

# 1 Constitutional Analysis of the Interpretation Clause of the Zimbabwean Declaration of Rights

*Admark Moyo\**

## 1 Introduction

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 (DoRs) in the Zimbabwean Constitution. It provides courts, legal practitioners, law- and policy-makers with guidance on how to interpret the provisions of both the DoRs and Acts of Parliament. To give appropriate meaning and content to the rights and freedoms set out in the DoRs, 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 DoRs. The interpretation clause in the new DoRs requires and anticipates huge transformation in the way courts and other decision-making bodies should interpret and limit the fundamental rights and freedoms protected in the Constitution. Yet, the interpretation clause has not been subjected to scholarly analysis since the adoption of the current Constitution, and judicial officers each approach constitutional interpretation in their own way, sometimes without any reference whatsoever to the interpretation clause. This creates a huge gap between the aspirations of the drafters of the Constitution and the way in which legal practitioners, judges and other state institutions approach the interpretation of the constitutional rights. In the absence of scholarly work on the scope of the interpretation clause, legal practitioners and the courts are facing challenges on how to flesh out the meaning of fundamental rights and freedoms. This research attempts to fill in this gap.

This paper explores the reach of various theoretical models and approaches to constitutional interpretation and examines the interpretation clause with a view to establishing the extent to which the Constitution reproduces some of these theoretical models. This includes an analysis of the scope of the interpretation clause and how the DoRs or statutory laws ought to be interpreted in light of the same clause. The paper also analyses whether international law has, from time to time, been consistently applied to specific fact situations that come before domestic courts as is required by section 46(1)(c) of the Constitution.

Given that the Constitution stipulates that international law should play an important role in the interpretation of the rights in the DoRs, it is also important to explore the functions actually performed by international law in the interpretation of rights. To this end, the significance of the proposed research lies in the fact that it explains the meaning of the provisions governing the relationship between national law and international law, thereby enabling the courts to take full advantage of the interpretation clause (section 46(1)–(2)) and sections 326(2) and 327(6) of the Constitution. Lawyers and the courts may not take full advantage of the interpretation

---

\* Senior Law Lecturer, Great Zimbabwe University. Programme Manager, Children and the Law, African Child Policy Forum.

clause if the scope of its provisions has not been fully explored. This places the analysis of the interpretation clause in a position of practical relevance to not only lawyers and judges, but also to the overall goal of ensuring that the jurisprudence of the local courts is strongly influenced by international legal norms and standards.

Equally compelling is the fact that the interpretation clause introduces new interpretive guidelines which were not part of the DoRs analysis under the LHC. For instance, the interpretation clause requires courts and other decision-making bodies to pay due regard to the national objectives set out in Chapter 2 of the Constitution and to be guided by the founding values when interpreting provisions in the DoRs. 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 these provisions to be unpacked so that courts and lawyers are aware of both the tools of constitutional analysis and their peremptory obligations when interpreting the provisions of the DoRs.

## **2 Models of Interpretation**

### ***2.1 The Role of the Constitutional Text – Grammatical Interpretation***

The constitutional text is the starting point for determining the meaning and scope of the provisions entrenching fundamental human rights and freedoms. Where the words of the Constitution are clear and unambiguous, the courts ought to give effect to them. In *State v. Zuma*,<sup>1</sup> Kentridge, J.A. had the following to say about the role of the text in the interpretation of constitutional provisions:

While we must always be conscious of the values underlying the Constitution, it is nonetheless our task to interpret a written instrument. I am well aware of the fallacy of supposing that general language must have a single ‘objective’ meaning. Nor is it easy to avoid the influence of one’s personal intellectual and moral preconceptions. But it cannot be too strongly stressed that the Constitution does not mean whatever we might wish it to mean. We must heed Lord Wilberforce’s reminder that even a constitution is a legal instrument, the language of which must be respected. If the language used by the lawgiver is ignored in favour of a general resort to ‘values’ the result is not interpretation but divination ... I would say that a constitution ‘embodying fundamental rights should *as far as its language permits* be given a broad construction’.<sup>2</sup>

These remarks underline the danger associated with utter disregard of the constitutional text, especially the fact that if judges would interpret rights to mean whatever they wish them to mean then they are given a licence to ignore the words that embody the spirit of the Constitution. Kentridge emphasises the fact that constitutional interpretation must be grounded in the letter of the Constitution and the letter draws the boundaries of a possible interpretation.

However, constitutional interpretation often requires more than simply according words their literal or ordinary grammatical meaning. Most, if not all, of the substantive provisions entrenching human rights are couched in overly abstract and open-ended language, thereby leaving wide room for the courts to formulate wide formulations about the meaning and scope of these provisions. As a result, constitutional interpretation necessarily entails more than locating the ordinary literal meaning of the provisions under scrutiny. This explains why the interpretation clause envisages the role of many other factors in interpreting the provisions of the DoRs, not just the text protecting the right in question. Section 46(1) of the Constitution stipulates that when interpreting provisions in the DoRs, every court, tribunal or forum must,

---

<sup>1</sup> 1995 (2) SA 642 (CC) para. 17.

<sup>2</sup> Paras. 17 and 18.

among others, give full effect to the rights or freedoms set out in the Declaration; take into account international law; pay due regard to all the provisions of the Constitution, in particular the principles and objectives set out in Chapter 2; and promote the values and principles that underlie a democratic society based on openness, justice, human dignity, equality and freedom, and in particular the values and principles set out in section 3(1) and (2) of the Constitution.

