

11 Socio-Economic Rights under the 2013 Zimbabwean Constitution

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1 Introduction

In a watershed moment for the country, Zimbabwe adopted a new Constitution (hereinafter 'Constitution')¹ on 22 May 2013. The Constitution replaced the much-maligned 1980 Constitution negotiated at Lancaster House, London in 1979 (hereinafter 'Independence Constitution'). What is remarkable about the Constitution is that its Declaration of Rights contained in Chapter 4 includes a comprehensive set of economic, social and cultural rights,² alongside civil and political rights, which is a fundamental departure from the Independence Constitution. The Constitution follows the approach of the South African³ and Kenyan constitutions⁴ which have incorporated a litany of socio-economic rights. Significantly, the courts have the power to enforce the rights and a broad discretion to make any order that is just and equitable in the event of rights infringement.⁵

The world is reeling from the effects of the global pandemic known as COVID-19. At the end of 2019, the coronavirus known as SARS-CoV-2 broke out in Wuhan, China.⁶ Since then, this virus, along with the disease it causes, COVID-19, has rapidly spread across the world virtually affecting every country. On 30 January 2020, the World Health Organisation (WHO) declared COVID-19, a Public Health Emergency of International Concern.⁷ On 11 March 2020, WHO followed its earlier position by declaring COVID-19 a global pandemic. The Zimbabwean government, taking a cue from other countries and recommendations from the WHO, declared a State of Disaster⁸ and consequently a National Lockdown to contain the spread of

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¹ See Constitution of Zimbabwe Amendment (No. 20) Act of 2013.

² For the purpose of this chapter socio-economic rights are defined as the rights that protect and improve the material living conditions of all human beings in their individual capacity and in groups. They include the rights to health, education, social security, adequate standard of living including water, food and housing.

³ For a discussion of socio-economic rights under the 1996 Constitution of South Africa, see S. Liebenberg, *Socio-Economic Rights: Adjudication under a Transformative Constitution* (Juta & Co Ltd, Claremont, 2010).

⁴ See J. Biegon and G. M. Musila (eds.), *Judicial Enforcement of Socio-Economic Rights Under the New Constitution: Challenges and Opportunities for Kenya* (Kenya Section of the International Commission of Jurists, Nairobi, 2011) for a comprehensive discussion of the constitutionalisation of socio-economic rights under the 2010 Kenyan Constitution.

⁵ See section 175(6) of the Constitution. See also section 86 on the power of courts to grant any appropriate remedy.

⁶ C. Huang *et al.*, 'Clinical Features of Patients Infected with 2019 Novel Coronavirus in Wuhan, China', 395 *The Lancet* (2020) p.497–506.

⁷ <<http://www.who.int>>.

⁸ Civil Protection (Declaration of State of Disaster) Rural and Urban Areas of Zimbabwe (COVID 19) Notice 2020.

COVID-19.9 The coronavirus pandemic has illuminated the critical role of socio-economic rights in securing a dignified life for all and in countering social and economic inequalities laid bare by the consequences of restrictive measures to contain COVID-19. Zimbabwe, along with many countries across the world, are adopting far-reaching measures to address and mitigate the scourge wrought by the COVID-19 pandemic. Such mitigatory measures have entailed multiple restrictions to civil, economic, political and social rights and these have had a devastating effect especially on poor people's livelihoods. COVID-19's tragic consequences on livelihoods brings to the fore the role of the state in the respect, promotion, protection and provision of socio-economic rights such as the rights to the highest attainable standard of health, water, education, housing, food, social security and assistance. This is evidenced by measures that countries across the world have adopted in cushioning their populations from the socio-economic impacts of the COVID-19 pandemic.

The Constitution provides a wide range of socio-economic rights. These include the rights to freedom from arbitrary eviction,¹⁰ access to health care,¹¹ sufficient food, clean water¹² and education.¹³ The Declaration of Rights also protects select socio-economic rights of vulnerable groups such as children,¹⁴ women,¹⁵ the elderly,¹⁶ persons with disabilities¹⁷ and veterans of the 1970s liberation struggle.¹⁸ Significantly, the Constitution also protects the rights of access to information¹⁹ and administrative justice.²⁰ The rights of access to information and administrative justice no doubt play a fundamental role in facilitating people's right to be heard in decision-making processes that impact on their social, economic and political interests.²¹ What is clear is that there has been a significant gap between the promise of housing, clean and safe water, medical care, basic infrastructure contained in the Constitution and the delivery thereof. This is reflected, for example, in the huge disparities in the quality of education between rich and poor, with many schools in rural areas lacking basic education infrastructure. The advancement of these rights through legal mechanisms is made more difficult by the fact that they are being enforced while the underlying conditions of poverty have not been addressed. These conditions include lack of access to basic necessities such as water, sanitation, food, social security and assistance, health care and housing.

⁹ Public Health (COVID-19 Prevention, Containment and Treatment (National Lockdown) Order, 2020 S.I 83/2020.

¹⁰ Section 74.

¹¹ Section 76.

¹² Section 77.

¹³ Section 75.

¹⁴ Section 81.

¹⁵ Section 80.

¹⁶ Section 82.

¹⁷ Section 83.

¹⁸ Section 84.

¹⁹ Section 62.

²⁰ Section 68.

²¹ See Liebenberg, *supra* note 3, p. 53.

The recognition of these rights, however, is compatible with the constitutional vision to facilitate the transformation of Zimbabwe into a society that is based on the respect, protection and fulfilment of the human dignity of all persons who live in it.²² Although the nature of socio-economic rights differs, each right contains entitlements relating to accessibility, availability, adequacy, quality or cultural appropriateness.²³ Due to space limitations, this chapter does not delve into the specific content of individual socio-economic rights. This chapter also does not trace the history of the recognition of socio-economic rights under the Zimbabwean Constitution due to similar concerns highlighted in the preceding sentence.

Despite the constitutionalisation of socio-economic rights, objections to the notion of justiciability of socio-economic rights still impact on the way such rights are enforced.²⁴ The constitutionalisation of socio-economic rights, in so many ways, gives renewed impetus to the philosophical debates in the human rights discourse on the legal status of socio-economic rights and whether such rights could be subjected to judicial enforcement. Malcolm Langford, in his landmark book that carries out a comprehensive analysis of the judicial enforcement of socio-economic rights under international and national jurisdictions, asserts that the debate on the legal status of socio-economic rights, and whether such rights are justiciable, has since been resolved.²⁵ Rather, the debate is increasingly focusing on the degree of justiciability of socio-economic rights and whether courts should engage in weak or strong forms of review in light of institutional concerns, as well as the choice of appropriate remedies in balancing individual and collective interests.²⁶

From a Zimbabwean perspective, the protection of socio-economic rights in the Declaration of Rights fundamentally changes the question of whether socio-economic rights are justiciable to how to enforce them in a given case, which is the subject of this chapter. The adjudication of socio-economic rights also raises complex questions relating to the justiciability of these rights, in particular the legitimacy of thrusting courts into complex and often contentious fiscal and policy debates that are ordinarily presumed to fall under the exclusive remit of the other arms of the state. The judicial enforcement of socio-economic rights also puts into the spotlight the institutional competence of courts to craft appropriate remedies with potential polycentric implications that the executive and legislature will be in a position to implement.²⁷

²² This vision is set out in both the preamble and section 3(1)(e) of the Constitution.

²³ J. Biegon, 'The Inclusion of Socio-Economic Rights in the 2010 Constitution: Conceptual and Practical Issues', in Biegon and Musila, *supra* note 4, p. 13, at p. 14. See for example Committee on Economic, Social and Cultural Rights *General Comment No. 14 The Right to the Highest Attainable Standard of Health* (2000) UN Doc. E/C.12/2000/4; Committee on Economic, Social and Cultural Rights, *Poverty and the International Covenant on Economic, Social and Cultural Rights* (2001) UN Doc. E/C.12/2001/10 and Committee on Economic, Social and Cultural Rights, *General Comment No. 15 The Right to Water* (2002) UN Doc. E/C.12/2002/11.

²⁴ Biegon, *supra* note 23, p. p. 14.

²⁵ M. Langford, 'The Justiciability of Social Rights: From Practice to Theory', in M. Langford (ed.), *Socio-Economic Rights Jurisprudence: Emerging Trends in Comparative and International Law* (Cambridge University Press, 2008) p. 30.

²⁶ *Ibid.*, p. 29.

²⁷ Biegon, *supra* note 23, p. 18.

Socio-economic rights enforcement, like civil and political rights, without doubt, invites judicial inquiry into state policies and programmes. While it may be correct that socio-economic rights may result in courts making orders that have a direct impact on the budget, the same problem arises with civil and political rights enforcement. For example, a court could require the government to provide legal aid or to facilitate prisoners' right to vote by providing ballot boxes to every detention centre in the country, an exercise that may be costly. It follows, therefore, that the power conferred on courts to interpret and apply socio-economic rights is not so different from the power to interpret and apply civil and political rights in that it amounts to an infringement of the separation of powers. The Constitution's explicit entrenchment of a broad range of socio-economic rights has undoubtedly resolved the justiciability objections in favour of legitimising judicial enforcement of such rights. It follows that if courts, in executing their judicial mandate, review the reasonableness of state measures in the realisation of socio-economic rights, they are acting within their constitutional remit.²⁸ This clearly calls into question any rigid interpretation of the separation of powers doctrine grounded on inflexible functional demarcations between the three arms of government. The latter approach would most likely emasculate the courts and prevent them from enquiring into the reasonableness of executive or legislative measures in the realisation of socio-economic rights.

