Section 44 and 45 of the new Constitution of Zimbabwe contains provisions on the application of the fundamental rights enshrined under the Declaration of Rights. Through section 85, the new Constitution provides for how these fundamental rights can be enforced. In the paragraphs below, these application and enforcement provisions are fully discussed.

3.2 Application

Application of the Declaration of Rights refers to how, for whom and against whom the fundamental rights and freedoms enshrined under the Declaration of Rights operate. In other words, provisions on the application of the Declaration of Rights prescribe persons that are entitled to the enshrined rights. It also prescribes persons and entities that are bound by those rights and the extent to which such persons are bound by the provisions of the Declaration of Rights.

In terms of the Constitution of Zimbabwe, the Declaration of Rights applies both vertically and horizontally. The Declaration of Rights applies vertically when it regulates the relationship between the State and an individual. Vertical application allows private persons to enforce their fundamental rights against the State. For example, a private citizen can approach a court of law seeking for an order against an agency of government to respect his fundamental right to water.⁸⁸

On the other hand, the Declaration of Rights applies horizontally when it regulates the legal relationship between private persons. By virtue of section 45(2), the Declaration of Rights binds not just the State but private persons as well and therefore obliges them to respect, protect, fulfil and promote the rights enshrined under Chapter four of the Constitution. Horizontal application allows private persons to enforce their fundamental rights against other private persons. For example, in terms of section 81(1) (d), a child may claim its fundamental right to family care against its parents or guardians.

Furthermore, the Declaration of Rights applies directly and indirectly. Direct application is when individuals rely directly on the provisions of the Declaration of Rights to seek the protection, respect or fulfillment of their enshrined fundamental rights. Direct application of the Declaration of Rights can be horizontal or vertical. Direct horizontal application is when an individual relies directly on the provisions of the Declaration of Rights to enforce his fundamental rights against another individual. Direct vertical application happens when an

⁸⁸ Farai Mushoriwa v City of Harare HC 4266/13

individual directly invokes the provisions of the Declaration of Rights to enforce their rights against the State.

Indirect application is when the fundamental rights enshrined under the Declaration of Rights are given effect through the relevant legislation or common law. For example, the Education Act [Chapter 25:04] gives effect to the constitutionally guaranteed right to education.⁸⁹ As a way of applying the Declaration of Rights indirectly, individuals may therefore enforce their constitutional right to education by invoking the provisions of the Education Act, and the courts are obliged to interpret that Act in a manner that gives effect to the right to education as enshrined under the Declaration of Rights. Indirect application of the Declaration of Rights can either be vertical (against the State) or horizontal (against another private person).

3.3 Rights Bearers under the Declaration of Rights

Section 45(3) of the Constitution provides that natural and juristic persons⁹⁰ are entitled to the rights and freedoms set out under Chapter four to the extent that those rights and freedoms can appropriately be extended to them. This means that, every legal person is generally entitled to the rights provided for under the Declaration of Rights. However there are some rights that cannot be claimed by certain legal persons because of the nature of those rights. For example, a juristic person in the form of a private corporation cannot claim the right to education because the nature of that right is such that it can only be appropriately extended to natural persons.

It is also important to note that while every person is entitled to these rights in terms of section 45(3), provisions of some of the individual rights themselves contain qualifiers which specify categories of persons who can claim certain rights. For example, children are the only persons who are entitled to the right to shelter under the Constitution of Zimbabwe.⁹¹ Therefore this right cannot be claimed by every person except for children. In terms of section 75(1) and (a), only Zimbabwean citizens and those that are permanent residents in Zimbabwe can claim the right to basic State funded education. These internal qualifiers are consistent with section 45(3) which entitles rights and freedoms to every person but 'to the extent that those rights and freedoms can appropriately be extended to them'.

3.4 Duty Bearers in terms of the Declaration of Rights

Section 44 of the new Constitution places a general duty upon the State, every person and institutions of government to respect, protect, promote and fulfill the rights and freedoms enshrined under the Declaration of Rights. In terms of section 44, the State and all its institutions are therefore bound to respect, protect, promote and fulfill the fundamental rights provided for under Chapter four of the Constitution.⁹² It is also important to note that the

⁸⁹ This Act may however need to be realigned as it was enacted way before the adoption of the new Constitution that provides for right to education.

⁹⁰ Juristic persons refer to persons that are non -human beings but are considered legal persons because they have capacity to act on their own. These include private companies or corporations.

⁹¹ See section 81(1) (f) of the Constitution of Zimbabwe

⁹² Chapter 4 of the Constitution of Zimbabwe is also known as the Declaration of Rights.

institutions of the State or government that are referred to under section 44 include all State or government institutions at every level. This means State institutions in all the tiers of government have a constitutional duty to respect, protect, promote and fulfill the fundamental rights enshrined under the Declaration of Rights. This includes public administrative agencies such as government parastatals and branches of government, independent constitutional commissions⁹³ and local authorities.

In terms of section 44, ‘*every person including juristic persons*’ must respect, protect, promote and fulfill the rights enshrined under the Declaration of Rights. This means, private persons are also bound by the section 44 constitutional duty. Private persons include human beings and juristic persons such as private companies and any organisations that have legal capacity to act on their own. However as will be discussed later under each socio-economic right, the extent to which private persons are bound by the Declaration of Rights depends on the nature of the right concerned and the duty imposed by that right.⁹⁴

3.5 The Constitutional Duty to Respect, Protect, Promote and Fulfill fundamental rights

In terms of section 44 of the Constitution, the application of the Declaration of Rights involves the duty to respect, protect, promote and fulfill the rights and freedoms enshrined therein. It is important to understand what these terms mean. The duty to respect encompasses the obligation to observe and refrain from interfering with the enjoyment of an existing fundamental right and freedom. For instance, the agencies of government such as local authorities have a duty to respect the citizens’ rights to water.⁹⁵ In terms of section 44 duty to respect fundamental rights, the local authorities have a constitutional duty to refrain from interfering with the enjoyment of an existing supply of water.⁹⁶

The duty to ‘*protect*’ fundamental rights includes the obligation to take measures that secure continued enjoyment of an existing right, especially in the face of an impending or an existing violation. In respect of section 77 (a) constitutional right to safe and clean water; where there is a threat of contamination of a source of public water supply such as a dam, the relevant institutions of government have a duty to take measures to prevent or end such contamination.

The duty to ‘*promote*’ fundamental rights includes the obligation to take pro-active measures that seek to enhance the enjoyment of fundamental rights that are enshrined under the Declaration of Rights. This includes measures that are targeted at creating or increasing public awareness of the constitutional rights. One such duty is the obligation of the State to ensure public awareness of the Constitution, by translating it into all official languages and disseminating it as widely as possible.⁹⁷ Facilitating access to information on health issues is one of the State duties to ‘*promote*’ the right to health care.⁹⁸

⁹³ Independent constitutional commissions are only independent from interferences from other arms of government but they are subject to the Constitution and law.

⁹⁴ See section 45(2) of the Constitution of Zimbabwe

⁹⁵ See section 77(a) of the Constitution of Zimbabwe

⁹⁶ See *Farai Mushoriwa v City of Harare* HC 4266/13

⁹⁷ See section 7 (a) of the Constitution of Zimbabwe

⁹⁸ See section 76(4) of the Constitution of Zimbabwe

The duty to *'fulfil'* fundamental rights relates to the obligation to deliver services that facilitate the enjoyment or realization of particular rights enshrined under the Declaration of Rights. For instance, in terms of section 76 right to healthcare, the State has a duty to fulfill the realization of this right by way of establishing health care institutions in remote areas where such institutions do not exist.⁹⁹

3.6 Enforcement of the Fundamental Rights and Freedoms

3.6.1 Introduction

Enforcement of fundamental rights relates to how persons can claim or enforce their constitutionally guaranteed rights when they are faced with or when they are experiencing or have already suffered a violation of those rights. For purposes of effective implementation of the Declaration of Rights, the constitution must provide for strong enforcement mechanisms, which include allowing broad locus standi. Through section 85, the new Constitution of Zimbabwe regulates the issue of locus standi, which is discussed in the paragraphs below. However before discussing the issue of locus standi, it is important to note that in terms of section 85(2), the fact that an applicant has contravened the law does not debar him or her from approaching a court for relief on the basis of any of the section 85 locus standi. The implications of section 85(2) are such that even if an applicant is in violation of the law, he or she will not be denied locus standi simply on the basis of his or her failure to comply with the existing law. In view of this, the rule that the court cannot entertain a claim by a person whose hands are legally dirty is now unconstitutional.¹⁰⁰

3.6.2 Locus Standi

Locus standi is one of the key elements of enforcement. Locus standi, which is sometimes referred to as 'legal standing' concerns whether someone who approaches a court is the appropriate person to present the matter to the court for adjudication.¹⁰¹ For one to obtain locus standi to enforce the entrenched rights, he must meet certain constitutional requirements. In other words, the court has to examine whether an applicant meets these requirements in order to determine whether such a person has locus standi to bring the intended action before it. If the applicant fails to meet those requirements, then the court may decline to hear the matter despite the merits of the case he intends to bring before the court. The provisions of section 85(1) (a-e) prescribe various kinds of locus standi. Before discussing these types of locus standi and their requirements, it is important to note that the new Constitution has introduced a wide and liberal approach to determining locus standi as opposed to a narrow strict one.¹⁰²

3.6.3 Person acting in their own interests

⁹⁹ This is part of the State duties under section 76 (4) of the Constitution of Zimbabwe

¹⁰⁰ This rule was applied by the Administrative Court in *Associated Newspapers of Zimbabwe v Minister of State for Information and Publicity* to deny the applicant locus standing on the basis that it had failed to comply with the law concerning the registration of newspapers.

¹⁰¹ I Currie and J De Waal. *The Bill of Rights Handbook* 6th Edition (2013) 73

¹⁰² See the judgement of Chidyausiku CJ in *Jealous Mbizvo Mawarire v Robert Gabriel Mugabe* Judgment No. CCZ 1/13 page 8

In terms of section 85(1) (a) of the Constitution, any person acting in their own interests is entitled to approach the court seeking the enforcement of their rights that are provided for under the Declaration of Rights. In order to satisfy the requirements of this kind of locus standi, an applicant who intends to act on his own must simply allege that his fundamental right that is enshrined under the Declaration of Rights has been, is being or is likely to be infringed. As per the Constitutional Court of Zimbabwe ruling in *Jealous Mbizvo Mawarire v Robert Gabriel Mugabe*, when determining the section 85(1) (a) locus standi, the Court must adopt a liberal approach whereupon it should;

‘...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’¹⁰³

Therefore the Court will grant section 85(1) (a) locus standi even in cases where a litigant has not yet suffered the violation but perceives a threat of such a violation. However it is a constitutional requirement that the perceived threat or the actual violation must concern a right that is enshrined under the Declaration of Rights. An applicant can therefore not seek to use the section 85(1) (a) locus standi if the right that he is seeking to enforce is not provided for under Chapter four of the Constitution.

3.6.4 Person acting on behalf of another person

Section 85(1) (b) provides for locus standi to persons who intend to bring an action before the court acting in the interests of another person. An applicant will be granted such locus standi if she can show to the court that the person she is representing is unable to act on his own. There are various reasons why one may be unable to act on his own and such reasons include the fact that such a person is in detention or is economically disadvantaged to access justice. Ordinarily, an applicant who intends to act on behalf of another person must show proof that the person in whose interests he is acting on behalf of has consented to that action. However in certain circumstances where it is impossible to obtain consent, such an applicant should be allowed to bring the action on the basis of section 85(1) (b) if it is apparently clear from the circumstances that the person in whose interests the action is being brought before the court would have consented to the action.

Under the section 85(1) (b) locus standi, the applicant must allege that the fundamental right of the person in whose interest he is acting has been, is being or is likely to be infringed. The fundamental right concerned must be provided for under the Declaration of Rights. Such an applicant must also demonstrate that the person he is acting for has sufficient interest in the remedies he is claiming.

3.6.5 Person acting as a member or in the interests of a group or class of persons

¹⁰³ See the judgement of Chidyausiku CJ in *Jealous Mbizvo Mawarire v Robert Gabriel Mugabe* Judgment No. CCZ 1/13 on page 8

In terms of section 85(1) (c), an applicant is allowed to bring an action before the court for the enforcement of the Declaration of Rights, in the interest of a group or class of persons.¹⁰⁴ Such an applicant may do so as a member of the group or class of persons, but he must clearly identify and specify the class of persons or the group that he is acting for.¹⁰⁵ As a requirement, the applicant must allege that the fundamental rights of the concerned group or class of persons have been, are being or are likely to be infringed. The fundamental rights that the applicant intends to enforce must be provided for under the Declaration of Rights in order for such a litigant to obtain the section 85(1) (c) locus standi. The class or group of persons ‘represented’ in the action must have sufficient interest in the remedies or relief being claimed.

3.6.6 Person acting in public interest

In terms of section 85(1) (d), an applicant is allowed to bring an action for the enforcement of the Declaration of Rights, in the interest of the public. There is not enough information in our local jurisprudence to provide guidance as to the requirements that an applicant must fulfil in order to be allowed to bring an action in terms of section 85 (1) (d) of the Constitution. However, our Courts should take a cue from the Constitutional Court of South Africa’s ruling in *Ferreira v Levin NO 1996 (1) SA 984 (CC)* paragraph 234, where O’Regan J identified factors relevant to determine whether a person is genuinely acting in the public interest as including;

‘whether there is another reasonable and effective manner in which the challenge can be brought before the Court, the nature of relief sought, and the extent to which it is of general application, and the nature 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 to present evidence and argument to the court.’

As the same court held in *Lawyers for Human Rights v Minister of Home Affairs 2004 (4) SA 125 (CC)*, the factors mentioned in *Ferreira v Levin* must not be viewed as exhaustive. Other factors that the court may consider could include ‘*the degree and vulnerability of the people affected by the order, the nature of the right alleged to be infringed and the consequences of the infringement of the right.*’¹⁰⁶ In determining whether an applicant is indeed acting in public interest, the court enjoys some degree of discretion but in exercising such discretion, the court must be guided by the fact that the new Constitution requires the courts to be flexible and liberal when making such a determination, or else the object of the constitution in entrenching the broad locus standi will be defeated. The object of the Constitution in this regard is to ensure the effective enforcement of the Bill of Rights by allowing persons to seek the court’s intervention whenever their rights are trampled upon.¹⁰⁷ In that regard, the dictum of Chaskalson P in *Ferreira v Levin* is worthy of consideration by our courts;

¹⁰⁴ See *Ngxuza v Permanent Secretary, Department of Welfare, Eastern Cape 2001 (2) SA 609 (E) 618E-619F*; where the applicant found locus standi on similar provisions as section 85(1) (c) of the Constitution of Zimbabwe.