In instances where exclusive resort to the text of the Constitution does violence to the relevance of other factors enumerated in the interpretation clause, it is a constitutional imperative for the courts to depart from the literal approach and to have regard to other factors which define the scope of the constitutional right in question. This means that even when there is an apparently self-evident literal meaning to be accorded to a particular constitutional provision, the proper interpretation of the provision may involve looking beyond that meaning. In *S v. Makwanyane*,<sup>3</sup> the Constitutional Court of South Africa underscored the idea that “whilst paying due regard to the language that has been used, [an interpretation of the Bill of Rights must be] generous and purposive and give ... expression to the underlying values of the Constitution”.<sup>4</sup> Value-based constitutional interpretation does not, however, mean that courts should ignore evident and plain meanings that should be accorded to the text of substantive provisions, but that courts should flesh out meanings that are consistent with the broader imperatives of the Constitution. Accordingly, a literal meaning of the text should be regarded as an appropriate interpretation if it is consistent with a generous and purposive interpretation which promotes the values that underlie the Constitution.

## **2.2 Systemic Interpretation**

The idea of systemic interpretation presupposes that all the laws of a particular country constitute a consistent system of rules, principles and norms. It is premised on the assumption that although the law is fragmented, decentralised and contained in different sources, all the new rules are made with an awareness of the existing rules.<sup>5</sup> In the international law context, it has been observed that the principle of systemic interpretation assumes and reinforces the formal unity of the legal system.<sup>6</sup> At the domestic level, systemic interpretation essentially means that all the sources of law – from the Constitution to legislation, the common law and judicial precedent – constitute one legal system and the obligations they impose on citizens and the state must be interpreted and performed holistically. Given that our constitutional state is founded on the doctrine of the supremacy of the Constitution, legislation may not be interpreted in a manner that does not pay homage to the provisions of the Constitution.

In the context of constitutional 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. As is shown below, 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

---

<sup>3</sup> 1995 (3) SA 391 (CC).

<sup>4</sup> Para. 9.

<sup>5</sup> J. D’Aspremont ‘The Systemic Integration of International Law by Domestic Courts: Domestic Judges as Architects of the Consistency of the International Legal Order’, in O. K. Fauchald and A. Nollkaemper (eds.), *The Practice of International and National Courts and the (De-)Fragmentation of International Law* (2012) 141, 148.

<sup>6</sup> P. Sands, ‘Treaty, Custom and the Cross-Fertilization of International Law’, 1 *Yale Human Rights & Dev Law Journal* (1998) 85, 95. See also Article 33(1)(c) of the Vienna Convention on the Law of Treaties (VCLT) which provides for an interpretation of treaties that takes into account “any relevant rules of international law applicable in relations between the parties”.

freedoms.<sup>7</sup> Similarly, the obligatory constitutional duty of the courts to take international law into account when interpreting the provisions of the DoRs also tends to suggest that the drafters of the Constitution intended international law and domestic law to be construed as forming the bedrock of a unified legal system with provisions to be interpreted as part of one system.

### 2.3 *Evolutionary Interpretation*

Dynamic or evolutionary interpretation supposes that where important social and technical changes have occurred, then past legal doctrines laid out in judicial precedent should also change along the same lines.<sup>8</sup> In *Tyrer v. United Kingdom*, the European Court on Human Rights (ECtHR) was called upon to determine whether the practice of corporal punishment in schools was consistent with the European Convention of Human Rights (ECHR).<sup>9</sup> In its consideration of the matter, the ECtHR emphasised that it had to “recall that the Convention is a living instrument which ... must be interpreted in the light of present-day conditions ... The Court cannot but be influenced by the developments and commonly accepted standards in ... the Member States of the Council of Europe.”<sup>9</sup> Ultimately, the Court considered corporal punishment to be inconsistent with the prohibition of degrading and inhuman treatment or punishment which is enshrined in the ECHR. After *Tyrer v. United Kingdom*, the ECtHR relied on evolutionary interpretation to expand the meaning and reach of the provisions of the ECHR to other areas of the law.<sup>10</sup> The importance of evolutionary interpretation for the effective protection of human rights has been emphasised by the former president of the ECtHR, Luzius Wildhaber,<sup>11</sup> and other scholars of European Union law.<sup>12</sup>

Evolutionary interpretation becomes an effective tool for the realisation of human rights as the treaty or constitution being interpreted comes of age. This is because the circumstances to which the treaty or constitution in issue was originally designed to govern often change over time, and it becomes necessary for the courts to be flexible enough to accommodate emerging values and social goals. To this end, it has been argued that the doctrine of dynamic interpretation affords a necessary degree of flexibility to constitutional and treaty law, thereby allowing courts to adapt the law to rapidly changing socio-political and economic environments.<sup>13</sup> This argument has been made powerfully in the context of European Union law where Dzehtsiarou, relying on earlier academic scholarship, makes the following remarks:

The ECtHR can hardly avoid using evolutionary interpretation if it wishes to maintain the effectiveness of the ECHR. Contemporary Europe represents a different landscape in terms of human rights protection compared with 60 years ago. Application of the standards adopted during the early years of the ECHR would have

---

<sup>7</sup> See section 3.2 of this paper.

<sup>8</sup> See *Christine Goodwin v the United Kingdom*, 35 Eur.Ct.H.R 18 (2002), at para. 74.

<sup>9</sup> *Ibid.*, at para. 183.

<sup>10</sup> The doctrine of evolutionary interpretation was explored in relation to the meaning of article 3 of the ECHR in the context of the death penalty in *Soering v. the United Kingdom*, Eur. Ct. H.R 403 (1989), at para. 104, and in relation to the definition of torture in *Selmouni v. France*, 29 Eur. Ct. H.R 403 (2009), at para. 101. See also *Kress v. France*, VI, Eur. Ct. H.R. (2001), at para. 70; *Stafford v. the United Kingdom*, 35 Eur. Ct. H.R 32 (2002), at para. 68 applying evolutionary interpretation in the context of the right to liberty and security of the person (Article 5 of the ECHR), *Niemietz v. Germany*, 251B Eur. Ct. H.R (Ser A) (1995), at para. 29; and *Halford v. the United Kingdom*, 32 Eur. Ct. H.R (1997), at paras. 42–46.