The justiciability of socio-economic rights under the Constitution has largely been laid to bed given the burgeoning jurisprudence where Zimbabwean courts have enforced the rights, and in cases where socio-economic rights claims are dismissed, these are largely on technical grounds rather than on the justiciability question.²⁹ Nevertheless, concerns around the justiciability of socio-economic rights are likely to be raised given Zimbabwean courts' relative inexperience in the enforcement of socio-economic rights. Additionally, in a politically and economically fragile country like Zimbabwe where the independence of the judiciary is constantly under strain, granting courts wide powers with potentially far-reaching fiscal consequences risks putting them in the cross-hairs of the executive and legislature. This may further undermine the judiciary's independence.³⁰ Nevertheless, the constitutionalisation of

²⁸ Langford, *supra* note 25, p. 32.

²⁹ *City of Harare v. Mushowe and Others* Case No. SC 228/14 (water); *Combined Harare Residents Association and Others v. The Minister of Health and Child Care* NO and Others HC 4070/20; *Makoka v. Minister of Health and Child Care and Others* HC 3003/20; *Markham and Another v. Minister of Health and Child Care and Others* HC 2168/20; *Stringer v. Minister of Health & Sakunda Holdings* HH 259-20; *The Trustees Of The Arda-Transau Relocation Development Trust v. Zimbabwe Electricity Transmission and Distribution Company (Zetdc) (Pvt) Ltd* HC 88/20; *Zimbabwe Homeless Peoples' Federation and Others v. Minister of Local Government and National Housing* Judgment No. SC 94/2020; *Zuze v. Trustees of Mlambo & Anor* SC 69-19; *City of Harare v. Mukunguretsi & Ors* SC 46-18; *Hopcik Investment (Pty Ltd) v. Minister of Environment Water and Climate and City of Harare* HH 137-16 & HC 1796/14.

³⁰ B. Ray, *Engaging with Social Rights: Procedure, Participation, and Democracy in South Africa's Second Wave* (Cambridge University Press, Cambridge, 2016) p. 2. The proposed Constitutional Amendment No. Bill 2 of 2019 which seeks to amend the provisions of the Constitution is a cause for considerable concern on the independence of the judiciary in the country by giving the president more powers in the appointment of judges. The draft constitutional amendment proposes to alter the judicial appointment mechanism under section 180 of the Constitution by removing public advertisements and

socio-economic rights serves to ensure governmental attention to important interests that might otherwise be neglected in ordinary debates.³¹ Including socio-economic rights as justiciable rights demonstrates a concrete desire to ensure that the political process also focuses on assisting the poor and marginalised in accessing the basic needs to ensure a dignified livelihood.³² The constitutionalisation of socio-economic rights is a clear demonstration that issues of poverty alleviation, social justice and access to social goods necessary for a dignified existence are not left to the uncertainties of the markets.³³ Significantly, socio-economic rights are also considered a precondition for public participation and successful democracy because effective political participation, to a large extent, also depends on the existence of an informed and a healthy society.³⁴ In any case, all human rights should be regarded as interdependent, interrelated and indivisible from each other and that socio-economic rights and civil and political rights are indispensable to the realisation of the other. It follows that no hierarchical categorisation should be made between them given rights' mutual interdependence.³⁵ Such relationship of interdependence and indivisibility of all human rights is recognised in section 46 of the Constitution, which governs how the Declaration of Rights must be interpreted. Section 46(1)(a) and (b) states that, when interpreting the rights enshrined in the Declaration of Rights, the court "must give full effect" to the rights concerned and "must promote the values and principles that underlie a democratic society" and these values include human dignity. The effect of section 46 (1)(a) and (b) is therefore that courts must interpret all the constitutionally guaranteed human rights in a manner which ensures that those rights and the underlying constitutional values are protected effectively. In its recent judgment in the case of *Zimbabwe Homeless Peoples' Federation and Others v. Minister of Local Government and National Housing Judgment*, the Zimbabwean Supreme Court emphatically stated that "the Constitution must be interpreted in an holistic and seamless fashion. Each provision is to be interpreted ... in a manner that is consistent and accords with every other relevant provision, so as to achieve the underlying purpose of those provisions. They must be construed as being mutually complementary rather than as being contradictory to one another. In short, the Constitution must be construed as a unified

interviews in the context of sitting judges of the Supreme and High Courts. It does so by permitting the president to appoint judges sitting in the High Court or the Supreme Court to a higher court on the recommendation of the Judicial Services Commission. See Clauses 13 and 14 of the Bill 2 Constitution of Zimbabwe Amendment (No. 2) Bill, 2019.

³¹ C. R. Sunstein, 'Against Positive Rights: Why Social and Economic Rights Don't Belong in the New Constitutions of Post-Communist Europe', 2 *East European Constitutional Review* (1993) p. 35, at p. 131.

³² Ray, *supra* note 31, p. 11.

³³ D. M. Chirwa and L. Chenwi, 'Protection of Economic, Social and Cultural Rights in Africa', in D. M. Chirwa and L. Chenwi (eds.), *The Protection of Economic, Social and Cultural Rights in Africa: International, Regional and National Perspectives* (Cambridge University Press, New York, 2016) p. 17.

³⁴ *Ibid.*, p. 15.

³⁵ C. Scott, 'The Interdependence and Permeability of Human Rights Norms: Towards a Partial Fusion of the International Covenants on Human Rights', 27 *Osgoode Hall Law Journal* (1989) p. 769, at pp. 779–786.

whole.”³⁶ It follows that effective protection of constitutionally-guaranteed rights and values can only be achieved if courts and other adjudicative mechanisms apply the principle of indivisibility and interdependence of all human rights when they enforce such rights.

Zimbabwean courts, in executing their interpretive mandate, will have to develop a conceptual understanding of the proper role of courts in enforcing socio-economic rights and how the enforcement role can be performed without usurping the powers of the other arms of government. In addition, and given the abstract nature of the rights, the courts will have to give normative content to the socio-economic rights enshrined in the Declaration of Rights; develop a standard for assessing state compliance with the positive duties imposed by such rights; as well as advance appropriate remedies for any infringement of socio-economic rights without upsetting the separation of powers between the different arms of the state.³⁷

This chapter is divided into three parts. The first part provides an overview of the protected socio-economic rights in sections 74 to 84 of the Constitution. The second part is divided into six sections. The first section discusses and evaluates the role of international and comparative law as interpretive guides in giving meaning to the rights protected in the Declaration of Rights. This is followed by a discussion of the institutional competence concerns and their impact in the judicial enforcement of socio-economic rights. The third section focuses on the horizontal application of the Declaration of Rights, especially with regard to its meaning and impact in the enforcement of socio-economic rights. The fourth section analyses the models of reviewing the positive duties imposed by socio-economic rights, namely the reasonableness approach and the minimum core approaches. The fifth section focuses on the role of concepts impacting the enforcement of socio-economic rights, namely the ‘progressive realisation’ and ‘availability of resources’ and a recommendation on the proper interpretation of such concepts in enforcing socio-economic rights. The sixth section discusses and evaluates the framework provided for under the Constitution for remedying human rights infringements and the role of the courts in crafting appropriate remedies. Part three concludes the discussion.

2 Interpretation of Socio-Economic Rights in the Declaration of Rights

The socio-economic rights in the Constitution have different formulations and this impacts on how the courts should interpret them. Section 74 is formulated in the negative and provides that “no person may be evicted from their home, or have their home demolished, without an order of court made after considering all relevant circumstances”. The right to education (section 75) and the right to the right to health care services (section 76) provide for ‘basic’ entitlements limited to citizens and permanent residents. Significantly, these rights are subjected to an internal limitation, the ‘availability of resources’ and ‘progressive realisation’ qualification. Section 77 provides for the rights to water and food, while sections 82(c) and (b)

³⁶ *Zimbabwe Homeless Peoples’ Federation and Others v Minister of Local Government and National Housing* Judgment No. SC 94/2020, p.22.

³⁷ Biegon, *supra* note 23, p. 14.

provides for the rights to social security and health of the elderly, respectively. Of particular note is that these rights are also qualified by the availability of resources and progressive realisation internal limitation. Section 81(1)(f) provides for children's socio-economic rights, while section 84 provides for the rights of veterans of the liberation struggle to social security and access to basic health care. These rights are not subject to the 'availability of resources' and 'progressive realisation' qualification. Section 83(d) and (e) provides for the rights to health and education of persons with disabilities. However, these rights are subject to the 'availability of resources' qualification.

A question arises as to whether section 81(1)(f) on social security for children and section 84 on the rights of war veterans to social security and basic health impose direct obligations on the state to ensure the provision of a basic level of socio-economic rights without the qualifications relating to reasonable measures, progressive realisation and resource constraints. The proper interpretation would be to subject these rights to the general limitation clause contained in section 86 of the Constitution. Such a limitation is only justifiable in terms of the requirements of the general limitations clause which provides for a limitation through a law of general application. However, it is important to bear in mind that, although some rights are formulated as unqualified rights, all the rights in the Declaration of Rights are subject to the general limitations clause provided under section 86 of the Constitution. Such a limitation is only justifiable in terms of the stringent requirements of the general limitations clause.³⁸ It is important to note that the purpose of the limitation of the protected rights must be consistent with an open and democratic society based on a list of factors enumerated in section 86(2) such as openness, justice, human dignity, equality and freedom.³⁹ Such an interpretive approach was confirmed by the Supreme Court in the *Zimbabwe Homeless Peoples* case.⁴⁰ The Court, however, rightly pointed out that the list of these relevant factors is not exhaustive.⁴¹

The Constitution also contains provisions that are important for the enforcement of socio-economic rights. Section 85 confers standing on various categories of persons who may approach a court for appropriate relief alleging that a right in the Declaration of Rights has been infringed or threatened. This includes anyone acting in their own interests; a person acting on behalf of another person who cannot act for themselves; a person acting as a member or in the interests of a group or class of persons; a person acting in the public interest; and any association acting in the interests of its members.⁴² Such a generous approach to standing in constitutional litigation should be distinguished from the narrow and restrictive traditional common law approach where a litigant has *locus standi* where the party can establish that it has a direct and substantial interest in the subject matter of the litigation and the outcome.⁴³

³⁸ Section 86 of the Constitution.