¹⁰⁵ *Maluleke v MEC Health and Welfare Northern Province 1999 (4) SA 367 (T)*

¹⁰⁶ *Lawyers for Human Rights v Minister of Home Affairs 2004 (4) SA 125 (CC)* para 18

¹⁰⁷ I Currie and J de Waal. *The Bill of Rights Handbook 6th Edition* (2013) page 73

‘It is my view that we should rather adopt a broad approach to standing. This would be consistent with the mandate given to this 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’¹⁰⁸

The Constitution of Zimbabwe bestows upon the courts the responsibility of ensuring that the Constitution is upheld, particularly ‘*safeguarding human rights and freedoms and the rule of law.*’¹⁰⁹ In order to achieve this, it is imperative that the courts must be flexible when examining locus standi in terms of section 85(1) (d). In cases where an applicant seeks a relief that will benefit the public and does not undermine or impair any of the constitutionally entrenched founding principles of openness, justice, human dignity and equality, the court must be ready to grant such an applicant with the section 85(1) (d) locus standi.

3.6.7 Association acting in the interests of its members

In terms of section 85(1) (e), an association is allowed to act as an applicant seeking the enforcement of the Declaration of Rights on behalf of its members. In such a case, the association must allege that the fundamental rights of its member(s) that are enshrined under the Declaration of Rights have been, are being or are likely to be infringed. The association must show that the persons in whose favour it is acting are its bona fide members and such members have consented to the action brought before the court.

¹⁰⁸ *Ferreira v Levin NO* 1996 (1) SA 984 (CC) para 165

¹⁰⁹ See section 165(1) (c) of the Constitution of Zimbabwe

CHAPTER 4: INTERPRETING THE DECLARATION OF RIGHTS

4.1 Introduction

In order to determine the scope and content of the socio-economic rights or governmental duties provided for under the Declaration of Rights, it is important to engage in a discussion on how the new Constitution requires the Declaration of Rights to be interpreted. Section 46 of the Constitution is a very important provision in that discussion. Though not in an exhaustive manner, section 46 of the Constitution sets out guiding principles, and obliges every court or tribunal to apply them when interpreting any provision, the scope and content of the rights enshrined under the Declaration of Rights.

4.2 Guiding principles

In terms of section 46(1) (a), when interpreting the provisions under the Declaration of Rights, the court must give full effect to the rights and freedoms enshrined therein. This places a constitutional duty upon the courts to prefer an interpretation that is wide enough to give full effect to those rights as opposed to a narrow interpretation.

Furthermore, when interpreting the provisions under the Declaration of Rights, the courts are required to promote the values that underlie a democratic society based on openness, justice, human dignity, equality and freedom.¹¹⁰ What this means is that, when determining the scope and content of human rights, the courts are required to prefer an interpretation that fully advances and protects these underlying values of democracy, particularly the constitutional founding values and principles provided for under section 3. In that vein, the maximum advancement of the respect and protection of fundamental human rights is situated at the center of proper interpretation of the provisions of the Declaration of Rights.

Most of the rights enshrined under the Declaration of Rights are implemented through particular legislation enacted by the Legislature. Through section 46(2), the Constitution requires the courts to interpret such legislation, to develop common and customary law in a manner that promotes and is guided by the spirit and objectives of Chapter four, which is the Declaration of Rights. Fundamentally, one of these objectives is that every person who is entitled to these rights must be able to fully enjoy them and such rights must be respected and protected at all times, and any infringement of such rights must comply with the strict requirements of justification set out through section 86 of the Constitution. The courts are therefore obliged to interpret any other law in a manner that does not contradict the spirit and object of the Declaration of Rights but rather in a manner that fully advances the enjoyment of the enshrined rights and freedoms.

¹¹⁰ See section 46(1) (b) of the Constitution of Zimbabwe.

4.3 International and Foreign Law Considerations

When interpreting the Declaration of Rights, section 46(1) (c) of the Constitution requires the courts to take into account international law and all treaties and conventions to which Zimbabwe is a party. Therefore it is mandatory for the courts to consider international law when determining the scope and content of the rights enshrined under the Declaration of Rights. Relevant international law includes *inter alia* the United Nations General Comments on different rights conventions such as the International Covenant on Economic, Social and Cultural Rights; the African Charter on Human and Peoples' Rights, the Southern African Development Community (SADC) Principles and Guidelines Governing Democratic Elections. The courts must therefore prefer an interpretation of the enshrined rights that is consistent with, rather than contradictory to international law.

In terms of section 46(1) (e) of the Constitution, the courts may consider relevant foreign law when interpreting the Declaration of Rights. Relevant foreign law refers to decisions of superior courts in similar jurisdictions. It is important to note that, while the courts are obliged to consider international law, they are allowed discretion to consider foreign law or not. However, both international and foreign law plays a crucial role in providing Zimbabwean courts with guidance on the interpretation of some of the new fundamental rights enshrined under the Declaration of Rights. For instance, currently Zimbabwe has a very limited jurisprudence on the interpretation of socio-economic rights. The courts will therefore look up to international law and foreign law views on the interpretation of the scope and content of some of these fundamental rights.

4.4 Provisions of the Constitution

Section 46(1) (d) requires the courts to pay due regard to all provisions of the Constitution, when interpreting the Declaration of Rights. Essentially when determining the scope and content of fundamental human rights provided for under the Declaration of Rights, the courts will consider not just the specific clauses under which the rights are provided for but other relevant constitutional provisions within and or outside of the Declaration of Rights. For instance when determining the scope of governmental duty under the Declaration of Rights, particular regard must be given to the principles and objectives set out in Chapter two of the constitution.¹¹¹ When determining the scope of the fundamental human rights, regard must also be given to the provisions under part 3 of the Declaration of Rights which is an elaboration of rights enshrined under part 2 of the same.

¹¹¹ See section 8(2) of the Constitution whose implication is that, the constitutional obligation of the State to respect, protect, promote and fulfil the rights enshrined under the Declaration of Rights must be determined by paying due regard to the national objectives set out in Chapter 2 of the Constitution.

CHAPTER 5: CONSTITUTIONAL REMEDIES AGAINST THE INFRINGEMENT OF SOCIO-ECONOMIC AND CULTURAL RIGHTS

5.1 Introduction

Section 85 is the key constitutional provision on constitutional remedies against the infringement of socio-economic rights. In terms of Section 85(1), where a fundamental right has been violated or is being violated or is under threat, 'the court may grant appropriate relief, including a declaration of rights and an award of compensation'. While commenting on section 38 of the South African Constitution, which is drafted similarly to section 85(1) of the Constitution of Zimbabwe, in *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) para 19 the Constitutional Court of South Africa stated that:

'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.'

Appropriate relief therefore constitutes any suitable remedy that is just and equitable. Where a breach of any right has taken place or is imminent, a court is under duty to ensure that an effective relief is granted. Thus a person who has suffered or is likely to suffer a violation of any of their socio-economic rights is entitled to a just and equitable relief, and in terms of section 85 of the Constitution of Zimbabwe, the court is not restricted to a fixed list of remedies but can grant any appropriate relief that is capable of securing the protection, fulfilment and enforcement of the rights in question. In some cases, more innovative remedies may have to be developed to vindicate the constitution. Sometimes the court may grant more than one remedy if it deems it to be an appropriate relief. For instance the court may issue a declaration of rights and a prohibitive interdict simultaneously or a declaration of rights and a mandamus. The nature of the right infringed and the nature of the infringement will provide guidance as to what remedy would constitute an appropriate relief. Below is a discussion of some of these remedies which can be granted where a violation of socio-economic rights has taken place.

5.2 Declaration of Invalidity

As an appropriate remedy for the infringement of socio-economic rights (or any other fundamental rights) the court may grant a declaration of invalidity of the infringing law or conduct. Such a declaration means that the law or conduct in question is of no legal force and cannot be enforced anymore. In terms of section 167(3), the Constitutional Court makes

the final decision on the constitutional invalidity of legislation or conduct of the President. The Constitutional Court and the High Court are competent to declare invalid any conduct or legislation¹¹² which unconstitutionally infringes upon the socio-economic right in question. For instance in *Farai Mushoriwa v City of Harare* HC 4266/13, Bhunu J declared the decision by the City of Harare to disconnect water supply to be unconstitutional and therefore invalid.

5.3 Declaration of Rights

A declaration of rights is one of the remedies mentioned under section 85 (1). This remedy will be available where there is a clear dispute or uncertainty about the existence or validity of a right. Thus where there is a dispute about the existence, applicability or validity of a socio-economic right like the right to freedom from arbitrary eviction, any of the persons listed under section 85(1) (a-e) can approach the court for a declaration of rights order.¹¹³ If the court grants the application, the order will confirm the existence, applicability or validity of the right in question. In the past, the judiciary has ruled that a person seeking a declaration of rights must set forth his contention as to what the alleged right is and the contention must refer to a constitutional or legal right and not the factual basis upon which a right is based.

5.4 Compensation

In terms of section 85(1), a competent court may grant an award of compensation as an appropriate remedy for a violation of fundamental rights. When litigating the Bill of Rights (also known as the Declaration of Rights), an applicant can seek an award of compensation in addition to another remedy. Where a person has suffered financial loss as a result of violation of his or her fundamental rights, such a person is entitled to claim damages.

5.5 Prohibitive Interdict

Where a socio-economic right or any other fundamental right is being violated or is likely to be violated, any person listed under section 85(1) (a-e) may approach the court and seek an interdict as an appropriate relief. An interdict can be sought as a remedy to prevent the threatened commission or continued commission of a violation of a fundamental right. An interdict can be interim or final. Subject to the fulfilment of other requirements, an interim interdict is granted where the applicant succeeds to demonstrate a *prima facie* right. Thus an interim interdict enforces the *prima facie* right for a period of time, at the end of which a clear right must be proved or the interim interdict will be discharged. A final interdict is granted where the applicant has succeeded to show that a clear right has been infringed or there is a

¹¹² However in terms of section 167 (3) a declaration of invalidity of an Act of Parliament by the High Court will need to be confirmed by the Constitutional Court before it takes effect.

¹¹³ See the decision of the Magistrate's court in *Mavis Marange v Chitungwiza Municipality and Glory to Glory Housing Cooperative* 106/14. In this case, the court dismissed the point in limine raised by the defendant where it alleged that the applicant did not have the right it claimed.

reasonable possibility that the right may be infringed; that there is no other appropriate legal remedy available; and the applicant will suffer irreparable harm if the interdict is refused.¹¹⁴

5.6 Mandamus

A mandamus is a type of an interdict which can be used to compel the respondent in human rights litigation to perform a certain action to fulfil or protect the right in question. A mandamus can be sought to compel the state or an agency of government to fulfil its section 44 constitutional obligation to ensure that the rights enshrined under the Declaration of Rights are protected and fulfilled. For instance, under certain circumstances, a mandamus may be sought to compel a Local Authority to fulfil its duties under section 77(a) right to clean and potable water.

A mandamus is also available as appropriate relief where one wishes to compel a person or the state to correct the effects of its unconstitutional action which has resulted in the violation of a right. For example, where the state has violated one's right to freedom from arbitrary eviction (provided for under section 74 of the Constitution) by evicting the applicant without a court order, the applicant may seek the court to grant a mandamus where the state is directed to deal with the effects of its unconstitutional action and such an order may include directing the state to provide the evicted persons with transport to return to their homes.

5.7 Structured Interdict

A structured interdict is a type of an interdict which directs a violator to take particular steps to rectify a violation of a right under the court's supervision. When the court grants such an interdict, it will require the respondent to furnish the court with an affidavit setting out the manner in which the order will be implemented. A structured interdict may be granted where an applicant successfully demonstrates to the court that the respondent is refusing to commit itself to a date by which it will perform an enforceable undertaking.

¹¹⁴ See the decision of the court in *Mavis Marange v Chitungwiza Municipality and Glory to Glory Housing Cooperative* 106/14.

CHAPTER 6: LIMITATION OF SOCIO-ECONOMIC RIGHTS

6.1 Introduction

Generally, fundamental rights do not operate absolutely. However in terms of the Constitution of Zimbabwe, certain fundamental rights cannot be limited.¹¹⁵ Limitation of fundamental rights refers to the idea that human rights can be justifiably infringed.¹¹⁶ Socio-economic and cultural rights are subject to limitation just like civil and political rights. However this does not mean that these rights can be limited without strict adherence to the constitutional requirements on limitation of fundamental rights. Thus limitation of any of the fundamental rights enshrined under the Declaration of Rights must be constitutional.

Basically there are two key approaches which the court can take to assess the constitutionality of limitation of socio-economic and cultural rights. The court may take the approach of applying the section 86 general limitation clause¹¹⁷ to determine the proportionality and reasonableness of the limitation or the court may apply the internal limitations to determine the reasonableness of the infringement of the rights.¹¹⁸ Where the court takes the section 86 general limitation approach, it will take into account the factors listed under section 86(2) (a-f) to establish the proportionality and reasonableness of the limitation. If the court applies the special limitation clauses, it will focus on determining whether the state has taken reasonable legislative and other measures to ensure the progressive realization of the rights as permitted by the available resources. The Zimbabwean courts have not yet pronounced their approach concerning how they will assess the constitutionality of limitation of socio-economic rights. However, the two approaches are fully discussed in the paragraphs below.

Limitation of socio-economic rights through section 86 general limitation clause

Through section 86, the Constitution requires that limitation of all fundamental rights provided for under the Declaration of Rights must comply with the requirements set out under section 86(2) (a-f). Thus in terms of section 86 (2) any authority or person wishing to limit socio-economic rights must demonstrate that;

- a) Such limitation is done in terms of a law of general application and
- b) 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 the nature of the right, purpose of the limitation, the nature and extent of the limitation, the rights and freedoms of other persons, the relationship between such

¹¹⁵ Section 86(3) enlists the right to human dignity, freedom from slavery or servitude and right to fair trial as some of the rights which cannot be limited by any law.

¹¹⁶ Currie I. and De Waal J., *The Bill of Rights Handbook 6th ed* (2013) at 151.

¹¹⁷ See the minority judgment delivered by Ngcobo J., in *Khosa and Others v Minister of Social Development and Others* 2004 (6) BCLR 569 (CC), *Mahlaule and Another v Minister of Social Development* (CCT 13/03 para 112.

¹¹⁸ See the *Government of the Republic of South Africa v Grootboom 2001 (1) SA 46 (CC)* para 43.

limitation and its purpose and whether there are alternative less restrictive means of limiting the right.

In order to understand the application of section 86 as a general limitation clause in determining the constitutionality of limitation of fundamental rights, it is worthy to examine this clause in detail with particular reference to the limitation of socio-economic rights.