<sup>11</sup> L. Wildhaber, ‘European Court of Human Rights’, 40 *Canadian Yearbook of International Law* (2002) 310.

<sup>12</sup> See G. Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (2009) 79.

<sup>13</sup> See M. Varju ‘Transition as a Concept of European Human Rights Law’, *European Human Rights Law Review* (2009) 170, 172.

resulted in turning it to an instrument of stagnation ... The rudimentary form nature of the ECHR provisions and the age of the instrument have acted as the main driving forces behind an evolutive interpretation.<sup>14</sup>

Whilst these remarks could have been relevant to the interpretation of the provisions of the LHC, their relevance to the interpretation of a new Constitution which is, at the time of writing, less than five years of age, may be doubtful. The LHC governed the exercise of public power and the enjoyment of human rights for close to 33 years and was amended 19 times before its repeal by the new Constitution of 2013. As such, the doctrine of evolutive interpretation could have, had the judges been aware of it, played an important role in construing the previous Constitution in a manner consistent with contemporary developments for over three decades, but the challenge confronting the courts today concerns the scope and meaning of the provisions of the Constitution rather than whether the courts' approach to it is evolutive or dynamic. Nonetheless, dynamic interpretation will become an issue as the Constitution becomes of age and challenges begin to arise.

One of the key challenges confronting dynamic interpretation, as a doctrine or an approach, is whether it is legitimate for the courts to develop new interpretations of constitutional provisions, sometimes contrary to what the legislature might have originally intended. To begin with, judicial decisions built on the idea of dynamic interpretation may amount to no more than legislative or executive decision-making which ordinarily is the preserve of the political organs of the state. Courts have wide latitude to bypass the sovereign consent of the political organs of the state and to engage in counter-majoritarian conduct, sometimes on controversial issues, in the name of evolutive interpretation. Accordingly, the courts may rely on the doctrine to justify law reforms that are far beyond the social or cultural changes that are taking place in political communities. Further, counter-majoritarian concerns also surface in the process of locating the appropriate time for an evolution.<sup>15</sup> If the judiciary is liberal and overly activist, there is a great likelihood that liberal judges will rely on dynamic interpretation to justify reforms which put the law ahead of its own people.

Another challenge is that dynamic interpretation undermines the consistency of the legal system, pays little regard to the system of judicial precedent and negates such core values and principles of a common law legal system as equality, uniformity, legal certainty and predictability. In the end, the legitimacy of judicial decisions is severely undermined when judges have the freedom to move from one interpretation to another in the name of legal dynamism. Besides, it is difficult to determine at what point exactly a society acquires consensus over change of values or goals. Even in instances where such change is concretely determined, there is a real risk of suppressing the rights and interests of minorities within majorities or minorities within minorities.

If it is to mirror consensus over changing values, evolutive interpretation may not be based on the understanding of minorities, but on the beliefs and values that are revered by the majority. In *Sheffield and Horsham v. the United Kingdom*,<sup>16</sup> the ECtHR had to determine the failure to change birth certificates after gender reassignment surgery constituted an infringement of Article 8 of the ECHR. In addressing this question, the Court was at pains to emphasise that it could not depart from the existing case law because, for it, transsexualism gives rise to multiple

---

<sup>14</sup> See K. Dzehtsiarou, 'European Consensus and the Evolutive Interpretation of the *European Convention on Human Rights*', 12:10 *German Law Journal* (2011) 1730, 1732. See also C. Rozakis, 'The European Judge as Comparativist', 80 *Tulane Law Review* (2005) 257, 260–261.

<sup>15</sup> See generally L. B. Trembly, 'General Legitimacy of Judicial Review and the Fundamental Basis of Constitutional Law', 23 *Oxford Journal of Legal Studies* (2003) 525, 525 and J. Waldron, 'The Core of the Case Against Judicial Review', 115 *Yale Law Journal* (2006) 1346.

<sup>16</sup> Eur. Ct. H.R (1998).

and complex scientific, legal, moral and social issues in respect of which there existed no generally shared approach among members of the European Union.<sup>17</sup> However, the same question arose from similar facts in *Christine Goodwin v. the United Kingdom*<sup>18</sup> and the Court overturned its prior decision by holding that there was a ‘continuing international trend’ towards the recognition of the rights of transsexuals.<sup>19</sup>

## 2.4 Purposive/Teleological Interpretation

Purposive interpretation revolves around fleshing out the values that underpin enumerated human rights and freedoms – especially the founding values of the Constitution – and then to give an interpretation that best promotes those values. Often, this implies a broad and value-based approach to fleshing out the meaning of constitutional texts. At the heart of purposive 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 which are mirrored by an unequivocal commitment to new values and political goals. In *Government of the Republic of Namibia and Another v. Cultura 2000 and Another*,<sup>20</sup> 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’.”<sup>21</sup> 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 DoRs and the values upon which our constitutional state is founded. In *R v. Big M Drug Mart Ltd*,<sup>22</sup> the Canadian Supreme Court made the following seminal remarks:

The meaning of a right or freedom guaranteed by the Charter was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect. In my view, this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought, by reference to the character and larger objects of the Charter itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter. The interpretation should be ... a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the Charter’s protection.