³⁹ Section 86 of the Constitution.

⁴⁰ See *Zimbabwe Homeless Peoples' Federation and Others v. Minister of Local Government and National Housing* Judgment No. SC 94/2020, p26.

⁴¹ *Ibid.*

⁴² See section 85(1)(a)–(e) of the Constitution.

⁴³ *Combined Harare Residents Association and Others v. The Minister of Health and Child Care NO and Others* HC 4070/20.

Section 85 of the Constitution should also be interpreted to enable individuals and organisations to participate in human rights litigation through the submission of *amicus curiae* (friend of the court) briefs on issues directly impacting on the public interest. Insights could be drawn from the South African judicial practice where applicants need only show that their submissions will be useful to the court and are different from those of the parties to the litigation in order to be admitted as *amici*.⁴⁴ Admitting *amici* interventions are important especially in constitutional litigation as it provides an opportunity for civil society formations and individuals with expertise or experience on issues being adjudicated on to contribute to the development of Zimbabwe's economic and social rights jurisprudence.

Furthermore, the Constitution also confers broad remedial powers on the courts, including the powers to invalidate any law or conduct that is inconsistent with the Constitution, and to grant any just and equitable remedy in the event of an infringement of any constitutionally protected right.⁴⁵ In addition, the Declaration of Rights envisages both vertical application of constitutional rights against organs of state, as well as the horizontal application of human rights against non-state entities to the extent that the right in question is applicable.⁴⁶

3 Socio-Economic Rights and the Constitution

3.1 The Values of Openness, Justice, Human Dignity, Equality and Freedom

Section 46(1)(a) of the Constitution provides that when interpreting the provisions under the Declaration of Rights, a court, tribunal or forum “must promote the values and principles that underlie a democratic society based on openness, justice, human dignity, equality, [and] freedom”.⁴⁷ This provision is similar to section 39(1)(a) of the South African Constitution which provides that that when interpreting the Bill of Rights, a court, tribunal or forum “must promote the values that underlie an open and democratic society based on human dignity, equality and freedom”. The interpretive approach of courts and tribunals in that country will thus be useful as Zimbabwean adjudicative organs engage with providing content to the rights protected in the Declaration of Rights.

Each of these values offer valuable insights on the purposes which socio-economic rights advance in a polity such as ours which aspires to be a constitutional democracy. Significantly, different values will be implicated depending on the nature and context of particular cases. Courts and other tribunals are thus under a constitutional obligation, in their adjudicative function, to safeguard and promote the values underpinning society.⁴⁸ Giving content to the socio-economic rights protected

⁴⁴ Rules of the Constitutional Court, Government Notice R1675, Government Gazette 25726, 31 October 2003, Rule 10.

⁴⁵ Section 175(6) of the Constitution.

⁴⁶ Section 45(2) of the Constitution.

⁴⁷ Section 46(1)(b) of the Constitution.

⁴⁸ Liebenberg has also commented on a similar provision enshrined in the South African Constitution. See Liebenberg, *supra* note 3, p. 97.

under the Constitution entails engagement with the values and principles which these rights seek to promote and protect.⁴⁹ Such an approach, as argued by Liebenberg, “represents a fundamental departure from a formalist interpretation of these rights premised on ‘neutral’, ‘value free’ adjudication of the relevant legal texts”.⁵⁰ In the case *Sidumo v. Rustenburg Platinum Mines Ltd*,⁵¹ the South African Constitutional Court elaborated on the role of these values in constitutional interpretation, explaining that:

The values of the Constitution are strong, explicit and clearly intended to be considered part of the very texture of the constitutional project. They are implicit in the very structure and design of the new democratic order. The letter and the spirit of the Constitution cannot be separated; just as the values are not free-floating, ready to alight as mere adornments on this or that provision, so is the text not self-supporting, awaiting occasional evocative enhancement. The role of constitutional values is certainly not to provide a patina of virtue to otherwise bald, neutral and discrete legal propositions. Text and values work together in integral fashion to provide the protections promised by the Constitution.⁵²

As noted by Liebenberg, developing the legal and institutional meaning of socio-economic rights requires a theoretical inquiry and engagement with the values and purposes which these rights protect and promote.⁵³ In that regard, it is imperative that, in executing its adjudicative mandate, the judiciary must be sensitive to the historical and current social and economic context as well as the range of impacts which poverty, inequality and marginalisation of certain groups has had on their lives.⁵⁴ Judicial engagement with the theoretical underpinnings of socio-economic rights and the social contexts is imperative if the constitutional meanings which such rights acquire over time are to be maximally responsive to marginalisation, inequality and poverty experienced by various groups in Zimbabwe.⁵⁵ An adjudicative approach anchored on an understanding and engagement with the purposes and values undergirding socio-economic rights, it is argued, creates propitious conditions for developing a socio-economic rights jurisprudence which is responsive to people’s lived experiences of poverty and social and economic deprivation.

The following sections discuss and evaluate some of the interpretive guides important for giving meaning to the protected rights, as well as having a proper understanding of the nature of state obligations in the realisation of socio-economic rights.

⁴⁹ *Ibid.*, p. 50.

⁵⁰ *Ibid.*, p. 48.

⁵¹ *Sidumo v. Rustenburg Platinum Mines Ltd*, 2008 (2) SA 24 (CC), 2008 (2) BCLR 158 (CC).

⁵² *Ibid.*, para. 149.

⁵³ Liebenberg, *supra* note 3, p. 47.

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*, p. 48.

3.2 International and Comparative Law as Interpretive Guides

Section 46(1)(c) of the Constitution provides that when interpreting the Declaration of Rights, the courts must take into account international law. This provision doubtlessly signals the Constitution's openness to the norms and values of the international community as enshrined in international treaties and customary international law and general principles of international law. The question of the municipal application of international treaties is particularly relevant for a country like Zimbabwe which ratifies international and regional human rights treaties, but in various instances, fails to translate these agreements into national legislation. International judicial dialogues can strengthen the rule of law and assist domestic adjudicators to arrive at the best responses to shared problems.⁵⁶

Section 46(1)(e) of the Constitution permits the courts to consider foreign law when interpreting the Declaration of Rights. The difficulties of drawing on comparative constitutional law for the interpretation of a national constitution are well known. There is a greater risk of such sources being misunderstood, misconstrued or interpreted out of context. Importantly, "the subtleties of foreign jurisdictions, their practices and terminology require more intensive study",⁵⁷ and this renders "analogies dangerous without a thorough understanding of the foreign systems".⁵⁸ Nevertheless, comparative law is generally valuable when dealing with problems that are new to our jurisprudence but well developed in comparative jurisdictions.⁵⁹

Interpreters of the socio-economic rights contained in the Declaration of Rights therefore have to seek guidance from international and comparative law in understanding the scope and content of some of these rights. Interpretation and application of the socio-economic rights in the Constitution would entail defining the nature of state obligations imposed by such rights, defining the normative content as well as developing appropriate and effective remedies to address the infringement of these rights. Due to the relative inexperience of the Zimbabwean courts in adjudicating such rights, the paucity of local jurisprudence and inadequate literature, Zimbabwean courts and other bodies may have to draw from international and comparative standards and jurisprudence for guidance.⁶⁰

Judicial and quasi-judicial institutions in comparative jurisdictions such as South Africa and Kenya are already engaging with socio-economic rights cases, and these are sources to which Zimbabwe could look to tap for both model laws on the implementation of socio-economic rights as well as the existing jurisprudence for a proper understanding of the content and nature of state obligations engendered by such rights.⁶¹ Significantly, international and regional treaties and other quasi-judicial

⁵⁶ M. Kirby, 'Constitutional Law and International Law: National Exceptionalism and the Democratic Deficit?', 98 *Georgetown Law Journal* (2009) p. 433, at p. 442.

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*

⁵⁹ *Sanderson v. Attorney-General*, Eastern Cape 1998 (2) SA 38 (CC) para. 26.

⁶⁰ G. L. Neuman, 'International Law as a Resource in Constitutional Interpretation', 30 *Harvard Journal of Law & Public Policy* (2006) p. 176, at p. 177.

⁶¹ Langford, *supra* note 25.

mechanisms have adopted useful standards such as general comments and guidelines on socio-economic rights.⁶²

Important socio-economic jurisprudence has emerged from the interpretive work of the United Nations Committee on Economic, Social and Cultural Rights (CESCR)⁶³ and the African Commission on Human and Peoples' Rights (African Commission) and other thematic human rights treaty bodies under their complaints mechanisms. The CESCR, in particular, has developed a comprehensive template for understanding the normative content of socio-economic rights through the adoption of general comments. It is noteworthy that although general comments adopted by the CESCR are not themselves legally binding, they nevertheless constitute an authoritative interpretation of the socio-economic rights provisions of the International Covenant on Economic, Social and Cultural Rights (ICESCR), which is legally binding on states that have ratified or acceded to it. General comments are used by the CESCR to elaborate on the normative content and nature of the obligations imposed by the ICESCR, and these are valuable sources of guidance for national adjudicative mechanisms. The socio-economic rights provisions under the Zimbabwean Constitution are substantially similar to those protected under the ICESCR. This makes the CESCR's general comments, concluding observations on state reports and recommendations under its complaints mechanism important resources in giving meaning to the socio-economic rights provisions under the Declaration of Rights. In the *Zimbabwe Peoples' Homeless* case, the Supreme Court relied both on international standards⁶⁴ as well as comparative law sources⁶⁵ as interpretive guides in interpreting section 74 which protects against arbitrary eviction arbitrary from one's home and section 81(1)(f) which provides for children's the right to shelter. In the *City of Harare v. Mushowe*, a case relating to the enforcement of the right to safe, clean and potable water protected in section 77(a) of the Constitution, the Supreme Court utilised South African socio-economic rights jurisprudence as interpretive guides.⁶⁶ In the case of *Hopcik Investment (Pty Ltd) v.*

⁶² See Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights (1986) UN Doc. E/CN.4/1987/17. See the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (1998) 20 *Human Rights Quarterly* 691. See also Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights (adopted at the 47th Ordinary Session held in Banjul, The Gambia, from 12 to 26 May 2010 and formally launched at the Commission's 50th Ordinary Session held in Banjul, The Gambia from 24 October to 7 November 2011).