6.2 Limitation in Terms of a Law of General Application

Section 86(2) of the Constitution requires limitation of fundamental rights to be done only in terms of a law of general application. The idea of ‘law of general application’ is an expression of the principle of rule of law; wherein government action must be based on the law.¹¹⁹ Thus any limitation of fundamental rights, including socio-economic rights must be authorized by law. Law refers to all forms of legislation, principles of customary law and common law.¹²⁰ A mere policy or practice by government or an organ of state does not qualify as law.¹²¹ Fundamental rights including socio-economic rights cannot be limited through a government practice or policy that is not provided for through legislation. However the fact that the limitation is provided for by a law does not automatically make such limitation constitutional. The law in question must be of general application. This simply means that in its form, the law must be sufficiently clear, accessible and precise that those who are affected by it can ascertain the extent of their rights and obligations¹²² and in substance the law must not apply arbitrarily but equally to all. Equal application means that the law must not solely apply to an individual case or restrict the rights only of a particular individual or group of individuals but it must provide parity of treatment in the sense that like cases must be treated alike.¹²³

Where an administrative agency is given power to implement legislation that has an effect of limiting fundamental rights, the empowering or such enabling legislation must provide clear guidelines on how the powers are to be exercised. Failure to provide such guidelines will disqualify the enabling legislation from being considered as a ‘law of general application’.¹²⁴

The limitation must be fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom.

6.3 The Test for Proportionality and Fairness

Zimbabwean courts have not yet pronounced themselves on what this constitutional provision mean. However section 46(1) (a) and (e) requires courts to interpret the Declaration of Rights in a manner that gives full effect to the rights and freedoms enshrined therein. In order to do

¹¹⁹ Currie I. and De Waal J., ‘*The Bill of Rights Handbook 6th ed*’ (2013) at 155.

¹²⁰ *Du Plessis v De Klerk* 1996 (3) SA 850 (CC) para 44.

¹²¹ *Hoffman v South African Airways* 2001 (1) SA 1 (CC) para 41.

¹²² *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC) para 47.

¹²³ Currie I. and De Waal J., ‘*The Bill of Rights Handbook 6th ed*’ (2013) at 160.

¹²⁴ Currie I and De Waal J., ‘*The Bill of Rights Handbook 6th ed*’ (2013) 161. Also see *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC).

so, the courts may consider relevant foreign law when interpreting provisions under the Declaration of Rights. As such, the courts can rely on the interpretation of similar constitutional provisions by foreign courts operating in similar legal systems as Zimbabwe's. Section 36 of the South African Constitution contains provisions that are similar to section 86 of the new Constitution of Zimbabwe. Section 36 of the Constitution of South Africa requires limitation of fundamental rights to be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. In a landmark judgement in *S v Makwanyane* (CCT3/94) [1995] ZACC 3; 1995 (6), the South African Constitutional Court held that the section 36 limitation clause requires limitation of constitutional rights to be for a purpose that is reasonable and necessary in a democratic society based on human dignity, equality and freedom.¹²⁵ The court also held that an evaluation of whether a limitation complies with this general limitation clause is essentially an assessment based on proportionality wherein the court weighs competing values.¹²⁶

Section 86 of the new Constitution of Zimbabwe is different from section 36 of the Constitution of South Africa in the sense that the former requires the limitation to be fair and necessary in addition to being reasonable and justifiable as in the case of section 36 of South Africa's Constitution. However, with some adjustments to accommodate the requirement of fairness, the interpretation of section 36 of the South African Constitution remains relevant in trying to deduce the correct meaning of section 86 of the new Constitution of Zimbabwe. Thus taking into account the ruling in *S v Makwanyane*, any law or conduct that seeks to restrict fundamental rights, including socio-economic rights enshrined under Chapter 4 of the new Constitution of Zimbabwe must do so for reasons that are acceptable to a democratic society based on openness, justice, human dignity, equality and freedom. Furthermore, such restriction or limitation must not infringe the rights beyond what is necessary. In addition, because section 86(1) requires fundamental rights to be exercised with due regard to the rights and freedoms of other persons, the limitation must therefore be found to be fair to the bearer of the affected rights and other persons whose rights are being protected by such limitation.

In order to establish whether a limitation is fair, reasonable, necessary and justifiable in a democratic society, the court must consider a variety of factors which include; the nature of the right or freedom concerned and its importance in a democratic society based on openness, justice, human dignity, equality and freedom; the purpose of the limitation and its importance to a democratic society based on openness, justice, human dignity, equality and freedom; the nature and extent of the limitation and its efficacy; the need to strike a balance between one's enjoyment of his fundamental rights and the prejudice [such enjoyment] may cause to other persons' enjoyment of their fundamental rights; whether the limitation does not infringe the right more than what is necessary and whether the desired purpose could reasonably be

¹²⁵ *S v Makwanyane* 1995 (3) SA 391 (CC) para 104.

¹²⁶ *Ibid.*

achieved through other means that are less damaging to the right concerned.¹²⁷ As section 86(2) indicates, these factors do not constitute an exhaustive list but they should be taken as the minimum that the court can examine in order to establish the constitutional validity of a limitation. Once the court has examined each of these factors, it must then weigh up what the factors have revealed on one hand about the purpose, effects and importance of the infringing law or conduct and on the other hand about the nature and effect of the infringement caused by the law or conduct.¹²⁸ In the sections that follow, these factors are examined in greater detail.

6.3.1 The Nature of the Right or Freedom in Question: Section 86(2) (a)

When determining the reasonability of a limitation of fundamental rights, the court must examine the importance of the right that is being limited. Whilst all fundamental rights are important, it has been held in human rights litigation cases that some rights weigh more heavily than others¹²⁹ and as such, a right that is of particular significance to the constitutional vision of creating and sustaining a democratic society based on openness, justice, human dignity, equality and freedom will carry a great deal of weight in the exercise of balancing rights against justifications for their infringement.¹³⁰ Consequently, very compelling reasons will be required in order to justify the limitation of such rights.

6.3.2 The Purpose of the Limitation: Section 86(2) (a)

In determining the justifiability and necessity of a limitation, the court must consider whether the purpose for the limitation is something that can be said to be reasonably acceptable in a democratic society based on the values mentioned under the provisions of section 86.¹³¹ Not in an exhaustive manner, section 86(2) (a) identifies some of these reasonably acceptable purposes for limiting rights and they include defence, public safety, public order, public morality, public health, regional and town planning and general public interest. It is important to emphasize that the fact that a limitation seeks to serve a purpose mentioned under section 86(2) (b) or any other reasonably acceptable purpose in a democratic society does not automatically mean that such limitation is constitutional. Such a limitation will still need to pass the constitutional muster of proportionality and fairness posed by section 86(2) (a-f).

6.3.3 The Nature and Extent of the Limitation: Section 86(2) (c)

This factor is considered by the court in order to determine the reasonability of the limitation. As mentioned earlier on, the constitutional test for reasonability is assessed on the basis of proportionality.¹³² It is a cardinal rule of proportionality that a law or conduct that seeks to

¹²⁷ This interpretation is borrowed and adapted from the ruling of Chaskalson C J., in *S v Makwanyane* 1995 (3) SA 391 (CC) para 104. The interpretation is adapted taking into account the requirement of fairness.

¹²⁸ *S v Makwanyane* 1995 (3) SA 391 (CC) para 104.

¹²⁹ Currie I. and De Waal J., *'The Bill of Rights Handbook 6th ed'* (2013) at 164.

¹³⁰ Currie I. and De Waal J., *'The Bill of Rights Handbook 6th ed'* (2013) at 164.

¹³¹ These values are openness, justice, human dignity, equality and freedom.

¹³² See Chaskalson C J's ruling in *S v Makwanyane* 1995 (3) SA 391 (CC).

limit fundamental rights must not ‘use a sledgehammer to crack a nut’.¹³³ As such when determining the reasonability of a limitation, the court will examine the manner in which the limitation infringes or restricts the right and whether such a limitation restricts the right more than what is necessary. Thus the infringement of the right must not be more extensive than is warranted by the purpose that the limitation seeks to achieve.¹³⁴

6.4 The Need to Ensure that the Enjoyment of Rights and Freedoms by Any Person Does Not Prejudice the Rights and Freedoms of Other: Section 86(2) (d)

This section requires the court to ensure that a meaningful and fair balance is struck in cases where fundamental rights are in competition against each other. Such a balance must allow one to enjoy their fundamental rights without unnecessarily undermining the ability of the other person to enjoy their rights too. For instance, one’s desire to exercise her fundamental right of access to information held by a private person must not unfairly prejudice the right to privacy entitled to the bearer of that information. One’s desire to exercise their right to education should not unfairly prejudice another person’s property rights and the inherent right to realize material gain out of that property. Fundamental rights are more often in competition against each other and in the interests of fairness, the courts must seek to strike that balance when determining the constitutional validity of a limitation in terms of section 86(2) (d).

6.5 The Relationship between the Limitation and its Purpose: Section 86(2) (e)

Section 86(2) (e) imposes a duty upon those that seek to justify the limitation to demonstrate that there is a rational connection between the limitation itself and what it seeks to achieve. The restrictive conduct or law in question must be reasonably capable of achieving its intended legitimate purpose. If the law or conduct does not serve the purpose for which it is designed, then such law or conduct cannot be a reasonable and justifiable limitation of a fundamental right.¹³⁵ Equally, if the law or conduct in question marginally contributes to achieving its intended purpose, it cannot be taken as a reasonable and justifiable infringement of a fundamental constitutional right.¹³⁶

6.6 Whether there are any Less Restrictive Means of Achieving the Purpose of the Limitation

This requires the court to examine whether there are alternative means that are less damaging to the rights and whether such alternative means are reasonably capable of achieving the same purpose. If a less restrictive and equally effective alternative method exists to achieve the purpose of the limitation, then that less restrictive method must be preferred.¹³⁷ Whilst the court may on its own accord, examine whether there are any less restrictive alternatives, it is

¹³³ *S v Manamela* 2000 (3) SA 1 (CC) para 34.

¹³⁴ Currie I. and De Waal J., ‘*The Bill of Rights Handbook 6th ed*’ (2013) at 168.

¹³⁵ Currie I. and De Waal J., ‘*The Bill of Rights Handbook 6th ed*’ (2013) at 169.

¹³⁶ *Ibid.*

¹³⁷ *Ibid* at 170.

important for the party opposing the limitation to suggest less restrictive means of achieving the intended purpose.

In some cases where the court is called to determine whether there are less restrictive alternative means which the state could have used to achieve the same purpose, the court may have to exercise a degree of deference to the state in order to avoid second guessing the wisdom of policy makers.¹³⁸ However deference should not be taken to mean that the court must abdicate from its cardinal section 165(1) (c) role to ‘*safeguard human rights, freedoms and the rule of law*’. As such the court cannot, in the name of deference, allow conduct or law that is clearly disproportionate or overbroad to limit fundamental rights.

6.7 Application of Section 86 in Litigating the Declaration of Rights

The application of section 86 when litigating the Declaration of Rights is essentially a two stage process wherein the applicant, after having demonstrated their locus standi [in terms of section 85(1) (a-e)], must clearly show that a fundamental right provided for under the Declaration of Rights has been infringed or is threatened.¹³⁹ Once the applicant succeeds to show that a clear fundamental right has been violated or is threatened or is being violated, the litigation process moves to the second stage where the respondent must demonstrate that the limitation passes the constitutional muster posed by section 86.

There is no requirement to the effect that the factors set out under section 86 must be proven in a certain order. When defending a limitation, one can prove these factors in any order as long as it tells a coherent story which is that; the limitation is fair, necessary, reasonable and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom. For instance, having demonstrated that the limitation is in terms of a law of general application, the party defending the limitation can proceed to show that the limitation is fair, necessary, reasonable and justifiable in a democratic society considering that it serves a reasonably acceptable purpose in a democratic society [section 86(2) (b)], that it infringes a weighty right but there are very compelling reasons for the limitation [section 86(2) (a)], that there is a logical or rational connection between the limitation itself and the purpose it seeks to achieve [section 86(2) (e)], that the nature and extent of the limitation is not extensive to go beyond what is necessary [section 86(2) (c)] and that there is no other less restrictive and equally effective alternative means of achieving this purpose. Normally it is the duty of the applicant to demonstrate that there are less restrictive and equally effective methods that exist.

It appears that section 86(2) (d) may not always be applicable when justifying a limitation. That provision seems to apply only in situations where there is a conflict between one’s enjoyment of her rights and the other person’s entitlement to his constitutional fundamental

¹³⁸ Currie I. and De Waal J., ‘*The Bill of Rights Handbook 6th ed*’ (2013) at 170.

¹³⁹ In terms of section 85(1) , a person is entitled to approach the court alleging that a fundamental right enshrined under chapter four of the constitution ‘*is being or is likely to be infringed*’ or has already been infringed.

rights as well. With regards to this factor, both the applicant and the respondent will have to provide their own versions of what would be a fair balance.

6.8 Limitation of Socio-Economic Rights by Virtue of Special or Internal Limitation Clauses

Socio-economic rights may be limited by special or internal limitation clauses provided for under the Constitution. Usually these special limitations clauses are provided for under the section that sets out the specific right. Special limitations must however be distinguished from internal demarcations. Internal demarcations define the scope of the right available.¹⁴⁰ For example, section 75(2) contains some demarcations that define the scope of the right to establish and maintain an independent educational institution. These demarcations include that one can only exercise this right at their own material expense, which means that one cannot claim a right to establish and maintain an independent educational institution at the expense of the state or another person. Another demarcation of this right is that the independent educational institution must meet certain reasonable standards imposed by the state, and that the right to establish and maintain an independent educational institution does not include allowing such an institution to discriminate on any grounds prohibited by the Constitution. Demarcations therefore relate to the content of the right or the activity of the applicant while special limitation clauses relate to the state's conduct and to the means employed and objectives pursued by the state to protect, promote and fulfill the rights in the Declaration of Rights.¹⁴¹ For example, one such special limitation clause under section 75 right to education is section 75(4) which obliges the state to take reasonable legislative and other measures '*within the limits of the resources available*' to achieve the progressive realization of this right. Thus when litigating the Declaration of Rights, the applicant has the duty to demonstrate that his or her conduct falls within the demarcated scope of the right while it is the duty of the respondent to show that the restrictive law or conduct in question is justified by a special limitation clause. It is therefore important to separate demarcations from special limitation clauses because they determine the duties of the applicant and the respondent when litigating the Declaration of Rights. Because demarcations relate to the content of the right and the conduct of the applicant, they will be discussed later under the content and scope of the specific socio-economic and cultural rights enshrined under the Declaration of Rights. For now the discussion on limitation of socio-economic rights will focus on the special limitation clauses.

Special limitation clauses play a very crucial role in limiting the enjoyment and fulfillment of socio-economic rights. By their nature, socio-economic rights are usually viewed as rights that cannot be realized instantly but progressively¹⁴² and their realization requires a lot more

¹⁴⁰ Currie I. and De Waal J., '*The Bill of Rights Handbook 6th ed*' (2013) at 173.

¹⁴¹ *Ibid* at 174.