The purposes for which various rights were included in the Constitution play an important role in determining the scope of the provisions entrenching these rights. For instance, it is impossible to justify the practice of hate speech against a particular racial or ethnic group on the basis of the right to freedom of speech and expression. This is because the purpose behind protecting free speech and expression is not to incite racial or ethnic hatred between various social groups. Yet, the same rights can be justifiably relied upon by an individual seeking to criticise the government for adopting policies which they consider to be unreasonable or unfair. Moreover, at a general level, a right that has the purpose of protecting interest A may not be violated by conduct which infringes upon a right designed to protect interest B that underlies another right. This general statement is subject to the caveat that the courts should be mindful that at a much broader level the protection of fundamental human rights serve one ultimate purpose – hence the principle that all rights are indivisible, interrelated, interconnected and mutually reinforcing.

---

<sup>17</sup> *Ibid.*, para. 58.

<sup>18</sup> 35 Eur. Ct. H.R (2002) 18.

<sup>19</sup> At para. 85.

<sup>20</sup> (1994) (1) SA 407.

<sup>21</sup> *Ibid.*, at 418.

<sup>22</sup> 1985 18 DLR (4<sup>th</sup>) 321, 395–396.

## 2.5 Generous Interpretation

There is a tendency, even from top courts in developed countries, to conflate two methods of constitutional interpretation, namely generous and purposive interpretation. Whilst these two methods of interpretation may have overlaps and have ordinarily been construed to mean one thing, they are not necessarily the same. The Privy Council has, on numerous occasions, indicated that “the language of a Constitution falls to be construed, not in a narrow and legalistic way, but broadly and purposively, so as to give effect to its spirit, and this is particularly true of those provisions which are concerned with the protection of human rights”.<sup>23</sup> The term ‘generous’ should be viewed as an invitation to judges to avoid interpreting constitutional provisions in a narrow and restrictive manner. This represents a departure from formalism, literalism and intentionalism. A constitution should be interpreted in a flexible and liberal way. Thus, ordinary rules of statutory interpretation must give way to a more adaptable and flexible method when it comes to locating the scope of constitutional provisions.

Generous interpretation of constitutional provisions entails the development of new principles of construction, different from those developed in relation to the ordinary interpretation of statutes.<sup>24</sup> In the words of Lord Wilberforce, a generous interpretation does not only avoid “the austerity of tabulated legalism”, but is also amenable to giving an “individual the full measure of the fundamental rights and freedoms” entrenched in a constitution.<sup>25</sup> A constitution is drafted in broad and general terms which lay down principles of width and generality applicable to different contexts. As such, it should not be narrowly and 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 unnecessarily unduly circumscribed. As the Privy Council would have it, “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’”.<sup>26</sup> As will be demonstrated below, the injunction that courts give full effect to all fundamental rights or freedoms when interpreting the DoRs, demonstrates that the Constitution should be interpreted both systematically and generously. Below is a discussion on the interpretive guidelines enumerated in section 46(1) and (2) of the Zimbabwean Constitution.

## 3 Interpretive Guidelines Given to Courts When Interpreting the DoRs

### 3.1 The Peremptory Obligation to “Give Full Effect to the Rights and Freedoms Enshrined in” the DoRs

Section 46(1)(a) imposes on courts an obligatory duty to “give full effect to the rights and freedoms enshrined in” the DoRs. An approach that gives full effect to the rights and freedoms entrenched in the Zimbabwe Constitution echoes the elements of a generous interpretation of

---

<sup>23</sup> *A-G of Trinidad and Tobago v. Whiteman* (1991) 2 AC 240, 247. See also *A-G of The Gambia v. Momodou Jobe* (1984) AC 689, 700, where the Court held that “a constitution, and in particular that part of it which protects and entrenches fundamental rights and freedoms to which all persons in the state are to be entitled, is to be given a generous and purposive construction”.

<sup>24</sup> R. Clayton, H. Tomlinson and C. George, *The Law of Human Rights* (2000), 112–113, para. 3.11.

<sup>25</sup> *Minister of Home Affairs v. Fisher* (1980) AC 319 PC, 328.

<sup>26</sup> *Ong Ah Chuan v. Public Prosecutor; Koh Chai Cheng v. Public Prosecutor* (1981) AC 648.

the constitutional provisions. Section 46(1)(a) requires courts to give full effect to the rights and freedoms enshrined in Chapter 4 (*i.e.* the DoRs) of the Constitution. This is an interpretation in favour of rights and against their restriction. Courts must be particularly sensitive to the impact which the exercise of judicial functions may have on all the rights of individuals who appear before them, especially the weak and the most vulnerable. In order to do so, the DoRs must be interpreted broadly so as to give expression to the underlying values of the Constitution in light of the context and purpose of the provision. This will make it possible for courts to construe provisions of the DoRs in a manner which secures for individuals the full measure of its protection. The entire process involves interpreting the Constitution in a manner that ensures both that no one is left behind and that there is equal protection for all persons.

Courts must avoid the literal approach to constitutional interpretation in favour of that which gives all provisions or rights the full measure of protection they deserve. Another reason for a more generous or broad meaning rather than a narrow one is that the Constitution has a limitation clause. This suggests that a provision in the DoRs should be interpreted as broad as the language permits to ensure that rights are not limited at the point of interpretation. Section 46(1)(a) of the Constitution provides that when interpreting the provisions of Chapter 4, “a court, tribunal, forum or body, must give full effect to the rights and freedoms enshrined in” the DoRs. Like many other positive duties imposed on the courts by the interpretation clause, this duty is framed in peremptory language, thereby implying that all decision-making bodies are obliged to follow the letter of this sub-clause. In addition, the obligatory duty to ‘give full effect’ to all rights and freedoms enshrined in Chapter Four of the Constitution, suggests that courts must determine the scope of all constitutional rights holistically. Accordingly, it is imperative for the courts to take cognisance of the fact that human rights are not discrete silos that may be given content without recourse to the meaning and content of other rights. This approach implies that individual rights ought not to be interpreted in a manner that unnecessarily limits the meaning and significance of the other rights.