⁶³ The Committee on Economic, Social and Cultural Rights is the treaty body that monitors state compliance with the International Covenant on Economic, Social and Cultural Rights.

⁶⁴ The Supreme Court relied on the following international instruments as interpretive guides relating to the rights of children, namely, Convention on the Rights of the Child (1989) and the African Charter on the Rights and Welfare of the Child (1990).

⁶⁵ Some of the foreign case law the court relied on include *People's Union for Democratic Rights & Ors v. Union of India & Ors* 1983 (1) SCR 456; *Soobramoney v. Minister of Health (Kwazulu Natal)* 1998 (1) SA 765 (CC); *Government of the Republic of South Africa v. Grootboom* 2001 (1) SA 46 (CC) and *Port Elizabeth Municipality v. Various Occupiers* 2005 (1) SA 217 (CC).

⁶⁶ The court extensively cited the South African Constitutional Court decision in *Mazibuko & Others v. City of Johannesburg & Others* [2010] (4) SA 1.

*Minister of Environment Water and Climate and City of Harare*⁶⁷ on the right to water protected under section 77 of the Constitution, the High Court recognised the right to water declared by the United Nations in its General Assembly through Resolution 64/292,⁶⁸ as well as international treaties such the Convention on the Elimination of Discrimination Against Women (1979), the Convention on the Rights of the Child (1989) and the International Covenant on Economic, Social and Cultural Rights (1966) as interpretive guides. In the case of *Mudzuru & Another v. Ministry of Justice, Legal and Parliamentary Affairs (NO) & Others*, the Constitutional Court also noted that it was common cause that when interpreting the Declaration of Rights, a court must seek guidance from international jurisprudence and international instruments, particularly those ratified by Zimbabwe.⁶⁹ In its findings, the Court extensively referred to and relied on a number of international treaties on children and women's rights and proceeded to declare the practice of child marriage unconstitutional.⁷⁰ International and comparative law and jurisprudence provide useful normative insights on which constitutional and human rights adjudication can draw.

3.3 The Institutional Competence Question

Section 3 of the Constitution enshrines certain values and principles underpinning the Zimbabwean society.⁷¹ One of the principles binding on the state and all institutions is the principle of good governance, which encompasses among others, observance of the principle of separation of powers.⁷² Clearly, the Constitution requires a separation of powers between the legislative, executive and judicial arms of the state, though it does not prescribe what form that separation should take. Practically, this entails that the legislative branch is responsible for enacting legislation, the executive branch is responsible for developing and implementing policy and legislation, and the judiciary is responsible for interpreting the law. Importantly, mutual control and accountability is established through a system of checks and balances of which judicial review of legislative or executive action is an important component.⁷³

In socio-economic rights litigation, the courts are often called upon to adjudicate on highly contentious matters with significant political and policy implications. In the cases of *Markham and Another v. Minister of Health and Child Care and Others*⁷⁴ and *Makoka v. Minister of Health and Child Care and Others*,⁷⁵ the applicants unsuccessfully sought an order for the government to be compelled to provide safety

⁶⁷ *Hopcik Investment (Pty Ltd) v. Minister of Environment Water and Climate and City of Harare* HH 137-16 & HC 1796/14.

⁶⁸ United Nations General Assembly through Resolution 64/292 of 28 July 2010, UN DocA/64/L 63/Rev 1.

⁶⁹ *Mudzuru & Another v. Ministry of Justice, Legal and Parliamentary Affairs (NO) & Others* (Const. Application 79/14) [2015] ZWCC p.42.

⁷⁰ *Ibid.*

⁷¹ See section 3 of the Constitution.

⁷² See section 3(2)(e) of the Constitution.

⁷³ Liebenberg, *supra* note 3, p. 66.

⁷⁴ *Markham and Another v. Minister of Health and Child Care and Others* HC 2168/20.

⁷⁵ *Makoka v. Minister of Health and Child Care and Others* HC 3003/20.

nets in the form of cash handouts, food and portable water to cushion citizens from the effects of restrictive measures wrought by the COVID-19 pandemic. In the case of *The Trustees of The Arda-Transau Relocation Development Trust v. Zimbabwe Electricity Transmission and Distribution Company (Zetdc) (Pvt) Ltd*,⁷⁶ the applicants successfully obtained a court order that compelled the Zimbabwe Electricity Transmission and Distribution Company (ZESA) to provide electricity supply services to the Zimbabwe National Water Authority (ZINWA) water pumps within Arda – Transau community for the duration of the state of disaster subject to the load shedding schedule. The applicants were faced with COVID-19 outbreak and threat without running tap water due to ZESA power cut to the ZINWA outlet which supplied them with water. In the case of *Hopcik Investment (Pty Ltd) v. Minister of Environment Water and Climate and City of Harare*,⁷⁷ the applicant sought and successfully obtained an order compelling the respondents, the Minister of Environment, Water and Climate and the City of Harare, to supply 15,000 litres of potable water per week to its premises bases on section 77 of the Constitution which provides for the right to safe and potable water. The High Court ruled that the respondents had both failed to take reasonable steps to address the water challenges faced by the applicant and therefore were in breach of section 77 of the Constitution.⁷⁸

An important issue in constitutional adjudication is normally the question of appropriate interpretation and application of the doctrine of separation of powers, particularly in cases that have significant political and policy implications. The adjudication of socio-economic rights is an example where all sorts of polycentric concerns tend to arise – the so-called polycentric dilemma.⁷⁹ In his famous essay published in 1978, Lon Fuller argued that the judiciary could not and should not deal with situations in which there are complex repercussions beyond the parties and factual situation before the court.⁸⁰ Lon Fuller described polycentric disputes as disputes arising in litigation which give rise to many diverging issues, each of which is linked to the other in a complex web of interdependent relationships. For example, an adjudicative decision in one area generates unforeseen policy and budgetary implications impacting on parties not represented in the particular litigation.⁸¹ The argument is that judicial adjudication of socio-economic rights would compel the judiciary “to encroach upon the proper terrain of the legislature and executive”, particularly by “dictating to the government how the budget should be allocated”.⁸² Matters of policy, it was vociferously argued, are the domain of the executive and the legislature. Since policy is political, goes the argument, it should be addressed

⁷⁶ *The Trustees Of The Arda-Transau Relocation Development Trust v. Zimbabwe Electricity Transmission and Distribution Company (Zetdc) (Pvt) Ltd* HC 88/20

⁷⁷ *Hopcik Investment (Pty Ltd) v. Minister of Environment Water and Climate and City of Harare* HH 137-16 & HC 1796/14.

⁷⁸ *Ibid.*, pp. 6–7.

⁷⁹ See *Soobramoney v. Minister of Health (Kwazulu-Natal)*, 1997 (12) BCLR 1696 (1997) and *Mazibuko and Others v. City of Johannesburg and Others*, 2010 4 SA 1 (CC).

⁸⁰ L. Fuller, ‘The Forms and Limits of Adjudication’, 92 *Harvard Law Review* (1978–1979) pp. 353–409.

⁸¹ *Ibid.*

⁸² See *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*, 1996 (4) SA 744 (CC).

by the more directly accountable branches of governments, by those representatives who can easily be removed by popular vote, and not by 'unelected' courts.⁸³

Concerns on the separation of powers debate reflects a broader discussion over the legitimacy and effectiveness of entrenching economic and social rights provisions in constitutions. Significantly, such concerns are predicated on the need to guard against judicial usurpation of legislative and executive power over budgets and core policy priorities while still enforcing these rights.⁸⁴

Socio-economic rights enforcement, like civil and political rights, invites judicial inquiry into state policies and programmes. The Constitution's explicit entrenchment of a broad range of socio-economic rights has undoubtedly resolved the justiciability objections in favour of legitimising judicial enforcement of such rights. It follows that if courts have been constitutionally empowered to review the realisation of economic and social rights, then they are simply executing their constitutional mandate.⁸⁵ This clearly calls into question any interpretation of the separation of powers doctrine predicated on inflexible functional demarcations between the three arms of government and precludes courts from enquiring into executive or legislative action or inaction. In any case, the Constitution should never be interpreted in a manner that envisages bright-line boundaries between the three arms of government. If the judicial enforcement of socio-economic rights is understood as placing the burden on the government to justify its current lack of action on the realisation of the rights in breach of its obligations, then the separation of powers doctrine should not be used as a bar against judicial inquiry on such state inaction.⁸⁶

3.4 Horizontal Application of the Declaration of Rights

The horizontal application of human rights is a metaphor used to describe the application of human rights between private individuals *inter se*.¹ Liebenberg has defined 'horizontal application of the Bill of Rights' as referring to the applicability of human rights in relations between private parties.⁸⁷ The Constitution is also remarkable for its express provisions providing for both the vertical and horizontal application of the Declaration of Rights. Section 45(1) states that the Declaration of Rights "binds the State and all executive, legislative and judicial institutions and agencies of government at every level". Section 45(2) of the Constitution provides that a provision in the Declaration of Rights "binds a natural and juristic person if, and to the extent that, it is applicable taking into account the nature of the right or freedom concerned and any duty imposed by it". The above provisions create the possibility for socio-economic rights to apply in legal relations between private parties. In order to give effect to the horizontal application of a right in the Declaration

⁸³ Langford, *supra* note 25, p. 31.