¹⁴² See UN Committee on Economic, Social and Cultural Rights General Comment 3 (1990) 'The nature of States parties' obligations (Art. 2, Para. 1, of the Covenant)' para 9.

investment of public resources.¹⁴³ As such, there are special limitations attached to each socio-economic right and the respondent (usually the state) can rely on such special limitation clauses to justify the constitutional validity of laws or conduct that seek to infringe the enjoyment or realization of these rights. These special limitation clauses are separately discussed below;

6.8.1 Resource Availability

The fulfillment and enjoyment of most of the socio-economic rights provided for under the Declaration of Rights is subject to the special limitation of resource availability. The state is only obliged to ensure the fulfillment of these socio-economic rights to the extent allowed by the available resources. For instance, whilst section 76 read together with section 44 obliges the state to ensure the fulfillment of the right to healthcare, 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 realization of the rights set out under this section’.¹⁴⁴ In terms of this special limitation clause, the state is not required to do more than what the available resources permit it to do.¹⁴⁵ Thus in justifying the constitutional validity of a limitation to a socio-economic right, the state can demonstrate that it has done enough to discharge its constitutional duties within the limits of available resources, and it is unable to take any further measures. The applicant can however challenge the veracity of this claim by demonstrating to the court that the state has not done enough given the amount of resources at its disposal and therefore the limitation is not reasonable and justifiable in a democratic state based on openness, justice (which can also be interpreted to mean social justice) and equality (which is critical in contemporary Zimbabwe that is characterized with social inequalities).

The debate on ‘limitation by available resources’ raises the question whether the judiciary can determine how public resources should be utilized. By virtue of the constitutional principle of separation of powers and the policentric nature of decisions concerning public resource allocation, the judiciary must accord the state a measure of discretion on how to utilize public resources. However that should not be taken to mean that the state must be left alone to choose whether and how to implement these rights.¹⁴⁶ By virtue of section 165(1) (c), the judiciary has a role to protect human rights and can therefore ensure that the legislative and other measures undertaken by the state to fulfill socio-economic rights are reasonable. Thus it is the duty of the state to make policy decisions on how to implement socio-economic rights but it is the duty of the judiciary to assess the reasonability of those policy decisions in terms of the Constitution.

¹⁴³ Currie I. and De Waal J., *‘The Bill of Rights Handbook 6th ed’* (2013) at 568 and *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) para 45.

¹⁴⁴ See sections 75(4) and 77(b) for similar special limitation clauses.

¹⁴⁵ *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) para 46.

¹⁴⁶ Moellendorf D., Reasoning About Resources: Soobramoney and the Future of Socio-Economic Rights Claims. (1998) 14 SAJHR 327 at 331.

Thus even scarcity of resources does not relieve government of its duty to fulfill socio-economic rights. The state has a duty to ‘strive to ensure the widest possible enjoyment of the relevant rights’ under the prevailing circumstances.¹⁴⁷ Where the state has scarce resources but nevertheless it has not done enough to strive to achieve the widest or best possible fulfillment of a right, the court can declare the measures taken by the state to be unreasonable and the limitation thereof would be unconstitutional. Thus in terms of litigating socio-economic rights, the applicant must amongst other things have sufficient evidence on government expenditure and the resources available in order to be able to challenge the justifications made by government.

6.8.2 Progressive Realization

Most of the socio-economic rights enshrined under Chapter four of the Constitution are meant to be progressively realized. This means most of these rights are not meant for instant realization. For instance under the section 77 right to food and water, the state is obliged to take reasonable legislative and other measures within the limits of the available resources, to achieve the ‘progressive realization’ of this right.¹⁴⁸ Progressive realization of socio-economic rights relates to the obligation of the state to ensure that the socio-economic rights are fulfilled over a period of time through state action.¹⁴⁹ Therefore generally, the state does not have a duty to ensure that these rights are instantly realized. However, this does not mean that the state is relieved of its duty to take urgent measures within its capacity to ensure the protection or realization of socio-economic rights.¹⁵⁰ The burden will be on the state to demonstrate that it is making reasonable progress towards the full realization of the rights.¹⁵¹ As such, when litigating socio-economic rights, the litigant must have sufficient evidence to question the progress being made by the state to ensure the achievement of the rights in question, and to examine whether such progress is proportional to the available resources for it to be deemed reasonable.

It is important to note that most of the socio-economic rights enshrined under the Declaration of Rights impose a duty upon the State to undertake ‘*reasonable legislative and other measures*’, within the available resources to ensure the progressive realization of the rights enshrined. The measures that the State is compelled to undertake are not limited to enacting legislation only but they extend to undertaking other programs that seek to ensure the fulfillment of these rights. The reasonability of these measures often comes under scrutiny

¹⁴⁷ See UN Committee on Economic, Social and Cultural Rights General Comment 3 (1990) ‘The nature of States parties’ obligations (Art. 2, Para. 1, of the Covenant)’ para 11.

¹⁴⁸ See sections 75(4) and 76(4) of the Constitution of Zimbabwe for similar special limitation clauses.

¹⁴⁹ Currie I. and De Waal J., ‘*The Bill of Rights Handbook 6th ed*’ (2013) at 580.

¹⁵⁰ See UN Committee on Economic, Social and Cultural Rights General Comment 3 (1990) ‘The nature of States parties’ obligations (Art. 2, Para. 1, of the Covenant)’ para 9.

¹⁵¹ UN Committee on Economic, Social and Cultural Rights General Comment 3 (1990) ‘The nature of States parties’ obligations (Art. 2, Para. 1, of the Covenant)’ para 8. Also see *Soobramoney v Minister of Health (KwaZulu Natal)* 1998 (1) SA 765 (CC).

during an examination of the constitutionality of the limitation of these rights.¹⁵² A measure undertaken to achieve the progressive fulfillment of a right is reasonable when first and foremost such a measure is logically linked to the aim of ensuring the fulfillment of that right. This means the measure must be logically capable of attaining the intended objective of fulfilling the rights in question.¹⁵³ Secondly, the measure undertaken by the State must be proportional to the resources available to the State.¹⁵⁴ The nature and extent of the measure must be directly proportional to the available resources.

6.9 Limitation of Socio-Economic Rights during Public Emergency

Socio-economic rights are not included under section 86(3) (a-f)'s list of rights that cannot be limited by any law. Therefore in addition to limitation through section 86, socio-economic rights may be limited in terms of section 87 but only when a public emergency has been declared and the particular right has been suspended for the duration of the public emergency.¹⁵⁵ It is critical to emphasize that when litigating socio-economic rights, the state or the respondent does not have the liberty of using section 87 to justify the limitation unless where a state of emergency has been declared in terms of the Constitution, the rights in question have been suspended in terms of section 87 of the Constitution and the state of emergency covers the geographical location where the applicant seeks to exercise his rights. Where these conditions do not exist, then the respondent cannot rely on section 87 to justify the limitation of rights.

Even where the above conditions exist, for section 87 limitation to be relied on, the limitation of socio-economic rights during public emergency must nevertheless be in accordance with the requirements of section 87. For such limitation to be constitutionally valid, the state or the respondent must first and foremost show that the limitation is in terms of a gazetted written law that specifies measures that will be taken to deal with situations arising during the period of public emergency.¹⁵⁶ This means if the law is not gazetted or does not spell out clear measures that will be undertaken; the resultant limitation of the socio-economic right will be unconstitutional. This also means that limitation of socio-economic rights or any other rights in terms of section 87 during a public emergency cannot be done through ordinary administrative action unless where such action is provided for under the specific written and gazetted public emergency law.

Furthermore, section 87 requires the limitation '*not to be greater than is strictly required by the emergency*'.¹⁵⁷ Thus the limitation must be strictly proportional and confined to what is necessary. The use of the word 'strict' in this provision may imply that under section 87

¹⁵² See the judgement of Yacoob J in *Government of the Republic of South Africa v Grootboom* 2001(1) SA 46 (CC) para 39

¹⁵³ *Ibid* at para 41

¹⁵⁴ See fn 152 at para 39

¹⁵⁵ See section 87(1) of the Constitution of Zimbabwe.

¹⁵⁶ See section 87(1) and (2) of the Constitution of Zimbabwe.

¹⁵⁷ *Ibid* section 87 (3).

limitation, the court will apply a test that is more rigorous to assess proportionality than what it would apply under the section 86 general limitation clause.

CHAPTER 7: SPECIFIC SOCIO-ECONOMIC AND CULTURAL RIGHTS

7.1 Introduction

This chapter discusses the scope and content of each of the socio-economic and cultural rights enshrined under the Declaration of Rights. As mentioned under Chapter 2 of this book, these rights have been identified as the right to language and culture, right to freedom from arbitrary eviction, right to education, right to food and water, right to freedom of profession, trade and occupation, right to social security and marriage rights.

7.2 The Right to Language and Culture

The new Constitution of Zimbabwe guarantees the right to language and culture through section 63. The language and culture right includes the following rights;

- Everyone has the right to use their language of choice
- Everyone has the right to participate in the cultural life of their choice

Before examining the content of the above rights, it is important to note that these rights cannot be exercised in any manner that is inconsistent with any of the provisions of the Declaration of Rights or that violates the rights provided therein.¹⁵⁸ For instance, one cannot exercise their right to conduct cultural activities where such cultural practices amount to a violation of the right to equality, right to human dignity or any other fundamental right enshrined under the Declaration of Rights. Thus the right to culture is not a constitutionally valid justification for limiting any of the fundamental rights provided for under the Declaration of Rights. Having clarified this, the above stated language and cultural rights are examined in greater detail below.

7.2.1 Section 63(a) Right to Use Language of Choice

In terms of section 63(a), everyone is entitled to the right to use their language of choice. Essentially this means that everyone is free to communicate using any language that they may prefer, whether such language is constitutionally recognized as an official language or not.¹⁵⁹ However, in order to determine the extent to which one can invoke his right to use a language of choice, section 6(2) of the Constitution must be dully considered. In terms of section 6(2) the state is allowed to enact legislation that may prescribe languages of record. In terms of such legislation, one may be compelled to use a certain language as a medium of communication. Although section 6(2) is not part of the Declaration of Rights, it nevertheless should be taken into consideration when interpreting provisions under section 63(a). In any case, section 46(1) (d) requires all provisions of the Constitution to be taken into consideration when interpreting the provisions of the Declaration of Rights. Section 6(2) is

¹⁵⁸ See section 63(b) of the Constitution of Zimbabwe.

¹⁵⁹ Ibid section 6(1) for a list of official languages.

therefore a critical demarcation (or limitation) of the scope of the right to use a language of choice. However, where there is no language of record that is prescribed through an Act of Parliament, one will be free to exercise his or her section 63(a) right to communicate using any language of their choice.

Notwithstanding section 6(2), due regard must also be given to provisions of section 83 particularly (e) and (f), which require the government to take appropriate measures within the limits of available resources to ensure persons living with disabilities are provided with special facilities for their education and any other necessary training. By virtue of this provision, one can challenge the constitutional validity of a government policy which designates a language of record which makes education or any other government services inaccessible to persons living with disabilities.

In any case, violation of the right to language in general must comply with the requirements of the general limitation clause-section 86 of the Constitution. Again, as mentioned earlier on, one cannot exercise this right in any way that is inconsistent with the provisions of the Declaration of Rights.

7.2.2 Section 63(b) Right to Participate in the Cultural Life of Their Choice

In both international law and foreign jurisdictions, this right has been interpreted to include the freedom to enjoy one's own culture particularly the right to participate in cultural activities and the right to maintain and celebrate cultural identity.¹⁶⁰ However, section 63(b) right is not limited to one's own culture but to '*the culture of their choice*', which essentially means the freedom to identify with, enjoy and participate in the activities of 'any' culture that one chooses. This right also includes the right to conduct cultural activities or rituals. As indicated earlier on, this right may however not be exercised in a manner that violates the rights enshrined under the Declaration of Rights. For instance section 80(3) specifically outlaws any cultural practice, principles or values that infringe the constitutional rights of women.

7.3 The Right to Freedom of Profession, Trade or Occupation

The right to freedom of profession, trade or occupation is provided for under section 64 of the Constitution of Zimbabwe. It is considered as a socio-economic right because it is a right that is meant to ensure that individuals are able to provide materially for themselves and their dependents, as well as live profitable, dignified and fulfilling lives.¹⁶¹ Just like the rest of the other socio-economic rights, the right to freedom of profession, trade or occupation constitutes a basis for the existence of other rights and freedoms.¹⁶² To a large extent, section

¹⁶⁰ Irina D., A culture of human rights and the right to culture. *Journal for Communication and Culture* 1:2 (2011) 30-48 at 41.

¹⁶¹ Currie I. and J De Waal J., '*The Bill of Rights Handbook 6th ed*' (2013) at 465.

¹⁶² Ibid.

64 is framed in the same way as section 22 of the Constitution of South Africa.¹⁶³ However, in terms of section 22 of the Constitution of South Africa, South Africans only are entitled to the freedom of profession, trade and occupation while in terms of section 64 of the Constitution of Zimbabwe, every person who is in Zimbabwe is entitled to that right. Nonetheless, the interpretation that has been given to section 22 of the Constitution of South Africa is to a large extent quite relevant in trying to understand the meaning of the right to freedom of profession, trade or occupation under section 64 of the Constitution of Zimbabwe.

Section 64 is framed as a freedom right, which makes it a negative right that guarantees protection against interference from choosing a profession, trade or occupation. Essentially this right entitles everyone in Zimbabwe the freedom to choose any profession, or engage in a form of trade or occupation that they want. The term profession or occupation may not necessarily mean that one has to derive profit or income from the activity.¹⁶⁴ Too, this does not give individuals the right to engage in criminal activities as a profession or occupation.¹⁶⁵

Furthermore, this right does not extend to an entitlement to employment or a form of trade but simply gives a person the right to choose what profession to undertake or trade to engage in.¹⁶⁶ Notwithstanding this freedom of choice, the legislature is allowed by section 64 to enact regulations that govern the manner in which the profession, trade or occupation is to be conducted and the nature of people who can engage in such trade or profession.

7.3.1 Regulating Profession, Trade or Occupation

Fundamentally, it must be appreciated that the right to freedom of profession, trade and occupation does not operate absolutely. Just like every other right under the Declaration of Rights, it is subject to limitation but such limitation must be lawful. Therefore the right to choose a profession, trade or occupation may be limited through regulations. However such regulations must pass the test of the '*law of general application*' and above all, must satisfy all the requirements under section 86-*the general limitation clause*.

Section 64 implies regulating the manner in which the profession, trade and or occupation shall be conducted. That is to say, should one choose to pursue a particular profession or engage in a particular trade or occupation, he must abide by the stipulated regulations governing that profession, trade or occupation. Certain professions require particular qualifications prescribed by law and persons who lack such qualifications may not choose to engage in such professions and as such, the right to freely engage in any profession should not be construed as entitling persons to ignore laws that regulate the manner in which

¹⁶³ Section 22 of the Constitution of South Africa provides that 'Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law.'

¹⁶⁴ Currie I. and J De Waal J., 'The Bill of Rights Handbook 6th ed' (2013) at 465.

¹⁶⁵ See *JR 1013 Investments CC v Minister of Safety and Security 1997 7 BCLR 925 (E)* para 929A.