In order to ‘give full effect’ to the rights and freedoms entrenched in the whole of Chapter 4 of the Constitution, it is vital for the courts 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 interpretation clause 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 of all the rights that are protected in the DoRs.

More importantly, reference to an interpretation that ‘gives full effect’ to all the rights that are entrenched in the DoRs transcend the historical divides between the so-called generations of rights. In the past, there were three generations of rights in terms of 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 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 rights.<sup>27</sup> These latter rights were not viewed as important and were generally relegated to the margins of the international legal system. It is clear that the idea of rights created, if not intentionally, a

---

<sup>27</sup> For a fuller description of generations of rights, *see generally* L. Seafeld, ‘South Africa: The Interdependence of All Human Rights’, in A. A. An-Na’im (ed.), *Human Rights under African Constitutions* (2003) 295.



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. Section 46(1)(a) of the Constitution departs from this rather artificial classification of rights and stipulates that rights should be read holistically if they are to be ‘given full effect’.

### ***3.2 The Peremptory Obligation to “Promote the Values and Principles that Underlie a Democratic Society” Based on Founding and Other Values***

Section 46(1)(b) of the Constitution provides that when interpreting the provisions of the DoRs, “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 which 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.

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. Where 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 DoRs are informed by and give effect to the founding values and principles. As such, courts may not ignore this fact when interpreting and giving effect to all the provisions in the DoRs.

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

DoRs. In *New Patriotic Party v. Attorney-General*,<sup>28</sup> 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.<sup>29</sup>

Values, whether 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.<sup>30</sup> 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”.<sup>31</sup> In *Agyei Twum v. Attorney-General and Akwetey*,<sup>32</sup> 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.<sup>33</sup>

Thus, if the letter of the does not explicitly authorise a particular form of interpretation, then the spirit of the Constitution as embedded in its unwritten architecture 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*,<sup>34</sup> 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.<sup>35</sup>

---

<sup>28</sup> [1993–1994] 2 GLR 3531.

<sup>29</sup> At 79–80.

<sup>30</sup> See *Asare v. Attorney General* [2003–2004] 2 SCGLR 823, 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”.

<sup>31</sup> See *New Patriotic Party v. Attorney-General*, 84.

<sup>32</sup> [2005–2006] SCGLR 732.

<sup>33</sup> *Ibid.*, 766.

<sup>34</sup> [1993–1994] 2 GLR 525.

<sup>35</sup> At 561–562.

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 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 DoRs. 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.<sup>36</sup>

### ***3.3 The Peremptory Obligation to Take into Account International Law and All Treaties and Conventions to Which Zimbabwe is a Party***

#### **3.3.1 General Remarks**

Regardless of the above mentioned constitutional imperatives, it remains questionable whether all legal practitioners and judges are aware of their obligation to take international law into account when performing their interpretive functions. For those who have read the provisions governing the relationship between international law and domestic law, it may be difficult to determine what it means to take international law into account. Does it mean that international law has persuasive value (if it does, why the provision in the first place, especially given that all sources of law that are not strictly legally binding on the courts have persuasive value?) or does it mean that international law is now part of Zimbabwean law (if it does, why not just provide, as the Constitution of Namibia does, that international law forms part of the law of Zimbabwe?) or does it mean that the force of international law in domestic courts is somewhere between being persuasive authority and mandatory authority (if it does, what exactly does this mean?).

Under the Zimbabwean legal system, international law constitutes both a direct and indirect source of law. International law is a direct source of law in two respects. First, section 326(1) stipulates that customary international law forms part of the law of Zimbabwe unless it is inconsistent with the Constitution or an Act of Parliament. Thus, general principles of public international law need not be incorporated into domestic law by statute for them to be binding on all agencies of government. Customary international law is binding on Zimbabwe as long as there is no domestic statute or constitutional provision providing for the contrary.<sup>37</sup> In applying principles of customary international law, courts and other decision-making forums should attempt to reach an interpretation that is consistent with the Constitution or municipal legislation, but if this is not feasible, domestic law will always prevail. Second, section 327(2)(a)–(b) provides that “an international treaty which has been concluded by the President ... does not bind Zimbabwe until it has been approved by Parliament and does not form part of the law of Zimbabwe unless it has been incorporated into the law through an Act of Parliament”.

---

<sup>36</sup> See G. J. Austin, ‘Constitutional Values and Principles’. in M. Rosenfeld and A. Sajo (eds.), *The Oxford Handbook on Comparative Constitutional Law* (2012) 777, 777. See also M. L. Fernandez Esteban, *The Rule of Law in the European Constitution* (1999) 40–41.

<sup>37</sup> For comparative literature, see M. J. Nkhata, *Malawi Country Report*, <[http://www.icla.up.ac.za/images/country\\_reports/malawi\\_country\\_report.pdf](http://www.icla.up.ac.za/images/country_reports/malawi_country_report.pdf)> (accessed 8 September 2015).