⁸⁴ Ray, *supra* note 30, p. 16. See also M. Pieterse, 'Possibilities and Pitfalls in the Domestic Enforcement of Social Rights: Contemplating the South African Experience', 26 *Human Rights Quarterly* (2004) p. 882.

⁸⁵ Langford, *supra* note 25, p. 32.

⁸⁶ *Ibid.*, p. 36.

⁸⁷ S. Liebenberg, 'Adjudicating Socio-Economic Rights under a Transformative Constitution', in Langford, *supra* note 25, p. 75, at p. 78.

of Rights, the above constitutional provisions require the law to be developed so that private entities are accountable to the rights and values protected in the Declaration of Rights. The inadequacy of solely relying on the state's protective obligation under international human rights law has been highlighted by scholars.⁸⁸ Strange, for instance, has emphasised the significance of conceptualising power beyond political power to include economic power embedded in markets.⁸⁹ Non-state actors are increasingly influencing government policies concerning the provision of social services due to their immense power and influence. The limitations and obstacles attendant on the state's duty to protect means that other efforts aimed at fostering the accountability of non-state actors such as developing the horizontal applications of the Declaration of Rights should be developed further.⁹⁰

Socio-economic rights should be understood as more than public commodities and services delivered by the state. Private corporations are increasingly influencing government policies in the provision of social goods such as health care, education and water provision. If human rights are to have an egalitarian influence, their reach should infuse the entire legal system, including private relationships such as family law, property law and contract law. The limitations and obstacles attendant on a state's duty to protect means that other efforts aimed at fostering the accountability of non-state actors such as through the horizontal application of the Declaration of Rights should be developed further.⁹¹ The application of constitutionalised human rights norms in private relations is thus an important accountability tool as it provides a mechanism to enforce individuals' and groups' rights against other private entities such as corporations.⁹²

3.5 Enforcing the Positive Duties Imposed by Socio-Economic Rights

The Constitution imposes obligations on the state to "respect, protect, promote and fulfil the rights in the Declaration of Rights".⁹³ The obligation to respect requires the state to refrain from carrying out any measure or act that infringes on individuals' or groups' enjoyment of their rights. The obligation to protect imposes a positive obligation on the state to protect rights beneficiaries from having their rights interfered with by non-state actors. The CESCR has conceptualised the obligation to protect as entailing measures by the state to ensure that enterprises or individuals do not deprive individuals of their access to the relevant right.⁹⁴

The state's duty to promote entails the adoption of educational programmes designed to enhance awareness of human rights. The duty to fulfil requires the state to adopt appropriate legislative, administrative and other measures towards the

⁸⁸ K. Moyo, *Water as a Human Right under International Human Rights Law: Implications for the Privatisation of Water Services*, LLD thesis Stellenbosch (2012), ch. 5.

⁸⁹ S. Strange, *The Retreat of the State* (Cambridge University Press, Cambridge, 1996) pp. 16–43.

⁹⁰ D. M. Chirwa, 'The Doctrine of State Responsibility as a Potential means of Holding Private Actors Accountable for Human Rights', 5 *Melbourne Journal of International Law* (2004) pp.1–28. 28.

⁹¹ *Ibid.*

⁹² Liebenberg, *supra* note 3, p. 61.

⁹³ See section 44 of the Constitution.

⁹⁴ See General Comment No. 12, para. 15.

enjoyment of rights by those who cannot afford on their own.⁹⁵ The idea that courts could involve themselves in questions concerning the fulfilment of economic and social rights has been, from a philosophical standpoint, the most controversial issue.⁹⁶ The issue is fully addressed below where the chapter at hand engages with the enforcement of positive duties imposed by socio-economic rights.

It must however be noted that slotting claims into one or more of these categories of duties should not be determinative of the appropriate interpretative approach in any particular case. The adjudication of socio-economic rights claims should always be a contextual inquiry guided by the nature of the interests and values at stake.⁹⁷ The degree of emphasis on any particular duty ultimately depends on the type of rights under consideration as well as the relevant contextual situation. The need to meaningfully enjoy some of the rights in a particular context may, for example, demand positive action from the state in terms of more than one of the duties.

One of the major issues in the adjudication of socio-economic rights relates to the standard or review the courts should utilise in assessing state compliance with the positive duties engendered by the socio-economic rights entrenched in the Declaration of Rights. The CESCR's General Comment No. 3⁹⁸ has proved significant in providing clarity on the justiciability of socio-economic rights. General Comment No. 3 divides the key state obligations into a duty to take steps to progressively realise the protected rights and a "minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights".⁹⁹ The CESCR asserted that "a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, *prima facie*, failing to discharge its obligations under the Covenant".¹⁰⁰ It justifies this position by positing that "if the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its *raison d'être*".¹⁰¹ The two standards developed by international and comparative courts and tribunals for reviewing state compliance with the positive duties imposed by socio-economic rights are fully discussed below.

Two major approaches for the enforcement of positive obligations imposed by socio-economic rights have arisen. These include the minimum core obligations approach developed by the CESCR as explained above and the reasonableness approach developed by the South African Constitutional Court in its socio-economic rights jurisprudence. It is important to note that most of the socio-economic rights enshrined under the Declaration of Rights impose a duty on the state to undertake "reasonable legislative and other measures" within the limits of available resources to ensure the

⁹⁵ See Committee on Economic, Social and Cultural Rights, General Comment No. 3 The Nature of States Parties' Obligations, (1990) UN Doc. E/1991/23, paras. 20–26.

⁹⁶ Langford, *supra* note 25, p. 21.

⁹⁷ Liebenberg, *supra* note 87, p. 78.

⁹⁸ General Comment No. 3.

⁹⁹ General Comment No.3, para. 10.

¹⁰⁰ *Ibid.*

¹⁰¹ *Ibid.*

progressive realisation of the protected rights.¹⁰² An exception is section 74 of the Constitution which is negatively formulated as it guarantees the freedom from arbitrary eviction from one's home or have their home demolished, without an order of court made after considering all the relevant circumstances.

3.5.1 The Reasonableness Approach

The South African Constitutional Court, in its landmark judgment in *Grootboom v. Government of the Republic of South Africa (Grootboom)*,¹⁰³ developed a model of reasonableness review for adjudicating the positive duties imposed by socio-economic rights protected under sections 26 and 27 of the South African Constitution. The Court declared that the decision whether the measures the state has taken to implement socio-economic rights meet the standards envisaged by the Constitution depends on the reasonableness of those measures. In reviewing the positive duties imposed by the socio-economic rights provisions on the state, the key question that an adjudicator asks is whether the means chosen are reasonably capable of facilitating the realisation of the socio-economic rights in question.¹⁰⁴

In its conceptualisation, the reasonableness has been interpreted in such a way that individuals cannot claim individualised remedies in relation to the state's positive duty to fulfil imposed by socio-economic rights. Rather, the individual is entitled only to a reasonable programme, the latter being a collective good to which no single individual can have a stronger claim than similarly-situated individuals. This approach, it was held, was designed to allow the government a margin of discretion relating to the specific policy choices adopted to give effect to socio-economic rights.¹⁰⁵ Significantly, the Court pointed out that it will assess the reasonableness of the state's conduct in light of the social, economic and historical context, including the capacity of institutions responsible for implementing social rights programmes.¹⁰⁶ What is clear is that the reasonableness approach has synergies with the CESCR's enunciation that states parties to the ICESCR are under an obligation to take steps that are "deliberate, concrete and targeted as clearly as possible towards meeting the obligation recognised in the Covenant".¹⁰⁷

A further important requirement which has emerged in the context of the South African courts' evictions jurisprudence is that a reasonable programme should entail 'meaningful engagement' with the intended beneficiaries of the programme. This introduces a significant aspect of participatory democracy as a key factor in assessing the reasonableness of how executive organs adopt and implement social policy.¹⁰⁸ The reasonableness approach has been criticised for its failure to define the content of the relevant socio-economic rights in the adjudication process. In

¹⁰² See sections 75(4), 76(4), 77, 82 and 83 of the Constitution.

¹⁰³ *Grootboom and Others v. Government of the Republic of South Africa and Others* 2001 SA 46 (CC).

¹⁰⁴ *Ibid.*, para. 41.

¹⁰⁵ *Ibid.*

¹⁰⁶ *Ibid.*, para. 43.

¹⁰⁷ General Comment No. 3, para. 2.

¹⁰⁸ See *Occupiers of 51 Olivia Road v. City of Johannesburg* 2008 (3) SA 208 (CC) paras. 10, 16–18.

particular, it has been questioned whether it is capable of protecting those who are experiencing severe deprivation of minimum essential levels of basic socio-economic goods and services.¹⁰⁹ Often, such a category of vulnerable groups is in danger of suffering irreparable harm to their lives, health and human dignity if they do not receive urgent assistance.