¹⁶⁶ However, in terms of section 14 (National Objective on Empowerment and employment creation), the State is obliged to endeavor to create employment for all Zimbabweans, particularly women and youths. This is not a fundamental right but it is a constitutional guideline which the government must give due consideration to when formulating public policy.

particular professions should be conducted.¹⁶⁷ It must however be pointed out that; regulation of the practice of a profession, trade or occupation can only be done through the law. In order to qualify as a law, the regulations must be both formally a law (valid legislation, common law or customary law) and it must be accessible and precise.¹⁶⁸ For instance, in Zimbabwe the Legal Practitioners Act (Chapter 27:07) allows the Council for Legal Education to enact rules that regulate qualifications and registration process for one to be registered as a legal practitioner.

Although largely inaccessible (as they exist in unwritten form) common law rules relating to restraint of trade contracts are applicable as regulatory measures on freedom of trade, to the extent such rules are constitutionally valid.

Regulations must however be necessary. When section 64 is interpreted together with section 24 (National objective on Work and Labour Relations), government is obliged to endeavor to secure the removal of restrictions that unnecessarily inhibit or prevent people from working in gainful economic activities. The regulations (whether they are common or customary law or legislation) must be necessary and rational in the sense that there must be a logical nexus between the regulatory measures and a legitimate objective, and the regulatory measures must be necessary for achieving the legitimate objective¹⁶⁹. In terms of section 24 read together with section 64 of the Constitution, government can therefore not impose regulations that are irrational. There is in fact a duty on the state to remove irrational restrictions or regulations in order to ensure that the right to freedom of profession, trade or occupation is fully enjoyed.

7.3.2 Regulations on Affirmative Action

Constitutionally, the legislature may enact regulations that reserve certain trade to particular population groups. By virtue of the new Constitution's section 14 national objective on empowerment and employment creation, government may set aside certain trade for Zimbabwean citizens or marginalized persons. For instance section 14(2) directs government to prioritise women and youths when creating employment opportunities. Thus the permission to regulate the practice of profession, trade or occupation given to government under section 64 extends to permission to introduce regulations that provide for affirmative action in particular professions, trade or occupation provided such regulations are rational and the intended affirmative action is targeted at achieving a legitimate objective.

7.4 The Right to Freedom from Arbitrary Eviction

The Constitution of Zimbabwe provides for the right to freedom from arbitrary eviction. This right is provided for under section 74 which is framed as follows;

¹⁶⁷ S v Lawrence 1997 (4) SA 1176 (CC) para 33-34.

¹⁶⁸ Sunday Times v United Kingdom 2 EHRR 245 (1979) and Currie I. and J De Waal J., 'The Bill of Rights Handbook 6th ed' (2013) at 468.

¹⁶⁹ Currie I. and J De Waal J., 'The Bill of Rights Handbook 6th ed' (2013) at 468.

'No person may be evicted from their home, or have their home demolished, without an order of the court made after considering all the relevant circumstances'

This right is framed similarly to the section 26(3) right under the Constitution of South Africa. Given the limited Zimbabwean jurisprudence on this particular right, the interpretation of section 26(3) of the Constitution of South Africa by the South African judiciary is very significant in trying to understand the scope and content of the section 74 right under the Constitution of Zimbabwe.

This right imposes a procedural and substantive¹⁷⁰ requirement which protects every person in Zimbabwe against arbitrary eviction in the sense that no one may be removed from their home unless the person who wishes to conduct the eviction has an order from the court authorizing such an eviction. This requirement was confirmed in *Mavis Marange v Chitungwiza Municipality and Glory to Glory Housing Cooperative* 106/14 heard in the Magistrate's Court. Therefore no matter what justifications maybe present, no one has the authority to evict a person from his or her home without obtaining a court order first. Consequently, any law in Zimbabwe which authorizes evictions or demolition of homes without obtaining a court order first is unconstitutional and cannot be enforced.¹⁷¹ Therefore evictions and demolishing of homes cannot take place on the basis of an administrative decision by the city or local authority or any organ of the state but can only take place on the authority of a court order.¹⁷² The procedural requirement to obtain a court order binds any person who wishes to carry out evictions or demolitions, whether such a person is an agent of the state or is a private person. The right can also be claimed by any person in Zimbabwe as the Constitution entitles the right to 'everyone'. Section 74 does not however absolutely prohibit property owners from evicting illegal occupants.¹⁷³ It rather protects against eviction or demolition of a person's home unless a court orders in favour of the eviction after having considered all the relevant circumstances.¹⁷⁴

Even though section 74 allows property owners to conduct eviction or demolition after obtaining a court order, this right also imposes a duty upon the court to consider all the relevant circumstances before granting such an order. Circumstances will vary from case to case but the court may consider such factors as the legal status of the occupants, the period of occupation, whether the eviction or demolition will render the occupants homeless.¹⁷⁵

¹⁷⁰ The substantive element suffices when the court considers all relevant factors in its determination of the application of an order of eviction.

¹⁷¹ See the judgement in *Mavis Marange v Chitungwiza Municipality and Glory to Glory Housing Cooperative* 106/14.

¹⁷² Currie I. and J De Waal J., 'The Bill of Rights Handbook 6th ed' (2013) at 587.

¹⁷³ See *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 21. The court was ruling on the scope and content of section 26 (3) of the Constitution of South Africa which is similar to section 74 of the Constitution of Zimbabwe.

¹⁷⁴ See Currie I. and J De Waal J., 'The Bill of Rights Handbook 6th ed' (2013) at 587.

¹⁷⁵ See *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 (2) SA 104(CC) para 39.

The Zimbabwean courts have not yet defined what a ‘home’ refers to in terms of the right to freedom from arbitrary eviction. However in *Despatch Municipality v Sunridge Estate and Development Corporation (Pty) Ltd* 1997 (4) SA 596 (SE), while ruling on the interpretation of the word ‘home’ in terms of section 26(3) of the Constitution of South Africa, the court held that a ‘home’ refers to any dwelling which the occupant is currently occupying and intends to occupy for residential purposes permanently or for a considerable period of time. In terms of this interpretation, shacks or informal dwellings are considered homes.¹⁷⁶ However a person using a dwelling other than for residential purposes does not qualify for protection under section 74. The UN Committee on Economic, Social and Cultural Rights has defined ‘eviction’ to include the permanent or temporary forceful removal of individuals, families and or communities from their homes or land which they are occupying.¹⁷⁷ Demolition of a home would relate to the destruction of the entire or part of the dwelling against the will of the occupants.

7.5 The Right to Shelter

Section 74 of the Constitution of Zimbabwe does not provide for the right to shelter but guarantees freedom from arbitrary eviction. However the Constitution of Zimbabwe provides for the right to shelter for children.¹⁷⁸ The constitution defines children as every boy and girl who is under the age of eighteen years.¹⁷⁹ Therefore children can claim both the right to shelter as well as the right to freedom from arbitrary eviction. Where the court is approached for an order of eviction or demolition in a case that involves children, it is imperative that such a court considers the right of children to shelter as one of the relevant circumstances to be considered as required under section 74 of the Constitution, even if the defendant does not raise it as an argument.

The children’s right to shelter bestows upon the state the duty to provide such shelter.¹⁸⁰ The same right also imposes upon the parents and or guardians a similar duty as part of family or parental care as required by section 81(1) (d) of the Constitution.

7.6 The Right to Education

Introduction

The Constitution of Zimbabwe provides for the right to education through section 75(1-4). First, in order to establish the scope of this right, it is important to identify the specific rights provided for under section 75. The constitutional right to education as provided for under section 75 includes the following rights;

¹⁷⁶ See *Despatch Municipality v Sunridge Estate and Development Corporation (Pty) Ltd* 1997 (4) SA 596

¹⁷⁷ The UN Committee on Economic, Social and Cultural Rights General Comment No. 7 On the Right to adequate Housing (1997) para 4.

¹⁷⁸ See section 81(1) (f) of the Constitution of Zimbabwe

¹⁷⁹ See section 81(1) of the Constitution of Zimbabwe

¹⁸⁰ See section 44 of the Constitution of Zimbabwe which imposes upon the State, the duty to respect, protect, promote and fulfil the rights and freedoms enshrined under the Declaration of Rights.

- Right of Zimbabwean citizens and those that hold permanent residence in Zimbabwe to basic state funded education, including adult basic education. [Section 75(1) (a).
- Right of Zimbabwean citizens and those that hold permanent residence in Zimbabwe to further education. [Section 75(1) (b)
- The right to establish and maintain independent educational institutions. [Section 75(2)

Secondly and more importantly, in order to establish the scope of the right to education, section 75 must be interpreted together with the provisions of section 81(1) (f) relating to the rights of children, section 83(e) relating to the rights of persons with disabilities, section 27 relating to national objective on education.

7.6.1 Basic Education vs Further Education

These rights enshrined under section 75(1) are not self-standing rights enforceable independent of considerations under section 75(4) state duty. The right to basic education and the right to further education are subject to what the state is able to provide for in terms of its duty to take reasonable legislative and other measures, within the limits of the resources available to it, to achieve the progressive realization of these rights.¹⁸¹ Thus unlike under the South African constitutional right to basic education where the right is immediate and is not subject to progressive realization¹⁸², the right to basic education under the Constitution of Zimbabwe is not an immediate right but has to be progressively realized. Therefore to establish the scope and content of the right to basic and further education, section 75(1) must be read together with section 75(4) because the latter section qualifies the scope of the right provided for under the former section.

It is also important to note that the right to basic education and the right to further education vest only in Zimbabwean citizens and those that hold permanent residence in Zimbabwe. This is quite different from the scope of the same right under the South African constitution, where the right vests in ‘*everyone*’ who is in South Africa and not just specific social categories of persons.¹⁸³ As such, the Zimbabwean constitutional right to basic education and further education cannot be invoked by persons who fall outside of these two categories.

Having put across these two quick comments on the scope and nature of the right to basic education and the right to further education, the sections below proceed to discuss the scope of these rights separately and in greater detail.

¹⁸¹ See section 75(4) of the Constitution of Zimbabwe.

¹⁸² See Seleane M., The right to education: Lessons from Grootboom. *Law, Democracy and Development Journal* (2009) at 141.

¹⁸³ See section 29(1) (a) of the Constitution of South Africa, 1996. Of course the relevant Legislation specifies age groups that are entitled to enroll in the different forms of basic education.

7.6.2 Basic State Funded Education, including Adult Basic Education

In order to establish the meaning of this right, one has to consider the interpretations that have been given to the key words that have been used in framing this right under section 75(1) (a). To that end, regard is given to previous decisions by the Zimbabwean and relevant foreign superior courts, UN comments on the right to education as provided for under article 13 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) as well as relevant articles of the World Declaration on Education for All.¹⁸⁴

The right provided for under section 75(1) (a) is that of basic education, including adult basic education. This raises the question of what constitutes basic education. The UN General Comment 13 adopts the World Declaration on Education for All's definition of basic education which is education that is designed to meet the needs of every child, youth and adult and these needs comprise of such tools as literacy, oral expression, numeracy, problem solving, knowledge, skills, values and attitudes which human beings require in order to survive, develop their full capacities, live and work with dignity, participate fully in development, improve the quality of their lives, make informed decisions and continue learning.¹⁸⁵ Basic education is more than an end in itself but it is the foundation for lifelong learning and human development on which countries may build, systematically, further levels and types of education and training.¹⁸⁶ The specific needs of such basic education will vary from one country to the other and as such Zimbabwe will have to develop its basic education system to cater for the particular needs of its society. The Zimbabwean government therefore has constitutional liberty to determine such things like the curriculum and age categories of people who enroll for the different tiers or sectors of education. In terms of this right, the government has a duty to fund and ensure the establishment as well as utilization of facilities and services that are necessary for the provision of basic education and adult basic education.¹⁸⁷

A question also arises as to the correct meaning of the phrase '*State funded basic education*'. Does this mean government has a constitutional duty to deliver free basic education including adult basic education? It is clear that in terms of section 75(1) (a), the state has to fund basic education. The question is to what extent is government obliged to fund this education? This

¹⁸⁴ When determine the meaning of provisions under the Bill of Rights, section 46(1) (c) and (e) of the Constitution of Zimbabwe obliges courts to consider international law to which Zimbabwe is party, and allows courts to consider relevant foreign law. As mentioned earlier on that the Zimbabwean jurisprudence on the Bill of Rights is quite limited and young, and as such there is a lot more reference made to international and foreign law when establishing the meaning of this right.

¹⁸⁵ See Article 1(1) of The world declaration on education for all and framework for action to meet basic learning needs. Adopted by the world conference on education for all meeting basic learning needs. Jomtien, Thailand and 5-9 March 1990.. Also see UN Committee on Economic, Social and Cultural Rights, General Comment 13, The right to education (Twenty-first session, 1999), U.N. Doc. E/C.12/1999/10 (1999) para 9.

¹⁸⁶ See Article 1(4) of the world declaration on education for all.

¹⁸⁷ Such facilities and services include but not limited to schools, teachers and study materials. These facilities and services must be economically, physically and equally accessible. See UN Committee on Economic, Social and Cultural Rights, General Comment 13, The right to education (Twenty-first session, 1999), U.N. Doc. E/C.12/1999/10 (1999) para 6b.

question could attract a variety of legal opinions. However the most probable interpretation is that section 75(1) does not entitle Zimbabweans with the right to free basic education. It is a basic rule of legal interpretation that the words used in the formulation of the provision must be given due regard when determining the meaning of a legal provision.¹⁸⁸ If this Constitution intended the state to provide free basic education, it would have said so. In this case the Constitution does not provide for right to ‘*free basic education*’ but rather the right to ‘*basic State funded education*’. Secondly, in terms of section 46(1) (d), when interpreting the Declaration of Rights, due regard must be given to all the provisions of this Constitution. As such, when interpreting the meaning of section 75(1) (a) right, one must give due regard to section 75(4) because it qualifies the scope of the section 75(1) rights. In light of this argument, the right to basic education is not an immediate right that is independent of section 75(4) state duty. As such, in order to determine the scope and content of the right to basic education, section 75(4) duty of the state to ensure that this right is progressively realized must be taken into consideration. As the UN General Comment 13 notes, most of the socio-economic rights, including the right to basic education, are to be realized on a progressive basis because of the formidable structural and other obstacles impeding the full realization of these rights.¹⁸⁹ It is therefore improbable that the Constitution would acknowledge the challenges that make it difficult for the right to basic education to be an immediate constitutional right and at the same time the constitution provides for right to free basic education. Thus the Constitution acknowledges these challenges that Zimbabwe faces and as such made the right to be realized on progressive basis with the state funding the basic education system as much as is allowed by the resources at its disposal. As such, the rational conclusion is that the intended right is not free basic education but state funded education and the level of state funding will be subject to the available resources.

The right to basic state funded education as interpreted above is elaborated under section 81(1) (f) rights of children. In terms of section 81(1) (f), persons that are under the age of 18¹⁹⁰ have the right to receive basic state funded education. In terms of section 81(2), which makes the interests of a child paramount in every case that concerns the child, the right to basic state funded education must be given greater importance by the courts in a case where a child is concerned and the right to basic education is in question. Greater importance will also be given to this right where a child is concerned because section 81(3) requires the courts to give adequate protection to the child, and ‘adequate protection’ should be interpreted to mean vindicating or protecting all the affected rights of a child in question. This provision therefore requires the courts to give adequate protection to the child’s right to basic education where that right is affected.