International law is an indirect source of law in that it aids the courts in their interpretation of the provisions of the DoRs. Many provisions of the Constitution prescribe an important interpretive role for norms of public international law – whether customary in nature or contained in international treaties.<sup>38</sup> Section 46(1)(c) imposes on those interpreting the DoRs the peremptory duty to “take into account international law and all treaties and conventions to which Zimbabwe is a party”. This provision leaves the courts with no discretion over whether or not they should consider international law when interpreting constitutional provisions entrenching fundamental rights and freedoms. Section 46(1)(c) also indirectly imposes on practicing lawyers an ethical duty to refer to all applicable laws to ensure that the court is acquainted with the relevant international norms when locating the meaning and scope of the constitutional provision or right in question. There are limited, if any, sections of the DoRs which do not have corresponding provisions at the international level. As such, it is highly likely that the interpretation of constitutional rights almost invariably requires the consideration of equivalent provisions in international law.

The duty imposed on the courts is to ‘take into account’ international law when interpreting fundamental human rights and freedoms. At a general level, the phrase ‘take into account’ means ‘to take consideration of something’ or to ‘pay attention to something’. Accordingly, section 46(1)(c) prescribes that the Court should ‘consider’ the scope of the right in question under international law. As Chisala-Tempelhoff and Bakare would have it, courts are under an obligation “to interpret laws in such a way as to avoid creating breaches [of] international law or international agreements. [In other words], the judiciary must make every effort to take judicial notice of all treaties that are binding on” the country.<sup>39</sup> It is debatable whether our Constitution merely requires our courts to “take judicial notice of all treaties that are binding” on Zimbabwe as the duty of the courts is framed in peremptory terms. This suggests an approach that is more than “taking judicial notice of all [binding] treaties”. The duty to ‘take into account’ embraces international law into the domestic legal system, thereby requiring courts to let international law influence the outcome of concrete cases where such law is not inconsistent with statutory or constitutional provisions.

The duty to ‘take into account’ does not, however, mean that the Court is required to interpret the right in exactly the same way it has been interpreted by international courts, treaty-monitoring bodies and other forums. As O’Shea would observe, the duty to ‘consider’ international law “means that an inquiry must be made into the relevant provisions of international law; however they need not necessarily be applied to the particular situation if there are other overriding considerations arising out of other rules of interpretation.”<sup>40</sup> The position would, however, be different if the Constitution of a particular country – Namibia is a good example – has a provision stipulating that customary international law and all international treaties to which the country is a state party form part of domestic laws and need no domestication for them to be binding on the country in question.

Nonetheless, the phrase must take into account suggests that international law should play more than a persuasive role in the interpretation of fundamental human rights and freedoms. It means that it is inadequate for the court to just have a glance at international law, but for it to genuinely consider its role in the interpretation of the provisions of the DoRs. Accordingly, it will be

<sup>38</sup> See, for example, sections 46(1)(c), 326(2) and 327(6) of the Constitution, which are discussed below.

<sup>39</sup> See S, Chisala Tempelhoff and S. S. Bakare, ‘Malawi’, in V. O. Ayeni (ed.), *The Impact of the African Charter and the Maputo Protocol in Selected African states* (2016) 149, 153.

<sup>40</sup> See A O’shea ‘International law and the Bill of Rights’, in Lexis Nexis, *Bill of Rights Compendium* (1996) 7A1, 7A-6, para. 7A2.

inconsistent with the Constitution for judicial officers to just cast a ceremonial glance at international law and then proceed to hastily dismiss its relevance to constitutional issues before the courts. Justice Kapindu once made compelling remarks which resonate with the way the Constitution anticipates our courts to approach international law when interpreting rights or legislation. He posited that:

The position ... is that where...a party to a treaty containing provisions that are relevant to the facts of a case at hand, it is peremptory that if a court is interpreting the Constitution, it must demonstrate that it paid due regard to that treaty. The courts, as an organ of the state, will be bound not to act in a manner that defeats the object and purpose of such a treaty in interpreting the Constitution. In cases where the treaty has been domesticated, it will obviously easily be directly enforceable by the courts as part of domestic law.<sup>41</sup>

Under the Vienna Convention on the Law of Treaties (VCLT), it is imperative that where a state party has signed a treaty without ratifying it, the same state may not act in a manner which is not consistent with the spirit and object of the treaty it has signed. Considering the relevance of international law to matters regulated by domestic law, Mohamed D P, in *Azanian People's Organisation (AZAPO) v. President of the Republic of South Africa*,<sup>42</sup> held as follows:

The issue which falls to be determined by this Court is whether s 20(7) of the Act is consistent with the Constitution. If it is, the inquiry as to whether or not international law prescribes a different duty is irrelevant to that determination. International law and the contents of international treaties to which South Africa might or might not be a party at any particular time are, in my view, relevant only in the interpretation of the Constitution itself, on the grounds that *the law-makers of the Constitution should not lightly be presumed to authorise any law which might constitute a breach of the obligations of the state in terms on international law*.<sup>43</sup>

The first two sentences are very dismissive of the role of international law in determining the legality of the statutory provisions under consideration; focussing instead on whether the statute is consistent with the Constitution. Nonetheless, Mohamed, D. P. deserves credit for emphasising that Parliament should not be “lightly presumed to authorise any law” which is inconsistent with international law. This encourages the systemic interpretation of human rights which emphasises the idea that instruments protecting human rights – whether international or domestic in character – should be viewed as a single system targeted at respecting and protecting the full dignity of the human person. Perhaps one of the shortcomings of the interpretation clause is that it does not provide guidelines on how the process of ‘taking into account’ should be conducted and how international legal norms should be read into the DoRs’ interpretive matrix. At common law, there is a presumption that Parliament would not make laws that are contrary to the state’s international obligations.<sup>44</sup> This common law position appears to have been codified in and expanded upon by the Constitution.