The reasonableness review approach does not clearly distinguish between determining the scope of the right, whether it has been breached, and justifications for possible infringements. Bilchitz has also pointed out that until some understanding is developed on the content of socio-economic rights, the assessment of whether the measures adopted by the state are reasonably capable of facilitating the realisation of a particular socio-economic right takes place in a normative vacuum.¹¹⁰

It must however be noted that the model of reasonableness review gives the adjudicator a flexible and context-sensitive model for interpreting socio-economic rights claims. It allows government the space to design and formulate appropriate policies to fulfil its socio-economic rights obligations. It also simultaneously subjects government's choices to the requirements of reasonableness, inclusiveness and, in particular, the requirement that government initiatives aimed at meeting its socio-economic rights obligations must provide for short-term relief for those in crisis situations.¹¹¹ The South African Constitutional Court's jurisprudence suggests that the government's justifications will be subject to water-tight scrutiny when a disadvantaged sector of society is deprived of access to essential services and resources.¹¹² In the *Mushoriwa* case, the Supreme Court explicitly embraced the reasonableness approach developed by the South African courts in enforcing the positive obligations imposed by socio-economic rights, noting that:

What the State is enjoined to do is to take reasonable legislative and other measures to achieve the progressive realisation of the rights to sufficient food and potable water. Moreover, its obligations in this regard are confined to measures within the limits of the resources available to it.¹¹³

Given the dearth of jurisprudence particularly enforcing the positive duties imposed by socio-economic rights guaranteed in the Constitution, there is likely to be sometime before Zimbabwean courts can lay down an adjudicative approach sensitive to the realities of destitution and deprivation confronting most Zimbabweans on one hand, and on the other, the importance of holding the government to account on how it uses public funds.

¹⁰⁹ D. Bilchitz, 'Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio- Economic Rights Jurisprudence', 19 *South African Journal on Human Rights* (2003) p. 1, at pp. 9–10.

¹¹⁰ *Ibid.*

¹¹¹ Liebenberg, *supra* note 87, p. 89.

¹¹² See *Grootboom*, para. 79.

¹¹³ *City of Harare v. Mushoriwa* (SC 54/18, Case No. SC 228/14) [2018] ZWSC 54.

3.5.2 Minimum Core Approach

The idea of minimum core obligations suggests that there are degrees of fulfilment of a right and that a certain minimum level of fulfilment takes priority over a more extensive realisation of the right.¹¹⁴ Bilchitz interpreted minimum core obligations as arising from the very basic interest people have in survival and the socio-economic goods required to survive.¹¹⁵

As noted above, the minimum core content approach was developed by the CECSR in its General Comment No. 3 with the aim of providing clarity on the normative content of entitlements embodied in socio-economic rights. The CESCR explained that:

[A] minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party ... [A] State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, *prima facie*, failing to discharge its obligations under the Covenant.¹¹⁶

Over and above the minimum core entitlements, the state is obliged to adopt legislative measures to progressively achieve the full spectrum of the socio-economic rights guaranteed in the ICESCR.¹¹⁷ In the South African cases of *Grootboom*, *Treatment Action Campaign*¹¹⁸ and *Mazibuko*,¹¹⁹ the South African Constitutional Court declined to adopt the minimum core approach as a model of review in assessing state compliance with the positive obligations imposed by sections 26 and 27 of the South African Constitution. The Court's reasoning ranged from textual, institutional and feasibility considerations.¹²⁰ In *Grootboom*, for instance, it pointed out that the determination of the minimum core in the context of the right to have access to adequate housing presents difficulties because there are people who need land, others need both land and houses, yet others need financial assistance.¹²¹ Furthermore, the Court said that, unlike the CESCR which developed the notion of the minimum core obligations based on its extensive experience in reviewing state reports under the ICESCR, it lacked adequate information on which the content of the minimum core obligations could be based.¹²² It must however be noted that despite dismissing the minimum core approach, the Court in *Grootboom* left the door open for the minimum core approach to play a role in the assessment

¹¹⁴ Bilchitz, *supra* note 109, p. 11.

¹¹⁵ *Ibid.*

¹¹⁶ General Comment No. 3, para. 10.

¹¹⁷ *Ibid.*

¹¹⁸ *Minister of Health and Others v. Treatment Action Campaign and Others (No 2)*, 2002 (5) SA 721 (CC) (TAC).

¹¹⁹ *Mazibuko and Others v. City of Johannesburg and Others*, 2010 (4) SA 1 (CC) (Mazibuko).

¹²⁰ See *Grootboom*, paras. 23–33; *TAC*, paras. 26–39; *Mazibuko*, paras. 51–62. The Court pointed to the difficulty of defining the content of minimum core obligations; a concern that any definition would not reflect the diversity of needs of differently placed groups; and an incompatibility with the institutional roles and competencies of the courts.

¹²¹ *Grootboom*, para. 33.

¹²² *Ibid.*, para. 31.

of the reasonableness of state conduct provided that sufficient evidence of the content of such a core obligation is placed before the court.¹²³

The minimum core concept and reasonableness review are not necessarily either/or concepts as the minimum core concept can be incorporated within the reasonableness model of review. Some scholars have argued for a hybrid model that enables the full realisation of the promise of socio-economic rights.¹²⁴ As a model of review, the minimum core helps in defining the content of the rights, such as the right to water, and providing a principled basis for the evaluation of state measures in the implementation of such a right. On the other hand, the reasonableness test provides a model for analysing and evaluating the nature of the state's obligations imposed by a specific right. The combined model is a suitable one in that it combines both rights analysis and the evaluation of measures adopted by the state to realise socio-economic rights. The challenge for the Zimbabwean adjudicators enforcing the socio-economic rights protected under the Declaration of Rights is to adopt either the reasonableness approach or the minimum core or alternatively to develop their own adjudicative path altogether. It must however be noted that the assessment of the reasonableness of government programmes is influenced by two further criteria derived from sections 75(4), 76(4) and 77 of the Constitution. These are the concepts of 'progressive realisation' and 'availability of resources'. These are fully discussed below.

3.5.3 Progressive Realisation and Availability of Resources

Most of the socio-economic rights enshrined under Chapter 4 of the Constitution are meant to be realised progressively. For instance, whilst section 76 read together with section 44 obliges the state to ensure the fulfilment of the right to health care, section 76(4) imposes a special limitation to the enjoyment of this right by providing that the state must take reasonable legislative and other measures "within the limits of the resources available to it" to achieve the "progressive realisation of the rights set out under this section". Section 75(4) obliges the state to take reasonable legislative and other measures "within the limits of the resources available" to achieve the progressive realisation of the right to education. Section 77 obliges the state to take reasonable legislative and other measures within the limits of the available resources to progressively realise the rights to food and water.

Progressive realisation constitutes an acknowledgement that the full enjoyment of socio-economic rights will generally not be achieved in a short period of time.¹²⁵ The concept of progressive realisation is key to an understanding of the nature of states' obligations. If not carefully construed, however, progressive realisation in the fulfilment of socio-economic rights is capable of depriving state obligations of any

¹²³ *Ibid.*, para. 33.

¹²⁴ G. M. Musila, 'Testing Two Standards of Compliance: A Modest Proposal on the Adjudication of Positive Socio-Economic Rights under the New Constitution', in Biegon and Musila, *supra* note 4, p. 55, at p. 87.

¹²⁵ General Comment No. 3, para. 9.

normative significance.¹²⁶ Admittedly, some dimensions of socio-economic rights may involve progressive realisation to a greater extent than civil and political rights. This is because in most democratic systems the state has already invested in the infrastructure such as judicial institutions and electoral systems necessary to guarantee and protect civil and political rights.¹²⁷ The concept of progressive realisation must therefore be understood in light of the objective of the Declaration of Rights, which is to establish clear obligations for the state to take steps towards full realisation of socio-economic rights. This also entails the dismantling of a range of legal, administrative, operational and financial obstacles which may impede access to such rights.

The availability of resources for the fulfilment of socio-economic rights is one of the contentious issues pervading the judicial enforcement of socio-economic rights.¹²⁸ A challenge in enforcing socio-economic rights claims is where the resource implications of the claim are extensive and provision has not been made for such expenditure within existing budgetary provisions.¹²⁹

Jurisprudence and standards from international and comparative jurisdictions could be helpful in the interpretation of the phrase 'to the maximum of available resources'. The CESCR has interpreted the phrase 'to the maximum available resources' as entailing resources existing within a state as well as those available from the international community.¹³⁰ The CESCR explained that the considerations that it will take into account in its evaluation of justifiability of resource constraints include whether the state party's decision not to allocate available resources is in accordance with international human rights standards.¹³¹

The South African Constitutional Court case has pronounced itself on the issue, starting with the case of *Soobramoney*,¹³² which was the first case in which the Court was asked to find a violation of socio-economic rights. The major question which the Court was called upon to decide was whether the health rights in section 27 of the Constitution entitled a chronically ill man in the final stages of renal failure to an order enjoining a public hospital to admit him to the renal dialysis programme of the hospital. The Court thus had to deliberate whether and under what conditions limited resources constitute a valid basis for limiting access to medical treatment for patients. The Court noted that the scarcity of resources meant that the need for access to kidney dialysis treatment greatly exceeded the number of available dialysis

¹²⁶ P. Alston and G. Quinn, 'The Nature and Scope of State Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights', 9 *Human Rights Quarterly* (1987) p. 156, at p. 172.

¹²⁷ Liebenberg, *supra* note 3, p. 191.

¹²⁸ E. Riedel, 'Economic, Social and Cultural Rights', in C. Krause and M. Scheinin, *International Protection of Human Rights: A Textbook* (Åbo Akademi University Institute for Human Rights, Turku, 2009) p. 129, at p. 137.

¹²⁹ Liebenberg, *supra* note 3, p. 192.