¹⁸⁸ See Post R., *Theories of Constitutional Interpretation*. *Yale Law School* (1990) at 3.

¹⁸⁹ See Committee on Economic, Social and Cultural Rights, General Comment 13, *The right to education* (Twenty-first session, 1999), U.N. Doc. E/C.12/1999/10 (1999) para 2.

¹⁹⁰ See section 81(1) of the Constitution of Zimbabwe which defines children as persons that are under the age of 18.

Furthermore, section 83(e) requires the government to take reasonable measures, within the limits of available resources, to provide special facilities for persons living with disabilities to fully realize their right to basic state funded education. Such special facilities include supplying education materials and establishing infrastructure in the form and manner that is user friendly to persons that are living with disabilities.

The right to basic education is a direct constitutional right. In terms of section 75(1) (a), the State has a constitutional duty to provide education and not just access to education. Therefore the duty of government goes beyond just setting up educational facilities, but it includes making sure that beneficiaries of this right actually make use of those educational facilities.¹⁹¹ Amongst other things, this may mean that government can make it compulsory for beneficiaries to attend classes in the schools. Thus unlike the section 76(1) right of ‘access’ to basic health, where the duty of government is to provide for accessible basic health facilities, under section 75(1) (a) right to basic education, the state has a duty to ensure that the beneficiaries use the educational facilities provided for by government. This is because the state has a constitutional duty to provide basic education and not just access to basic education.¹⁹²

7.6.3 Further Education

In terms of section 75(1) (b), citizens and permanent residents have a right to further education, which the state, through reasonable legislative and other measures, must make progressively available and accessible. The Zimbabwean government has determined that further education includes secondary education (Form 1 to 6) and vocational training. Thus Zimbabweans and those that are permanent residents in Zimbabwe have a constitutional right to enroll for secondary education as well as in vocational training centers.

As mentioned earlier on, this is however not an immediate right but it has to be realized on a progressive basis. In terms of section 75(1) (b), the state has a duty to implement reasonable legislative and other measures to ensure that further education is made available and accessible. Section 75(4) qualifies the scope of the right to further education along the same lines as section 75(1) (b). However even though this is not an immediate right, the state is obliged to implement measures that ensure that the state moves as expeditiously and effectively as possible towards the provision of the right to further education.¹⁹³ As such under no circumstances shall government have the right to defer indefinitely, efforts to ensure

¹⁹¹ See the judgement of Mahomed DP in *Ex parte Gauteng Provincial Legislature: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995* 1996 (3) SA 165 (CC). Also see Seleane M., The right to education: lessons from Grootboom. *Law, Democracy and Development Journal* (2009) at 141. This argument could equally be relevant to the interpretation of section 75(1) rights given that they are formulated similarly with the South African Constitutional provisions.

¹⁹² Section 75(1) is formulated as right ‘to a State funded basic education’, while section 76(1) is formulated as right to have ‘access to basic health care.’ These are different formulations and have different implications in terms of the duty of the State.

¹⁹³ UN Committee on Economic Social and Cultural Rights General Comment No. 3: The Nature of States Parties’ Obligations (Art. 2, Para. 1, of the Covenant) para 9.

the full realization of this right.¹⁹⁴ Thus in terms of section 75(1) (b), progressive realization does not mean that the government can do nothing for whatever reasons, including that of limited resources, to provide for the right to secondary education and vocational training.

This right, when read together with section 75(4) bestows upon the government, a constitutional duty to establish accessible secondary educational and vocational training facilities such as schools and training centers, teachers, curriculum and study materials, to the extent possible given the resources available to it.¹⁹⁵ Accessibility includes affordability of further education facilities and services, physical accessibility of the facilities, goods and services that are necessary for one to obtain further education and equal access for all citizens, particularly the marginalized or vulnerable groups.¹⁹⁶ In terms of section 75(4), the state has no duty to provide facilities and services that are beyond its ability in terms of the available resources. However as mentioned earlier on, the state must do as much as possible to achieve the widest and quickest realization of this right even though resources may be limited. In terms of section 83(e) the state must take reasonable measures, within the limits of available resources to provide special facilities in order to ensure that persons living with disabilities are able to fully realize and utilize their right to further education as interpreted above. Furthermore, the right to further education will receive paramount importance where a child is concerned.¹⁹⁷

7.6.4 Establishment and Maintenance of an Independent Educational Institution

Under the right to education, section 75(2) gives everyone in Zimbabwe a right to establish and maintain an independent educational institution at their own expense. This means anyone can use their own money to set up and maintain such educational institutions as primary or secondary schools, colleges or vocational training centers. However such institutions must offer educational services that meet reasonable standards.¹⁹⁸ In terms of section 75(3), government is obliged to enact legislation that regulates the establishment and running of such institutions, including providing for the reasonable standards which must be met by these independent educational institutions. The right to establish and maintain private educational institutions also comes with a further constitutional responsibility that such an institution must not discriminate on any ground prohibited by the Constitution. With reference to section 56, such educational institutions may not discriminate on the basis of nationality, race, religion, colour, tribe, and place of birth among others.¹⁹⁹ In addition, the regulatory legislation contemplated under section 75(3) allows government to order the closure of independent educational institutions that do not meet the prescribed reasonable

¹⁹⁴ International Court of Justice *Economic Social and Cultural Rights: A compilation of essential documents* (1997) para 82.

¹⁹⁵ This is not an exhaustive list of what the state should provide for.

¹⁹⁶ UN Committee on Economic, Social and Cultural Rights, General Comment 13, The right to education (Twenty-first session, 1999), U.N. Doc. E/C.12/1999/10 (1999) para 6 (b).

¹⁹⁷ See section 81(1) (f), section 81(2) and (3).

¹⁹⁸ See section 75(2) of the Constitution of Zimbabwe.

¹⁹⁹ See section 56(3) of the Constitution of Zimbabwe for a full list of the prohibited grounds of discrimination.

standards as well as those that violate the constitutional principle against unfair discrimination. However, government has a duty to ensure that whatever standards that are provided for by this legislation are ‘reasonable’²⁰⁰ and the process of ordering the closure of such an institution is lawful and just.²⁰¹

7.7 The Right to Healthcare

The Constitution of Zimbabwe provides for the right to health care through section 76. In order to understand the scope and content of this right, one has to consider the interpretation of the right to healthcare as an international human right. The United Nations’ (UN) General comments on the right to health provided for under article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) must be taken into consideration. Regard must also be given to article 16 of the African Charter on Human and People’s Rights which is however drafted similarly to article 12 of the International Covenant on Economic, Social and Cultural Rights. However regard must be given to the fact that the right provided for under both the African Charter and the ICESCR is wider than what is provided for under the Constitution of Zimbabwe.²⁰² As such the scope and content of this right under the ICESCR or the African Charter is wider than what is contemplated under section 76 of the Constitution of Zimbabwe. Apart from interpretations of the international law right to health, previous decisions of Zimbabwean and foreign courts on the interpretation of the right to healthcare must also be considered in determining the scope and content of section 76.

Basically, the scope and content of the right to healthcare encompasses an individual right to the enjoyment of a variety of facilities, goods, services and conditions necessary for the realization of health care.²⁰³ Thus the right to healthcare includes certain components which are legally enforceable. As such, in order to understand the content and application of the right to health, it is important to unpack these components. Essentially the right to healthcare under section 76 of the Constitution of Zimbabwe can be divided into the following three entitlements;

- The right of Zimbabwean citizens and those that are permanent residents in Zimbabwe to access basic health care services, including reproductive healthcare services [Section 76(1)]
- The right of persons suffering from chronic illness to access basic healthcare services for such illness [section 76(2)]
- The right not to be refused emergency healthcare [section 76(3)]

²⁰⁰ Reasonability in this case can be tested based on the rationale of the standards .

²⁰¹ Given that a government decision to close down an educational institution will amount to administrative action, such a decision must comply with the requirements set under section 68 right to administrative justice.

²⁰² Both the ICESCR and the African Charter provide for ‘*the right of everyone to enjoy the highest attainable standard of physical and mental health*’. On the other hand, the Constitution of Zimbabwe provides for the ‘*right to healthcare*’.

²⁰³ UN Committee on Economic, Social and Cultural Rights, General Comment 14, The right to the highest attainable standard of health (Twenty-second session, 2000), U.N. Doc. E/C.12/2000/4(2000) para 9.

- The duty of the state to take reasonable legislative and other measures, within the limits of available resources to ensure the progressive realization of the rights enshrined under section 76.

Each of these rights or entitlements is discussed below in order to establish the content and scope of the constitutional right to healthcare in its totality. However it must be understood that these rights do not function as independent positive rights but their scope is determined subject to section 76(4) state duty to ensure their progressive realization subject to available resources. Thus the content of the rights set out under section 76(1)-(3) is qualified by the provisions of section 76(4) on the state duty. Generally (but not always) these rights may not be realized immediately but may be fulfilled progressively given the formidable structural and other obstacles which the state has to deal with in order to achieve their full realization.²⁰⁴

In order to demarcate the scope of the right to health care as provided for under section 76, due regard must be given to provisions under section 81(1) (f) relating to the rights of children, section 82(b) relating to the rights of the elderly, section 83(d) relating to the rights of persons with disabilities and section 84 (1) relating to the rights of veterans of the liberation struggle.

7.8 The Right to Basic Health Care Services

This particular right is provided for through section 76(1) and it can only be invoked by Zimbabwean citizens or those that have permanent residence status in Zimbabwe. Thus unlike its sister provision under the South African constitution, this right is not available to persons that are not in either of these two specific classes.²⁰⁵

Zimbabwean courts have not yet had the opportunity to define this particular right. However, this right was thoroughly discussed in the judgement of the Constitutional Court of South Africa in *Minister of Health v Treatment Action Campaign 2002 (5) SA 703 (CC)*. By virtue of section 46(e) of the Constitution of Zimbabwe, the interpretation of this right by the South African judiciary is relevant in establishing the meaning of section 76(1) right to basic healthcare services.²⁰⁶

²⁰⁴ UN Committee on Economic, Social and Cultural Rights, General Comment 14, The right to the highest attainable standard of health (Twenty-second session, 2000), U.N. Doc. E/C.12/2000/4 (2000) para 5.

²⁰⁵ Section 27(1) of the Constitution of South Africa provides every person in South Africa with the right to access basic health care services.

²⁰⁶ In terms of section 46(e) of the Constitution of Zimbabwe, courts may consider relevant decisions of foreign courts on similar issues when interpreting provisions of the Bill of Rights.

The scope of this right is limited only to accessing ‘*basic*’ healthcare. Basic healthcare services refer to essential primary health care.²⁰⁷ This means one cannot rely on section 76(1) to claim health services that go beyond what is considered primary and basic.

In order to establish the meaning of the section 76(1) right of access to basic healthcare, the term ‘*access*’ should be explained. The UN General Comment 14 on the right to health defines ‘*access*’ to basic healthcare as implying that health facilities, goods and services have to be accessible to everyone without discrimination, and they must be within safe physical reach for all sections of the population, especially the vulnerable or marginalized groups.²⁰⁸ Furthermore, the UN General Comment defines ‘*access*’ to include economic accessibility or affordability which requires that [basic] health facilities, goods and services must be affordable for all and payment for [basic] health-care services, as well as services related to the underlying determinants of health, has to be based on the principle of equity, ensuring that these services, whether privately or publicly provided, are affordable for all, including socially disadvantaged groups.²⁰⁹ Thus the section 76(1) right of access to basic healthcare must be interpreted to mean timely access, affordability of basic healthcare, physical accessibility of basic health facilities, goods and services that are necessary for basic healthcare and equal access for all citizens, particularly the marginalized or vulnerable groups.

7.8.1 The Right of Persons Suffering from Chronic Illness to Access Basic Healthcare Services for such Illness

This right is provided for under section 76(2) of the Constitution of Zimbabwe. Unlike the South African Constitution, section 76 (2) explicitly provides for the right of persons that are suffering from chronic illnesses to access basic healthcare services for such illness. Section 76(2) vests this right in persons suffering from any kind of chronic illnesses. Therefore a person who does not suffer from any such illness cannot claim this right.

Unlike the right of access to basic healthcare provided for in section 76(1), section 76(2) applies to ‘*everyone*’ within Zimbabwe as long as they are suffering from chronic illness. Such persons do not have to be necessarily holding Zimbabwean citizenship or permanent residence status in Zimbabwe.

This right relates to what is considered basic or primary healthcare for the chronic illness which the person who is claiming this right is suffering from. As such, the right is not available to access any healthcare which is not considered primary for such illness. What

²⁰⁷ See UN CESCR General Comment 3 on ‘the nature of States parties obligations (Art. 2, par.1)@ 14/12/90’ para 10.

²⁰⁸ UN Committee on Economic, Social and Cultural Rights, General Comment 14, The right to the highest attainable standard of health (Twenty-second session, 2000), U.N. Doc. E/C.12/2000/4 (2000) para 12b.

²⁰⁹ UN Committee on Economic, Social and Cultural Rights, General Comment 14, The right to the highest attainable standard of health (Twenty-second session, 2000), U.N. Doc. E/C.12/2000/4 (2000) para 12b.

constitutes primary healthcare will obviously depend on the illness in question. For instance, a person suffering from chronic renal failure and who requires dialysis two to three times a week to remain alive may invoke this right because such dialysis treatment may be considered basic for chronic renal failure.²¹⁰

7.8.2 Emergency Medical Treatment

Through section 76(3), everyone is entitled to the right not to be denied emergency medical treatment. The duty not to refuse emergency medical treatment binds not just the state but private health institutions as well.²¹¹ In terms of this right, a person who suffers a sudden health related catastrophe that calls for immediate medical attention should not be refused emergency services which are available and should not be turned away from the healthcare institution that is able to provide the necessary treatment.²¹² It is important to note that the right is confined to receiving emergency medical treatment that is available.²¹³ As such the person against whom the right operates does not have a duty to provide emergency medical treatment beyond what she can and what she has available. For example, a hospital does not have a duty to provide an ambulance if such a hospital does not have one. Thus the bearer of this right can only claim emergency treatment services that are available. Emergency treatment may however not be refused for any reasons including lack of funds, but payment for treatment may be sought after the treatment has been provided.²¹⁴

The state does not have an immediate duty to ensure that emergency medical facilities are made available so that no one in an emergency situation can be turned away.²¹⁵ However as will be demonstrated later on, the state has a constitutional obligation to ensure the progressive realization of the rights set out under section 76, including the right not to be refused emergency medical treatment. Therefore the state is obliged to take reasonable measures within the meaning of section 76(4) to ensure that the right to emergency medical treatment is progressively realized in its totality. It therefore can be argued that when section 76(3) is read together with the section 76(4) State duty, the Constitution envisages the stage in the country's development where medical facilities are made available to ensure that no one in an emergency situation can be turned away. The state therefore has a constitutional duty to take reasonable legislative and other measures to ensure that the country progressively moves towards that stage.

