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

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## 1 Introduction

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

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

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

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

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

## 2 Constitutional Values and Principles

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

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

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

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

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

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

[4] *See* G. J. Austin, 'Constitutional Values and Principles', in M. Rosenfeld and A. Sajo (eds.), *The Oxford Handbook on Comparative Constitutional Law* (2012) p. 777, at p. 777.
[5] *See*, for instance, the principles referred to in section 3(2) of the Constitution.
[6] M. L. F. Esteban, *The Rule of Law in the European Constitution* (1999) pp. 40–41.

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

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

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

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

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

## 2.1 *Teleological Theory, Values and Textual Analysis*

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

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

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

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

[12] *Ibid.,* 294.

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

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

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

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

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

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

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

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

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

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

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

### 2.2 *The Role of Values in Constitutional Analysis*

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

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[22] In *Ong Ah Chuan v. Public Prosecutor*; *Koh Chai Cheng v. Public Prosecutor* [1981] AC p. 648, the Privy Council observed that "the way to interpret a constitution … is to treat it not as if it were an Act of Parliament, but 'as *sui generis,* calling for principles of interpretation of its own, suitable to its character … without necessary acceptance of all the presumptions that are relevant to legislation or private law".
[23] [1994] 1 SA 407.
[24] *Government of the Republic of Namibia*, p. 418.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

#### 2.3.1 The Indirect Application of the Declaration of Rights to Legislation

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## 3 National Objectives and Human Rights

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### 3.2 *National Objectives as Directly Enforceable Guarantees?*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## 4 The Declaration of Rights in Context

### 4.1 *Structure of the Declaration of Rights*

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

#### 4.1.1 The Application Clause

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

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

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

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

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

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

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

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

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

### 4.1.2 The Interpretation Clause

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

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

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

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

### 4.1.3 The Limitation Clause

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

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

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

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

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

### 4.1.4 Public Emergency Clause

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

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

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

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

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

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

### 4.1.5 Substantive Provisions

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

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

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

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

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

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

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

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

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

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

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

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

### 4.3 *Monumental Milestones of the Declaration of Rights*

#### 4.3.1 Indivisibility and Interconnectedness of Human Rights

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4.3.3 The Liberalisation of *Locus Standi* (Standing)

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

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

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

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

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

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

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

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

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

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

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

provides that "[t]he State and every person, including juristic persons, and every institution and agency of the government at every level must respect, protect, promote and fulfil the rights and freedoms set out in this Chapter". Section 45(1) of the Constitution provides that the Declaration of Rights "binds the State and all executive, legislative and judicial institutions and agencies of government at every level". Thus, all the organs of the state at every level have the duties to respect, protect and promote the enforceable guarantees enshrined in the Declaration of Rights.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### 4.3.6 The Protection of the Rights of Vulnerable Groups

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

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

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

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

***Experiences of Disadvantaged Persons***


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

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

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

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

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

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

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

## 5 Conclusion

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

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

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

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

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

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

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

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