¹³⁰ See United Nations Committee on Economic, Social and Cultural Rights, *An Evaluation of the Obligations to Take Steps to the Maximum of Available Resources under an Optional Protocol to the Covenant* (2007), UN Doc. E/C.12/2007/1, para. 5.

¹³¹ *Ibid.*, para. 8.

¹³² *Soobramoney v. Minister of Health, Province of KwaZulu-Natal*, 1998 (1) SA 765 (CC).

machines. The Court further noted that this was a national problem extending to all renal clinics.¹³³ According to the Court, the diversion of additional resources to the renal dialysis programme and related tertiary health care interventions from within the health budget would negatively impact on other important health programmes.¹³⁴ Additionally, the Court pointed out that if the overall health budget was to be substantially increased to fund all health care programmes, this would diminish the resources available to the state to meet other socio-economic needs such as housing, food, water, employment opportunities and social security.¹³⁵ Accordingly, the Court held that there was no breach of section 27(1)(a) read with (2) of the South African Constitution.

In the case of *Blue Moonlight Properties 39 (Pty) Ltd and Another*,¹³⁶ the South African Constitutional Court rejected resource arguments where the claimed shortfall resulted from a flawed budgeting process. The Court explained that “it is not good enough for the City [of Johannesburg] to state that it has not budgeted for something, if it should indeed have planned and budgeted for it in the fulfilment of its obligations”.¹³⁷ What is significant about the above approach is that it asserts the principle that a state’s resource-limitation arguments are irrelevant where those limitations are the result of its own lack of understanding of its constitutional or statutory obligations.¹³⁸ It is also important to note that where a state can show that it lacks the requisite resources to fulfil the elementary requirements of rights such as the provision of a minimum amount of socio-economic goods, it still remains under a duty to seek international cooperation and assistance under Article 2(1) of the ICESCR.

3.6 Enforcing Negative Duties

A handful of cases recently adjudicated by the courts have dealt with situations where individuals or groups have been deprived of existing access to socio-economic rights.¹³⁹ Most of the cases have involved disconnections of water services as well as forced evictions from peoples’ homes without court orders authorising such evictions. In that regard, a body of jurisprudence is developing particularly in the context of the high courts and the Supreme Court’s evictions jurisprudence. Unlike the South African courts’ socio-economic rights jurisprudence, there does not appear to be a distinction when Zimbabwean courts adjudicate on positive or negative duties imposed socio-economic rights as evidenced by the Supreme Court’s approach in the *City of Harare v. Mushoriwa* case. In that case, the

¹³³ *Ibid.*, para. 24.

¹³⁴ *Ibid.*, paras. 27–28.

¹³⁵ *Ibid.*, para. 28.

¹³⁶ *Blue Moonlight Properties 39 (Pty) Ltd and Another*, 2012 (2) BCLR 150 (CC) para. 61.

¹³⁷ *Ibid.*, para. 61.

¹³⁸ Ray, *supra* note 30, p. 157.

¹³⁹ *City of Harare v. Mushoriwa and Others* Case No. SC 228/14; *The Trustees Of The Arda-Transau Relocation Development Trust v. Zimbabwe Electricity Transmission and Distribution Company (Zetdc) (Pvt) Ltd* HC 88/20; *Zimbabwe Homeless Peoples’ Federation and Others v. Minister of Local Government and National Housing* Judgment No. SC 94/2020; *Zuze v. Trustees of Mlambo & Anor* SC 69-19; and *City of Harare v. Mukunguretsi & Ors* SC 46- 18.

Court deployed the reasonableness approach which South African Courts have used to assess state compliance with the positive obligations imposed by socio-economic rights; yet what was at stake involved negative enforcement of the right to water since the City of Harare had disconnected the respondent's water supply without the requisite notice as per the applicable by-laws.

According to the Supreme Court:

The first point to note about s 77 of the Constitution is that it is a fundamental human right enshrined in Part 2 of the Declaration of Rights. As such, it is directly enforceable in terms of s 85 of the Constitution if it has been, is being or is likely to be infringed. Nevertheless, being in the nature of a social right, I do not think that it is susceptible to unqualified application and enforcement. This emerges clearly from the wording of the section itself.¹⁴⁰

The Supreme Court proceeded to embrace the reasonableness approach developed by the South African courts in enforcing the positive obligations imposed by socio-economic rights, noting that:

What the State is enjoined to do is to take reasonable legislative and other measures to achieve the progressive realisation of the rights to sufficient food and potable water. Moreover, its obligations in this regard are confined to measures within the limits of the resources available to it.¹⁴¹

The Court proceeded to state that:

the Constitution is that the possible violation of its provisions (s77 right to water) is only implicated where the State or a local authority fails to provide any or adequate water supply to any given community or locality. It might also arise where, as appears to have been recently admitted by the appellant itself, having afforded an adequate water supply to most inhabitants, it is then discovered that such supply is in fact contaminated and therefore only potable at great risk. In contrast, it is difficult to envisage how the broad import of s 77 might be invoked in the case of a consumer, who has full or adequate access to water supply, but is deprived thereof by being disconnected for having failed to pay for water consumed and after having received due notice and warning to settle his account.¹⁴²

The Supreme Court misapplied the reasonableness approach by deploying it in a case that involved the breach of the negative duty, that is disconnection of water services. In a case involving the breach of a negative duty as in *Mushoriwa*, any justifications by the state must be evaluated in terms of the requirements of the general limitations clause provided in section 86 of the Constitution. In respect of the negative duties, the South African courts have deployed a two-stage analysis applicable to negative civil and political rights.¹⁴³ Where a claim is predicated on a rights violation, a court considers, at the first stage, whether a particular right is protected in the Constitution and whether the challenged law or conduct impairs that right. If a court finds that the challenged law or conduct does impair the right in question, at the second stage, the court must determine whether the infringement is

¹⁴⁰ *City of Harare v. Mushoriwa* (SC 54/18, Case No. SC 228/14) [2018] ZWSC 54 p.27.

¹⁴¹ *Ibid.*

¹⁴² *Ibid.*

¹⁴³ *Jaftha v. Schoeman; Van Rooyen v. Stoltz* 2005 (2) SA 140 (CC).

reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.¹⁴⁴

In the case of *Jaftha v. Schoeman; Van Rooyen v. Stoltz*,¹⁴⁵ the South African Constitutional Court held that any measure that permits a person to be deprived of existing access to adequate housing constitutes a violation of the negative duty imposed by the right of access to housing protected under section 26 of the South African Constitution. According to the Court, the state must justify such a measure in terms of the requirements of the general limitations clause contained in section 36 of the South African Constitution.¹⁴⁶

Jaftha involved a challenge to the constitutionality of provisions of the Magistrates' Court Act 32 of 1944 (Act) that permitted the sale in execution of people's homes in order to satisfy sometimes very small debts. Such sales-in-execution would result in the eviction of the applicants from their state-subsidised homes. The applicants would have no suitable alternative accommodation should they be evicted, and would not be eligible again for a housing subsidy from the state.¹⁴⁷ The South African Constitutional Court found that the impugned provisions of the Magistrates' Court Act constituted a negative violation of section 26(1) of the South African Constitution as they permitted a person to be deprived of existing access to adequate housing.¹⁴⁸ This negative duty, the Court held, was not subject to the qualifications in subsection (2) relating to reasonableness, resource constraints and progressive realisation. According to the Court, deprivations of existing access to housing (and by implication, other socio-economic rights) can be justified only in terms of the requirements of the general limitations clause in section 36 of the Constitution. In the *Jaftha* case, the Court, in carrying out the limitations analysis in terms of section 36 of the Constitution, closely scrutinised the purposes that the relevant provisions of the Act were designed to serve, and found them to be overbroad. It thus held that the relevant provisions were not justifiable

Jaftha shows that, as is the case with civil and political rights, socio-economic rights impose negative obligations on the state the breach of which can be the subject of litigation. Thus, where the state through its conduct or legislation deprives people of their existing access to socio-economic rights, such conduct or legislation will be regarded as a *prima facie* breach of sections 26 and 27 of the South African Constitution. The burden then shifts to the state to justify such conduct or legislation according to the general limitations clause. This shows that a stronger model of review applies to negative duties. In *Gundwana v. Steko Development CC91*,¹⁴⁹ the South African Constitutional Court extended the *Jaftha* principles to the execution of mortgage bonds secured against a debtor's home in circumstances where the debtor defaults on her home loan payments. It is clear that a more demanding standard of

¹⁴⁴ *Ibid.*

¹⁴⁵ *Ibid.*

¹⁴⁶ *Jaftha*, paras. 31–34

¹⁴⁷ *Ibid.*, para. 12.

¹⁴⁸ *Ibid.*, paras 31–34.

¹⁴⁹ *Gundwana v. Steko Development CC91* 2011 (3) SA 608 (CC).

review, incorporating a proportionality assessment, is thus applied when people are deprived of their existing access to socio-economic rights.¹⁵⁰

It is quite clear from South Africa's socio-economic rights jurisprudence that the enforcement of negative duties are clearly regarded as less polycentric and cost-intensive within the context of separation of powers concerns than the enforcement of the positive duties imposed by progressively realisable socio-economic rights.¹⁵¹ This possibly explains the courts' willingness to subject the state's conduct to a more demanding standard of scrutiny, and impose robust remedies where breaches are found.¹⁵² Zimbabwean courts are recommended to embrace such an approach when enforcing socio-economic rights claims based on breach of negative duties imposed by such rights.