²¹⁰ See the judgment in *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC) para 21. Although the court held that the applicant was not entitled to the right claimed, the court indicated that the treatment sought by the applicant constitutes basic treatment for a chronic illness.

²¹¹ Section 45(2) of the Constitution of Zimbabwe allows both horizontal and vertical application of the Bill of Rights depending on the nature of the right. By its nature and by virtue of its purpose, the right not to be denied emergency treatment is enforceable against private persons running private healthcare institutions.

²¹² Currie I. and De Waal J., *'The Bill of Rights Handbook 6th ed'* (2013) at 593.

²¹³ *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC) para 20.

²¹⁴ Currie I. and J De Waal., *'The Bill of Rights Handbook 6th ed'* (2013) at 593.

²¹⁵ Currie I. and De Waal J., *'The Bill of Rights Handbook 6th ed'* (2013) at 593.

Do section 76(1) right to basic healthcare services, section 76(2) right to basic healthcare for chronic illness and section 76(3) right not to be refused emergency medical treatment constitute self-standing positive rights?

In *Minister of Health v Treatment Action Campaign* 2002 (5) SA 703 (CC), the court had to decide whether section 27(1) (a) right of access to basic health care is a separate right independent of section 27(2) state duty to ensure progressive realization of this right. The court held that;

‘We therefore conclude that section 27(1) [*right to access basic health care*] of the Constitution does not give rise to a self-standing and independent positive right enforceable irrespective of the considerations mentioned in section 27(2) [*state duty to ensure progressive realization of this right*]. Sections 27(1) and 27(2) must be read together as defining the scope of the positive rights that everyone has and the corresponding obligations on the State to respect, protect, promote and fulfil such rights. The rights conferred by sections 26(1) and 27(1) are to have access to the services that the state is obliged to provide in terms of sections 26(2) and 27(2).’²¹⁶

In terms of section 76(4), the state has a duty to take reasonable legislative and other measures, within the limits of the resources available to it, to achieve the progressive realization of the rights set out under section 76. Therefore the scope of the rights set out under sections 76(1) (2) and (3) must be defined with due regard to considerations of the State duties set out under section 76(4). As such section 76(1) right to access essential primary healthcare services, section 76(2) right to basic healthcare for chronic illness and section 76(3) right not to be refused emergency medical treatment are not self-standing positive rights but must be read together with section 76(4) duty of the state to ensure progressive realization of those rights considering available resources. Effectively this means one’s right of access to primary healthcare, the right to basic healthcare for chronic illness and the right not to be refused emergency medical care is subject to what the state is able to provide given the available resources. Section 76(1)-(3) rights do not expect more of the state than is achievable within its available resources²¹⁷ and generally they do not confer an entitlement to basic health care services immediately upon demand.²¹⁸ As far as the right to health care in its totality is concerned, the state is not obliged to go beyond available resources or to realize these rights immediately.²¹⁹ Thus the scope of these rights is defined by and subject to what the state is able to provide for in terms of section 76(4) duties.

This however does not mean that government is at liberty to undertake retrogressive measures that undermine the duty of the state to protect and fulfil these rights. Retrogressive measures

²¹⁶ *Minister of Health v Treatment Action Campaign* 2002 (5) SA 703 (CC) para 39.

²¹⁷ *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC) para 46.

²¹⁸ *Ibid* para 95.

²¹⁹ *Ibid* para 94.

include actions that have an effect of denying someone of an existing right to healthcare.²²⁰ A good example would be the existing right to receive and use approved contraceptives. Government may not prohibit women from accessing available contraceptives and other means of maintaining sexual and reproductive health. Such deliberate retrogressive measures would require the most careful consideration and would need to be fully justified by reference to the totality of the right to health and in the context of the full use of the maximum available resources.²²¹ Otherwise such actions would constitute a violation of the negative protection of the right to healthcare.²²² The state is therefore prohibited from acting in ways that directly infringe an existing right to healthcare. Rather the state has a negative obligation not to interfere with someone who is doing something that they have a constitutional right to do such as exercising their right to healthcare within the meaning of sections 76(1)-(3).²²³

The fact that the scope of these rights is subject to what the state is able to provide for in terms of its section 76(4) duties does not mean that the government is at liberty to decide (without being scrutinized) how to provide for the right to healthcare. Whilst the state has the mandate to decide on the measures to take in order to ensure that this right is progressively realized, such measures must nevertheless be reasonable.

Furthermore, the fact that these rights do not vest immediately does not mean government can take all the time it wants to ensure that the rights are fulfilled. Section 76(1)-(3) read together with section 76(4) impose an obligation on the state to move as expeditiously and effectively as possible towards ensuring that the right to basic health care is realized.²²⁴

As mentioned earlier on, when determining the scope of the right to healthcare, provisions under Part 3 of the Declaration of Rights must be given due regard. As such, all the rights enshrined under section 76 right to health (as interpreted above) will be given paramount treatment by the courts in cases that involve a child, and where these rights are in question.²²⁵ In terms of section 82 (b), the government has a duty to take reasonable legislative and other measures, within the limits of available resources to provide medical assistance to persons that are over the age of 70.²²⁶ This constitutional duty is to be fulfilled on a progressive basis. Section 83(d) obliges the state with a similar duty to ensure that persons living with disabilities have access to health particularly medical, psychological and functional treatment

²²⁰ See UN Committee on Economic, Social and Cultural Rights General Comment 3 (1990) 'The nature of States parties' obligations (Art. 2, Para. 1, of the Covenant)' para 9 and I Currie and J De Waal. *The Bill of Rights Handbook 6th ed* (2013) at 568.

²²¹ See UN Committee on Economic, Social and Cultural Rights General Comment 3 (1990) 'The nature of States parties' obligations (Art. 2, Para. 1, of the Covenant)' para 9.

²²² This principle was laid down in the decision of the Constitutional court of South Africa in the *First Certification case*. By virtue of the interpretation clause section 46(1) (e) of the Constitution of Zimbabwe, this principle is relevant to the interpretation of the scope of the right to health care under the Zimbabwe constitution.

²²³ Currie I. and De Waal J., *The Bill of Rights Handbook 6th ed* (2013) at 568.

²²⁴ See UN Committee on Economic, Social and Cultural Rights General Comment 3 (1990) 'The nature of States parties' obligations (Art. 2, Para. 1, of the Covenant)' para 9.

²²⁵ See sections 81(1) (f) and 81(2) and (3).

²²⁶ This is the legal age that is considered to be the definition of elderly persons in Zimbabwe. See section 82 of the Constitution of Zimbabwe Amendment (No.20).

necessary for such persons to realize their full mental and physical potential. Equally, section 84 (1) obliges the state to provide veterans of the liberation struggle²²⁷ with access to basic healthcare.

7.9 The Right to Food and Water

The fundamental human right to food and water is enshrined under section 77 of the Constitution. The right is framed as follows:

‘Every person has the right to –

- (a) safe, clean and potable water; and
- (b) sufficient food;

and the State must take reasonable legislative and other measures, within the limits of the resources available to it, to achieve the progressive realisation of this right.’

The right to food and water is framed as a single right. However, it is clear that there are two distinct aspects (or sub-rights) to the right in the Zimbabwe Constitution: the right to safe, clean and potable water and the right to sufficient food. As such the two sub-rights are discussed separately below.

7.9.1 The Content of the Right to Safe, Clean and Potable Water

The right to water is indispensable for leading a life in human dignity, and it is a prerequisite for the realisation of other human rights.²²⁸ In fact human life is not possible without water and the human person cannot survive for more than a few days without water. Recently the High Court of Zimbabwe was presented with an opportunity to interpret this right in the case of *Farai Mushoriwa v City of Harare* HH 4266/13 and the Court’s findings are discussed below. However it is crucial to note that the Court did not fully utilise this opportunity to clarify the interpretation of this right. Rather without elucidating much on the content and scope of the right, the Court emphasised that it is the role of the judiciary to interpret and enforce the law when someone complains that their human rights have been violated. As such, there is not enough detail within the local jurisprudence on the interpretation of this right. At this point in time, the local courts will have to draw a lot of guidance from international and comparative foreign law in order to determine the content and scope of this right.

With respect to comparative foreign law, the decision of the Court of Appeal of Botswana in *Matsipane Mosetlhanyane v Attorney General* stands out as a very good example of how international law can be used to interpret the meaning of the right to water. In this case, the

²²⁷ See section 84(1) (a-c) for the constitution’s definition of veterans of the liberation struggle.

²²⁸ See Report by UN Committee on Economic, Social and Cultural Rights titled “Substantive Issues arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights” (2003)

Court relied on the UN Committee on Economic, Social and Cultural Rights' General Comment 15 on the right to water to determine the content of the right to water. By virtue of section 46(1) (c) of the Constitution, Zimbabwean courts can also do the same. General Comment 15 states that while the content of right to water may vary according to different contexts, the following factors should always be present:

a) Availability

The right to water imposes a duty upon the State to ensure that water is available to the people. In so far as availability of water is concerned; the High Court of Zimbabwe has already laid down a very critical principle through its judgement in *Farai Mushoriwa v City of Harare*. In this case, the Court held that where there is a dispute, the authorities cannot proceed to disconnect existing water supply without an order from the courts. Thus the Court has confirmed that the right to water includes the right of freedom from arbitrary disconnection of water supply.

b) Quality

Section 77(a) provides helpful guidelines as to what quality of water is required. It states that the water should be '*safe, clean and potable*'. This means that water should be free from micro-organisms, chemical substances and radiological hazards so that it is safe and clean. Furthermore, potable water must be of an acceptable colour, odour and taste so that it is suitable for drinking.

c) Physical Accessibility

Unlike the South African Constitution which provides for 'right of access to water' the Zimbabwean Constitution does not refer explicitly to accessibility. Nevertheless, accessibility is essential to the realisation of the right to water and therefore it may be taken as implied. This is confirmed in the General Comment 15 which states that '[w]ater, and adequate water facilities and services, must be within safe physical reach for all sections of the population.'²²⁹ While this does not require that water and sanitation must be made available in every home, it does require that water is within a reasonable distance of each home. According to the World Health Organisation (WHO), water needs to be available within 1000 metres and within 30 minutes collection time in order to ensure basic access to water. If the water source is further away than this the quantity collected is likely to be very low and a number of hygiene concerns are raised.²³⁰

The physical accessibility of water is particularly important for the realisation of the right to water for vulnerable groups such as women, children and persons with disabilities.²³¹ In rural

²²⁹ See UN Committee on Economic, Social and Cultural Rights, General Comment 15, The right to water (Twenty-ninth session, 2003) para 12(c)(i).

²³⁰ Howard G. and Bartram J., "Domestic Water Quality: Service level and health". World Health Organization, (2003). Available: http://www.who.int/water_sanitation_health/diseases/en/WSH0302.pdf

²³¹ The Constitution of Zimbabwe makes special reference to these groups of people in Part 3 of Chapter 4.

Zimbabwe, women and children often shoulder the burden of fetching water and so are disproportionately affected if water is not easily accessible.²³² Persons with disabilities will not be able to access water themselves if the source of water is too far away.

d) Economic Accessibility

General Comment 15 states that '[w]ater, and water facilities and services, must be affordable for all.'²³³ While this does not create a blanket requirement for the State to provide free water, it does mean that no-one should be denied access to water, especially safe drinking water, on the basis that they are not able to pay. Therefore, it may mean that in some circumstances the State will need to provide access to water free of charge if the person or household is unable to pay.²³⁴ The State should also adopt pricing policies that are appropriate with respect to the income level of people.²³⁵ This may mean, as was the case in *Mazibuko*, that the State should charge poorer communities less for the use of water than wealthier communities.

e) Non-discrimination

The right to freedom from discrimination is enshrined in section 56 of the new Constitution of Zimbabwe and must be realised in the application of all other rights, including the right to water. The application of this principle to the right to water was stated in the General Comment 15 as follows:

‘Water and water facilities and services must be accessible to all, including the most vulnerable or marginalized sections of the population, in law and in fact, without discrimination on any of the prohibited grounds’.²³⁶

The prohibited grounds of discrimination are listed in section 56(3) of the Constitution of Zimbabwe are: 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. It is important to note that the General Comment protects against both discrimination in law and discrimination in fact, thus protecting both formal and substantive equality. This would include ‘discriminatory laws, policies or measures; exclusionary policy development; discriminatory water-management policies; denial of tenure security; limited participation in decision-making; or lack of protection against discriminatory practices by private actors.’²³⁷

²³² Manase G., et.al., “Mainstreaming gender in integrated water resources management: the case of Zimbabwe” *Physics and Chemistry of the Earth* 28 (2003) 967–971 at 967.

²³³ See UN Committee on Economic, Social and Cultural Rights, General Comment 15, The right to water (Twenty-ninth session, 2003) para 12(c)(ii).

²³⁴ UN High Commissioner for Human Rights, the Right to Water, Fact Sheet No. 35. United Nations, Geneva (2010) at 12.

²³⁵ See UN Committee on Economic, Social and Cultural Rights, General Comment 15, The right to water (Twenty-ninth session, 2003) at para 27.

²³⁶ See UN Committee on Economic, Social and Cultural Rights, General Comment 15, The right to water (Twenty-ninth session, 2003) at para 12(c) (iii).

²³⁷ UN High Commissioner for Human Rights, the Right to Water, Fact Sheet No. 35. At 14.

f) *Information Accessibility*

Lastly, the General Comment states that the sixth aspect of the content of the right to water is ‘the right to seek, receive and impart information concerning water issues.’²³⁸ This engages both the right of access to information (enshrined under section 62 of the Constitution) and the right to participate, individually and collectively, in decision-making processes that may affect the realisation of their right to water which is protected by section 67(1)(d) of the Constitution.

7.9.2 The Content of the Right to Sufficient Food

The second sub-right of ‘the right to food and water’ is the right to ‘sufficient food’. The African Commission on Human and Peoples’ Rights has stated that ‘[t]he right to food is inseparably linked to the dignity of human beings and is therefore essential for the enjoyment and fulfilment of such other rights as health, education, work and political participation.’²³⁹ The fact that this right is protected under the new Constitution of Zimbabwe is very important given that many people are faced with food insecurity in the country.²⁴⁰ Furthermore, ‘food security’ is listed as one of Zimbabwe’s National Objectives in section 15 of the Constitution which states:

‘The State must –

- a) encourage people to grow and store adequate food;
- b) secure the establishment of adequate food reserves; and
- c) encourage and promote adequate and proper nutrition through mass education and other appropriate means’

As with the right to safe, clean and potable water, the right to sufficient food is given limited normative content in the Declaration of Rights and so the Zimbabwean Courts will play an important role in defining the content of this right.