### 3.3.2 The Principle of Consistent Interpretation

Apart from directing courts to “take international law into account” when interpreting the DoRs, most states usually require judicial officers to construe legislation in a manner that is consistent with their international obligations. This can be an essential method for ensuring that

---

<sup>41</sup> Paper presented at the Judicial Colloquium on the Rights of Vulnerable Groups, held at Sunbird Nkopola Lodge, Mangochi, Malawi, 6 and 7 March 2014, available at <<http://www.Southernafricalitigationcentre.org/1/wp-content/uploads/2014/12/8.pdf>> (accessed 6 December 2015).

<sup>42</sup> 1996 1 BHRC 52 (CC).

<sup>43</sup> At 65H-66A.

<sup>44</sup> See generally *Maynard v. The Field Cornet of Pretoria* (1894) SAR 214; *S v. Penrose* 1966 1 SA 5 (N) at 11E-F

international law becomes ‘the law of the land’ even if it is not incorporated into domestic law. Thus, international law may still have a huge impact on the domestic legal system if local judicial officers interpret domestic legislation by drawing heavily on international human rights law.<sup>45</sup> Consistent with the notion of systemic interpretation, the Constitution protects a legal construct which may broadly be termed the ‘principle of consistent interpretation’. Under this approach to statutory or constitutional interpretation, the incorporation of international norms is not the sole means by which international law enters the municipal legal order. Accordingly, while international law which has not been incorporated into the domestic legal system does not form part of the land, it may still have the effects of an incorporated treaty if local judges interpret national law by drawing heavily on international law.<sup>46</sup>

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

[D]omestic courts are obliged to interpret domestic law in a manner consistent with international law. As a result, they necessarily heed international law and give weight to it in the domestic legal order. As such, the application of the principle of consistent interpretation does not endow international law with a self-executing character in domestic law – the question of the self-executing character of an international legal instrument being chiefly a question of international law rather than a question of domestic law. However, the role that international law can play through interpretation is far from negligible and it surely gives it an indirect effect in domestic law. The principle of consistent interpretation is sometimes a means to bypass missing requirements of incorporation and apply international law short of any measure of incorporation.<sup>47</sup>

The principle of consistent interpretation places on judges a general duty to ensure that they seriously take heed of international law and pay due regard to it in the interpretation of constitutional and statutory provisions under the domestic legal order. As briefly stipulated above, the principle does not only call upon courts to interpret domestic law in a manner consistent with international law, but also to pay heed and give effect to international law. However, the principle of consistent interpretation does not confer on the instrument in question self-executing characteristics of some international treaties, but ensures that international human rights law performs a pivotal role and takes centre stage in the interpretation of domestic legislation affecting the enjoyment of human rights. In addition, the principle may also prove to be useful where counsel or the court wishes to bypass the legal requirements of incorporation and ensure that international law influences the interpretation of domestic legislation without any measure of incorporation.

An accurate reading of the Constitution demonstrates that incorporation is not the ‘all or nothing’ procedure required for the application of international law in domestic courts. For purposes of the principle of consistent interpretation, there are two relevant constitutional provisions addressing the role of international law in the interpretation of legislation. First,

---

<sup>45</sup> J. D. Aspremont and F. Dopagne, ‘Kadi: the ECJ’s Reminder of The Abiding Divide Between Legal Orders’, 5 *International Organizations Law Review* (2008) 371.

<sup>46</sup> See generally R. G. Steinhardt, ‘The Role of International Law as a Canon of Domestic Statutory Construction’, 43 *Vanderbilt Law Review* (1990) 1103 and J. Turley, ‘Dualistic Values in an Age of International Legisprudence’, 44 *Hastings Law Journal* (1993) 185.

<sup>47</sup> J. D’Aspremont ‘The systemic integration of international law by domestic courts: Domestic judges as architects of the consistency of the international legal order’, in Fauchald and Nollkaemper, *supra* note 5, 141, 143–144. See also the House of Lords’ decision in: *A (FC) v. Secretary of State for the Home Department (Conjoined Appeals)* (2005) UKHL 7 and, for Canadian experiences, R. Provost, ‘Judging in Splendid Isolation’, 56 *American Journal of Comparative Law* (2008) 125.

section 326(2) stipulates that “[w]hen interpreting legislation, every court and tribunal must adopt any reasonable interpretation of the legislation that is consistent with customary international law applicable in Zimbabwe, *in preference to an alternative interpretation inconsistent with that law*”. Second, section 327(6) follows this injunction by providing, in the context of the application of treaty law, that “[w]hen interpreting legislation, every court and tribunal must adopt any reasonable interpretation of the legislation that is consistent with any international convention, treaty or agreement which is binding on Zimbabwe, in preference to an alternative interpretation inconsistent with that convention, treaty or agreement”.

There is no doubt that these provisions codify and reinforce the principle of consistent interpretation of legislation in line with principles of customary international law and the treaties or conventions that are binding on Zimbabwe. The phrase ‘any international convention, treaty or agreement which is binding on Zimbabwe’ must be interpreted to mean all conventions and treaties that have been duly ratified by the country since these are already binding on the country, at least at the international plane, regardless of whether or not they have been domesticated.

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

The two provisions referred to above also amount to more than a mere common law presumption. A common law presumption that the legislature would not make laws that are inconsistent with international law is subject to rebuttal by the litigant against whom the presumption is being invoked. Thus, if one of the two alternative interpretations of legislation is inconsistent with international law, the other interpretation would normally be preferred, but it does not have to be the preferred interpretation if the interpretation that is inconsistent with international law seems to be more appropriate in the context of the legislation in question. Section 327(6) requires more than this because it mandates the courts to prefer an interpretation which is consistent with international law provided the interpretation is reasonable, even if the other possible interpretation makes more sense within the context of the particular statute’.<sup>48</sup> Given that the Constitution itself was adopted in the form of an Act of Parliament, it is arguable that the rules entrenched in sections 326(2) and 327(6) must equally apply to the interpretation of constitutional provisions, particularly those entrenching fundamental rights and freedoms.