3.7 Crafting Appropriate Remedies

Judicial responses to socio-economic rights violations, to a large extent, may be dependent on the form of justice that the courts see themselves as dispensing.¹⁵³ Courts dispensing distributive justice will have to consider the needs and interests of the entire community beyond the immediate interests of the litigants before it.¹⁵⁴ In most cases, denial of socio-economic rights tends to be systemic and take place on a large scale, meaning such lack of access cannot feasibly be remedied by a once-and-for-all court order focusing on the claimant. A significant challenge thus is to strike the right balance between individual and systemic relief. Adjudicative institutions enforcing socio-economic rights will often be concerned with ensuring remedies that attempt to remedy not only the harms engendered by past rights infringements but also remedies that aim to ensure future compliance with constitutional dictates. This is perhaps the most important part of the judicial process because individuals and groups litigate human rights cases for the vindication of their rights not only for the present but also in the future.¹⁵⁵

Section 85 of the Constitution provides courts with broad remedial powers in the case of breach or threat of breach of the guaranteed rights. A court has the power to "grant appropriate relief, including a declaration of rights and an award of compensation".¹⁵⁶ Under section 175(6) of the Constitution, courts have the power to enforce the rights with broad discretion to make any order that is just and equitable in the event of infringement.¹⁵⁷

In the few socio-economic rights cases adjudicated by the Zimbabwean courts under the new Constitution, the orders issued have been limited to injunctions and

¹⁵⁰ *Ibid.*

¹⁵¹ *Ibid.*

¹⁵² *Ibid.*

¹⁵³ Biegon, *supra* note 23, p. 49.

¹⁵⁴ *Ibid.*, p. 50.

¹⁵⁵ *Ibid.*, p. 49.

¹⁵⁶ See section 85 of the Constitution.

¹⁵⁷ See section 175(6) of the Constitution. See also section 86 on the power of courts to grant any appropriate remedy.

principled and no detailed analyses have focused on examining the appropriate remedy for positive socio-economic rights claims. For example, in *Makani and Others v. Epworth Local Board and Others*,¹⁵⁸ the Harare High Court interdicted a local authority from demolishing the applicants' homes and evicting them from municipal land without a court order in contravention of section 74 of the Constitution. In another socio-economic rights decision in *Mushoriwa v. City of Harare*,¹⁵⁹ the Harare High Court held that a by-law which permitted the City of Harare to disconnect a consumer's water supply without recourse to the courts was unlawful and unconstitutional. The High Court decision was however overturned on appeal to the Supreme Court in the case *City of Harare v. Mushoriwa*.¹⁶⁰ In the *Zimbabwe Peoples' Homeless* case, the Supreme Court enforced section 74 which protects against arbitrary eviction and section 81(1)(f) which provides for children's the right to shelter. The right against arbitrary evictions was further enforced in the cases of *Zimbabwe Homeless Peoples' Federation and Others v. Minister of Local Government and National Housing Judgment*¹⁶¹ and *Zuze v. Trustees of Mlambo & Anor* SC 69-19.¹⁶² In the case of *Hopcik Investment (Pty Ltd) v. Minister of Environment, Water and Climate and City of Harare*,¹⁶³ the High Court enforced the right to water protected under section 77 of the Constitution. The case of *Hopcik* was particularly important as it involved enforcing the positive obligations imposed by the right to water in which the government and the City of Harare were compelled to supply potable water to the applicant.

The broad powers of the courts to grant appropriate remedies and to make any order that is just and equitable in the event of infringement of the protected rights provides scope for adjudicative bodies to adopt innovative remedies to effectively address any breach or threatened breach of socio-economic rights. Adjudicative bodies, under the Constitution, are not restricted to a fixed list of potential remedies. Rather, they can grant any appropriate relief that is capable of securing the protection of the rights in question.

Zimbabwean courts thus have wide remedial powers to grant effective remedies in cases involving socio-economic rights infringements. However, the critical consideration is what would constitute an effective remedy in a given case. Mandatory orders may potentially play a crucial role in providing effective remedial relief for violations of socio-economic rights, especially a remedial framework where a court assumes supervisory jurisdiction over the implementation of the order. In terms of such an order, the state will usually be ordered to devise and present to court a plan of action to remedy the violation, and to report back to the court on its implementation at regular intervals.¹⁶⁴ Supervisory orders are particularly suited to

¹⁵⁸ *Makani and Others v. Epworth Local Board and Others*, HH 550/14.

¹⁵⁹ *Mushoriwa v. City of Harare*, HH 4266/13.

¹⁶⁰ *City of Harare v Mushoriwa* (SC 54/18, Case No. SC 228/14) [2018] ZWSC 54.

¹⁶¹ *Zimbabwe Homeless Peoples' Federation and Others v. Minister of Local Government and National Housing Judgment* No. SC 94/2020.

¹⁶² *Zuze v. Trustees of Mlambo & Anor* SC 69-19.

¹⁶³ *Hopcik Investment (Pty Ltd) v. Minister of Environment Water and Climate and City of Harare* HH 137-16 & HC 1796/14.

¹⁶⁴ Liebenberg, *supra* note 87, p. 98.

cases that seek to redress systemic violations of socio-economic rights that require far-reaching reforms over a period of time.¹⁶⁵ They provide an opportunity for an adjudicative body not only to monitor the implementation of such orders, but also to enhance the participation of both civil society and other state institutions such as the Zimbabwe Human Rights Commission.¹⁶⁶

Supervisory orders require the state organ breaching its constitutional obligations to rectify the breach of a right under the supervision of the court through the submission of periodic reports to the court on predetermined dates describing in detail the action plan for remedying the challenged breaches. Significantly, and due to separation of powers concerns, the court order must also give the responsible state organ the opportunity to choose how best to comply with its constitutional obligations in question, as opposed to the court arrogating to itself the responsibility to design a solution to remedy the breach. On presentation of the report, the court evaluates whether the proposed plan sufficiently remedies the constitutional breach, and whether it brings the state organ in question into compliance with its constitutional obligations.

An abiding concern with supervisory orders is that they potentially infringe the separation of powers doctrine as courts are drawn into usurping the functions of executive and administrative organs of the state through intrusive court orders. It must however be noted that the nature of supervisory orders is that the order is often granted in general terms, leaving a margin of discretion to the executive and the applicants to devise a concrete plan to give effect to the constitutional obligations described in broad terms in the initial order.¹⁶⁷ Supervisory orders can in fact be more responsive to separation of powers concerns than the traditional final and specific court orders which can be both “inefficiently rigid and unnecessarily intrusive on executive authority”.¹⁶⁸

Socio-economic deprivations are systemic in nature, often reflecting underlying structural social and economic failures resulting in a significant number of people being deprived of rights.¹⁶⁹ Consequently, courts should be in a position to develop and adopt appropriate remedies that will have a wider impact, positively impacting on the lives of both the claimants before the court and similarly-situated individuals and groups not part of the litigation. Significantly, comparative experience from similarly-situated jurisdictions such as South Africa show that structural interdicts are the most effective remedies for violation of socio-economic rights.¹⁷⁰ Effective responses for violations of socio-economic rights reflect a society aspiring towards an equitable distribution of resources, social justice and the protection of marginalised groups.

¹⁶⁵ W. Trengove, ‘Judicial Remedies for Violations of Socioeconomic Rights’, 4 *ESR Review* (1999) pp. 8–11.

¹⁶⁶ Liebenberg, *supra* note 87, p. 100.

¹⁶⁷ Liebenberg, *supra* note 3, p. 434.

¹⁶⁸ C. F. Sabel and W. H. Simon, ‘Destabilization Rights: How Public Law Litigation Succeeds’, 117 *Harvard Law Review* (2004) p. 1085.

¹⁶⁹ Biegon, *supra* note 23, p. 49.

¹⁷⁰ Liebenberg, *supra* note 3, pp. 424–434.

4 Conclusion

Socio-economic rights provide a framework for social engineering to achieve social justice for marginalised groups and an egalitarian society focused on substantive equality, and not just on formal equality. The Declaration of Rights contained in Chapter 4 includes a comprehensive set of economic, social and cultural rights, alongside civil and political rights, which is a fundamental departure from the Independence Constitution. The constitutionalisation of socio-economic rights, in so many ways, gives renewed impetus to the philosophical debates in the human rights discourse on the legal status of socio-economic rights and whether such rights could be subjected to judicial enforcement. The adjudication of socio-economic rights, nevertheless, raises complex questions relating to the justiciability of these rights, in particular the legitimacy of involving courts in complex and often contentious fiscal and policy debates. Such concerns are particularly more pronounced given Zimbabwean courts' relative inexperience in the enforcement of socio-economic rights. This chapter has argued that including socio-economic rights as justiciable rights demonstrates a concrete desire to ensure that the political process consistently works towards assisting the poor and marginalised in accessing the basic needs to ensure a dignified livelihood. Additionally, the constitutionalisation of socio-economic rights serves to ensure governmental attention to important interests that might otherwise be neglected in ordinary debates.

This chapter pointed out, however, that Zimbabwean courts will have to develop a conceptual understanding of the proper role of courts in enforcing socio-economic rights and how the enforcement role can be performed without usurping the powers of the other arms of government. Significantly, given the abstract nature of the rights, the courts and other adjudicative mechanisms will not only have to give normative content to the socio-economic rights enshrined in the Declaration of Rights but also develop a standard for assessing state compliance with the positive duties imposed by such rights. It was also noted that socio-economic deprivations are often systemic in nature, frequently reflecting underlying structural, social and economic failures resulting in a significant number of people being deprived of rights. Consequently, courts should be in a position to develop and adopt appropriate remedies that will have a wider impact, positively impacting on the lives of both the claimants before the court and similarly-situated individuals and groups not part of the litigation. The constitutionalisation of socio-economic rights means that the Constitution considers poverty as a human rights issue that not only requires the involvement of the political organs of the state for its resolution but also accords victims of poverty enforceable rights to demand an account from the state on the measures it has taken to enhance access to social goods and a dignified living.