The word ‘sufficient’ is a synonym of, and is likely to be regarded as directly equivalent to, the word ‘adequate’ which is used in international human rights law in respect of the right to food. Therefore, guidance may be sought, once again, from the UN Committee on Economic, Social and Cultural Rights which has stated in its General Comment 12 on the Right to Adequate Food²⁴¹ that the concept of adequacy ‘underline[s] a number of factors which must be taken into account in determining whether particular foods or diets that are accessible can be considered the most appropriate under given circumstances for the purposes of article 11

²³⁸ Committee on Economic, Social and Cultural Rights, General Comment 15, The right to water (Twenty-ninth session, 2003), U.N. Doc. E/C.12/2002/11 (2002) at para 12(c)(iv).

²³⁹ Social and Economic Rights Action Centre (SERAC) and another v Nigeria (2001) AHRLR 60 at para 65.

²⁴⁰ Misselhorn A.A., What drives food insecurity in southern Africa? a meta-analysis of household economy studies. *Global Environmental Change* 15 (2005) 33–43 at 33.

²⁴¹ United Nations Committee on Economic, Social and Cultural Rights, *General Comment 12: the Right to Adequate Food*, 12 May 1999.

of the [ICESCRI].²⁴² Furthermore, the Committee stated that the notion of sustainability is ‘intrinsically linked to the notion of adequate food or food security, implying food being accessible for both present and future generations.’²⁴³ General Comment 12 defines the core content of the right to adequate food as the following:

‘The availability of food in a quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances, and acceptable within a given culture; The accessibility of such food in ways that are sustainable and that do not interfere with the enjoyment of other human rights’.²⁴⁴

Availability encompasses both making food available to one’s self through farming the land as well as food being made available through a well-functioning distribution system. This is captured in the National Objective of food security which requires the state to ‘encourage people to grow and store adequate food’ and to ‘secure the establishment of adequate food reserves’. *Accessibility* also includes both physical and economic accessibility which have been discussed above under the right to water.

7.9.3 Application of the Right to Food and Water

Who can claim the right to food and water?

Section 77 begins with the words ‘Every person has the right...’ This means that every person in Zimbabwe is a bearer of the right to food and water and can invoke this right whenever it is violated or threatened.

Duties under the right to food and water

In terms of section 44 of the Constitution of Zimbabwe, both the State (including its agencies) and private persons are bound to ‘respect, protect, promote and fulfil’ fundamental human rights. This means, the right to food and water binds both government agencies and private individuals. However, in terms of section 45(2) private persons are bound only to the extent that the right to food and water is applicable. Therefore, the four-fold obligation to ‘respect, protect, promote and fulfil’ the right to food and water rests primarily on the State. Furthermore, section 77 provides that the State has a duty to ‘take reasonable legislative and other measures within the limits of the resources available to it, to achieve the progressive realisation of this right.’

The duties of the State to respect, protect, promote (or facilitate), and fulfil (or provide) have been applied and developed in international human rights law. General Comment 12 and General Comment 15 outline how these duties manifest in relation to the rights to food and

²⁴² Ibid at para 7.

²⁴³ Ibid.

²⁴⁴ Ibid at para 8.

water, respectively. With regard to how the duty to *respect* relates to the right to food, General Comment 12 states:

‘The obligation to *respect* existing access to adequate food requires States parties not to take any measures that result in preventing such access.’

General Comment 15 outlines the types of circumstances in which the duty to respect the right to water will be violated:

‘Violations of the obligation to respect the right to water follow from the State party’s interference with the right to water. This includes, inter alia: (i) arbitrary or unjustified disconnection or exclusion from water services or facilities; (ii) discriminatory or unaffordable increases in the price of water; and (iii) pollution and diminution of water resources affecting human health.’

The duty to respect the right to water was recently applied in the Zimbabwean case *Mushoriwa v City of Harare*. The court held that a by-law which allowed the City of Harare to disconnect a consumer’s water supply without recourse to the courts (in case of a dispute between the City Council and the consumer) was unlawful and unconstitutional. The court ruled that the City of Harare had therefore arbitrarily disconnected the applicant’s water supply and had infringed his right to water. The court however did not take the opportunity to state in greater detail what the proper procedure for disconnecting a person’s water should be. According to General Comment 15 it must include the following procedural safeguards:

- (a) opportunity for genuine consultation with those affected;
- (b) timely and full disclosure of information on the proposed measures;
- (c) reasonable notice of proposed actions;
- (d) legal recourse and remedies for those affected; and
- (e) legal assistance for obtaining legal remedies

Nevertheless, the Court did lay down that a city council may not disconnect existing water supply without first obtaining a court order. This requirement should facilitate ensuring that the procedural requirements listed above are followed.

When the right to food and water is infringed by a third party (i.e. by someone other than the State or a government agency), there may be a constitutional action against the third party themselves if the right is deemed to be applicable to them in terms of section 45(2) of the Constitution of Zimbabwe. Additionally, however, the State owes a duty to protect people from the interference or violation of their right to food and water by third parties.²⁴⁵ The seminal African case on the duty of the State to respect and protect the right to food is a matter heard by the African Commission on Human and Peoples’ Rights, *Social and*

²⁴⁵ See UN Committee on Economic, Social and Cultural Rights General Comment 12 at para 15; and UN General Comment 15 at para 23.

Economic Rights Action Centre (SERAC) and Another v Nigeria (2001) AHRLR 60. In that case, the ACHPR stated:

‘Without touching on the duty to improve food production and to guarantee access, the minimum core of the right to food requires that the Nigerian government should not destroy or contaminate food sources. It should not allow private parties to destroy or contaminate food sources, and prevent peoples' efforts to feed themselves. The government's treatment of the Ogonis has violated all three minimum duties of the right to food. The government has destroyed food sources through its security forces and state oil company; has allowed private oil companies to destroy food sources; and, through terror, has created significant obstacles to Ogoni communities trying to feed themselves. The Nigerian government has again fallen short of what is expected of it as under the provisions of the African Charter and international human rights standards, and hence, is in violation of the right to food of the Ogonis.’²⁴⁶

Although this decision is not binding on Zimbabwean courts, it is relevant to the interpretation of the right to food since section 46(c) requires that the courts ‘take into account international law and all treaties and conventions to which Zimbabwe is a party’.²⁴⁷ The case illustrates how the duty to respect and the duty to protect are closely related. Furthermore, the case states that the duty to protect against infringements by third parties is part of the State’s minimum duties. The duty will apply equally in relation to infringements of the right to water by third parties.

It seems from this case that the duties to *promote* (or facilitate) and *fulfil* (or provide) the right to food and water will fall outside of the minimum duties of State. Nevertheless, as they are justiciable duties under the Zimbabwean Constitution it will be important for the courts to establish what these duties entail and to what extent the State can be required to discharge the duties. General Comment 12 outlines the duty to facilitate the right to food as follows:

‘[T]he State must proactively engage in activities intended to strengthen people’s access to and utilization of resources and means to ensure their livelihood, including food security.’

General Comment 15, which frames the duty as it relates to the right to water in similar language, adds that the duty to promote the right to water requires the State to ‘take steps to ensure that there is appropriate education concerning the hygienic use of water, protection of water sources and methods to minimize water wastage.’²⁴⁸

In relation the duty to *fulfil*, General Comment 15 states:

²⁴⁶ Social and Economic Rights Action Centre (SERAC) and Another v Nigeria (2001) AHRLR 60 at para 65.

²⁴⁷ Zimbabwe is a party to the African Charter on Human and Peoples Rights.

²⁴⁸ See UN Committee on Economic, Social and Cultural Rights, General Comment 15, The right to water (Twenty-ninth session, 2003) at para 25.

‘State parties are also obliged to fulfil (provide) the right when individuals or a group are unable, for reasons beyond their control, to realize that right themselves by the means at their disposal.’²⁴⁹

This duty relates particularly to persons who are victims of natural or other disasters, who as a result of which are unable to realise their right to food and water.²⁵⁰

7.10 Marriage Rights

Through section 78, the Constitution of Zimbabwe provides for marriage rights. These rights are;

- Everyone who has attained the age of 18 years has the right to enter into a marriage and establish a family.
- Everyone has the right to freedom from being forced to enter into a marriage.

These rights are framed in pretty much clear and simple language to the extent that it is easy to deduce the scope and content of the rights enshrined. In terms of section 78(1), everyone in Zimbabwe is free to decide to enter into a marriage once they reach the age of 18 years. The Constitution does not specify the type or nature of marriage, which means that a person can choose to enter into any kind of a marriage and found a family. However this right does not include same sex marriages as section 78(3) prohibits persons of same sex from marrying each other. The right to marry is however not absolute in the sense that such a right will be exercised subject to fulfilling certain legal procedural requirements that are set through the relevant legislation.²⁵¹ Government can therefore regulate the process of contracting a marriage but such regulation must be reasonable and rational, and must not frustrate the spirit and objectives of the Declaration of Rights, particularly the right to marriage itself.

Section 78(2) guarantees everyone the freedom from being compelled to enter into a marriage against their will. By virtue of this right, no one can be forced to enter into a marriage of any kind. This provision is in line with Article 10 of the ICESCR which stipulates that marriage must be entered into with the free consent of the intending spouses.

Within the family set up, section 60(3) relating to freedom of conscience gives parents and guardians the right to determine the moral and religious upbringing of their children. That means parents or guardians can decide for any person who is below the age of 18 who is under their care, which religion or moral values should such persons practice and abide by. However those moral and religious beliefs or values should not contradict any of the rights enshrined under the Declaration of Rights, particularly the rights of children including their right to health, education and welfare. In any case, by virtue of section 81(2), the family must ensure that the child’s best interests are always made paramount. That means family members must ensure that all the rights entitled to a child are respected and honored. Furthermore, in

²⁴⁹ Ibid.

²⁵⁰ General Comment 12 at para 12.

²⁵¹ These include the Marriage Act [*Chapter 5:11*] and the Customary Marriages Act [*Chapter 5:07*].

terms of section 81(1) (b) every person under the age of 18 has a right to be given a name and a family name.

The family has an obligation to provide reasonable care and assistance to family members that are over the age of 70.²⁵² Amongst other factors, reasonable care and assistance will depend on what the needs of those members are and what the family can afford to provide.

7.11 The Right to Receive Social Security from Government

One of the major legal questions pertaining to the right to receive social security from government will be; who are the persons that can claim this right? Through section 30, ‘*national objective on social welfare*’, the Constitution of Zimbabwe obliges the government to take all practical measures within the limits of the resources available to it, to provide social security and social care to those who are in need. Under the Declaration of Rights, the Constitution through section 82 (c) relating to the rights of the elderly persons, guarantees the right to receive financial support by way of social security and welfare. This right vest in elderly persons, whom section 82 of the Constitution, defines as persons that are over the age of 70. When section 82(c) is therefore read together with section 30, it becomes clear that needy persons that are over the age of 70 are the only persons who can claim social security from government as a matter of a fundamental right.

Section 84 of the Constitution entitles veterans of the liberation struggle to the right to receive suitable welfare such as pensions and access to basic health. It remains to be seen whether this provision will be interpreted to mean that liberation veterans can claim the right to receive social security as part of their right to receive suitable welfare.

Section 81(1) (f) relating to the Rights of Children, entitles persons that are below the age of 18 to the right to nutrition. It is unlikely that this provision could be taken to entitle children with the right to receive social security from government. The right to social security is of central importance in guaranteeing human dignity for all persons when they are faced with circumstances that deprive them of their capacity to fully realize their other rights.²⁵³ Therefore, clearly the right to social security by its nature is closely linked to other rights like food and water, healthcare and education. Nevertheless, the right to receive social security from government must be understood as a separate right because the Constitution has provided for it as a separate right. As such, section 84(1) (f) guarantees children the right to proper nutrition, which falls under section 77 right to food and water. This provision is therefore unlikely to be interpreted to mean that children can claim the right to receive social security from government.

Thus even though through the national objective on social welfare, the government is obliged to take steps to ensure that all persons in need receive social security from government, the

²⁵² See section 82(a) of the Constitution of Zimbabwe

²⁵³ See Committee on Economic, Social and Cultural Rights, General Comment 19, The right to social security (art. 9) (Thirty-ninth session, 2007), U.N. Doc. E/C.12/GC/19 (2008) para 1.

elderly persons are the only group that has a specific and express right to receive such social security. When sections 30 and 82(c) are therefore read together, they point out that the intention of the Constitution is to oblige government with a duty to provide social security to all elderly persons that are in need. Therefore this means not all elderly persons may claim the right to receive social security from government but only those elderly persons that are in need, within the meaning of section 30 of the constitution.

The other question is what exactly does the right to receive social security from government mean? The Covenant on Economic, Social and Cultural Rights through Article 9 obliges state parties to recognize the right of everyone to social security, including social insurance. The right to social security encompasses the right to access and maintain benefits, whether in cash or in kind, without discrimination in order to secure protection from lack of work-related income caused by sickness, disability, maternity, employment injury, unemployment, old age amongst many other causes.²⁵⁴ State parties should take appropriate measures to establish social security schemes that provide benefits to older persons, starting at a specific age, to be prescribed by national law.²⁵⁵ Thus in terms of the ICESCR, the right to social security from government includes the right by elderly persons to receive benefits to cushion them from poverty and enable them to survive with dignity. The ICESCR recognizes that there are various forms of social security measures which different governments can undertake. As such, there is no universal definition of social security and therefore social security systems differ from country to country.²⁵⁶ However essentially social security are measures that are undertaken to protect the individual against social risks by providing welfare and services to such an individual and his or her dependents if they are unable to provide for their own basic needs.²⁵⁷ In respect of elderly persons, the South African White Paper on Social Welfare Policy defines social security as policies which ensure that all persons have adequate economic and social protection during old age, and such protection could come in the form of cash or in kind benefits.²⁵⁸ Whilst the ICESCR and the above cited sources of comparative law indicate that social security can be provided in the form of cash or in kind, section 82(c) of the Constitution of Zimbabwe specifies that such assistance must be provided for in the form of 'financial support' which means it must be in the form of cash benefits. Thus elderly persons that are in need have a constitutional right to claim monetary grants from the government as part of their right to receive social security from the State. However for one to claim this right, they will have to show that they are above the age of 70 and they are failing to provide for their own basic needs. The court is likely to take into account whether or not such persons have anyone (including family members) who is capable of providing care for

²⁵⁴ Ibid para 2.

²⁵⁵ Ibid para 15.

²⁵⁶ Guthrie T. et al., 'Social security policy options for people with disabilities in South Africa: an international and comparative review' produced by The Child Health Policy Institute and the South African Federal Council on Disability (2001) at 11.

²⁵⁷ Ibid.

²⁵⁸ See White Paper on South African Social Welfare Policy 1997 chapter 7.

them.²⁵⁹ Furthermore, the right to receive social security from government is not an immediate right but one that is to be realized on a progressive basis. The realization of this right is therefore subject to the ability of government to take reasonable legislative and other measures as allowed by available resources, to ensure that this right is progressively realized.²⁶⁰ In order to understand what this means, see the earlier section on *'Limitation of socio-economic and cultural rights'*.

²⁵⁹ Section 82(a) obliges families with the duty to provide reasonable care and assistance to family members that are in need and are above the age of 70.

²⁶⁰ See section 82 of the Constitution of Zimbabwe Amendment (No.20).

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