---

<sup>48</sup> See A. O’Shea (ed) *International law and the Bill of Rights* (2004) 7A-8, para. 7A2.

### 3.3.3 The Application of International Law as a Result of the Rise of Worldly Judges

Incorporation and consistent interpretation aside, the developing influence of international law in the national legal system seems to arise from the general amenability of local judges towards the international legal system, regardless of whether the applicable rules of international law are strictly binding on the sitting judge. There is an emerging or developing tendency for judges to view the national legal and human rights systems not as islands unto themselves, but as an intrinsic part or offshoot of the international legal order. Behind this tendency is a subtle rise of ‘worldly judges’ who view themselves as agents of the international legal order and cherish the steady influence of international law on the content of domestic court decisions.<sup>49</sup> Local judges consider themselves to be guardians of the international legal system, but the emerging accommodativeness of the courts is not based on a sense of a legal obligation imposed on them by the domestic legal system, but is rather predominantly grounded on the persuasive value of international law. This creates room for domestic deliberation and engagement with international law without necessarily giving the impression that judges are legally bound to follow international law.<sup>50</sup> Under such an approach to the interpretive role of international law, local courts are inclined to take ownership of the processes through which international law creeps into the legal system and to own the outcome or consequences of making decisions based on it.

In the Zimbabwean context, domestic courts have consistently referred to international law without necessarily referring to constitutional provisions governing incorporation of international treaties, the principle of consistent principle or the positive duty to consider international law when interpreting rights provisions in the DoRs. While this is a promising development for the harmonisation of domestic and international norms and standards, the analysis is rarely done in a systematic fashion. Thus, the majority of judges do refer to international law only when it is convenient for them to do so and rarely refer to how the Constitution anticipates the application of international law to domestic legal problems. In essence, the courts’ failure to invoke the provisions of the interpretation clause does not necessarily negatively affect the role of international instruments in resolving domestic legal issues as such instruments are usually applied anyway. However, non-reference to the interpretation clause makes it look like the courts are inventing some mechanism which is not foreseen by the supreme law of the land when in fact they are required to do so by the very same law. Thus, the rise of ‘worldly judges’ should complement the current constitutional regulatory framework for the application of international law in the domestic courts and not act as the only natural catalyst for inclusive approach to international law in the domestic courts.

### ***3.4 The Peremptory Obligation to Pay Due Regard to All the Provisions of This Constitution, in Particular the Principles and Objectives Set out in Chapter 2 of the 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, 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

---

<sup>49</sup> K. Young, ‘The World through the Judge’s Eye’, 28 *AustYBIL* 27, 42.

<sup>50</sup> E. Benvenisti and G. W. Downs, ‘National Courts, Domestic Democracy, and the Evolution of International Law’, 20 *European Journal of International Law* (1009) 59–72.



provisions. Below is an explanation of what each of these related duties requires of the government.

### 3.4.1 Paying Due Regard to All Constitutional Provisions

This provision entrenches systematic and contextual interpretation. Though context encompasses aspects such as legal history and drafting history, section 46(1)(d) of the Constitution restricts context to textual context. Thus, provisions of the Constitution must and are often understood in relation to and in light of one another (especially when they are associated) and of other components of more encompassing instrument of which they form part, drawing on the system or logic or scheme of the written text as a whole. In *Mudzuru and Anor v. Minister of Justice, Legal and Parliamentary Affairs & Others*, section 78 of the Constitution, which protects marriage rights for heterosexuals, was interpreted within the context of sections 81 and 44 of the Constitution.<sup>52</sup> 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 DoRs. 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. Similarly, in *S v. Makwanyane and Another*,<sup>51</sup> section 11(2) of the Interim Constitution of South Africa which prohibited cruel, inhuman or degrading treatment punishment was interpreted within the context of other provisions of the Constitution such as the rights to equality and human dignity. Chaskalson, P proceeded as follows:

[S]ection 11(2) of the Constitution must not be construed in isolation, but in its context, which includes ... other provisions of the Constitution itself and, in particular, the provisions of Chapter Three of which it is part. It must also be construed in a way which secures for “individuals the full measure” of its protection. Rights with which section 11(2) is associated ... which are of particular importance to a decision on the constitutionality of the death penalty are ... the right to life, the right to respect for and protection of his or her dignity, and ... the right to equality before the law and to equal protection of the law. Punishment must meet the requirements of [these rights] and this is so, whether these sections are treated as giving meaning to Section 11(2) or as prescribing separate and independent standards with which all punishments must comply.<sup>52</sup>

It is evident from the case of *S v. Makwanyane* that rights are interdependent and mutually reinforcing. This explains the approach prescribed in the Constitution which requires courts to derive the meaning of rights from the constitutional provisions that surround them. 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. For example, the provisions regulating the limitation or rights and derogation from rights during emergencies tend to suggest that a court may not limit rights at the point of interpretation. Similarly, a close look at these provisions helps the reader identify both the rights which may not be limited or derogated from under any circumstances and also identify the criteria that governs circumstances under which rights may be justifiably and reasonably limited. By reading all the relevant provisions together, a court is more likely to come to an appropriate interpretation of a right than it would if it had not paid due regard to other constitutional provisions.

---

<sup>51</sup> 1995 (3) SA 391 (CC).

<sup>52</sup> Para. 10.

There is one more point to emphasise in relation to the command to the courts to ‘pay due regard to all the provisions of the Constitution’. It is that if this phrase is read in its immediate context, it requires the state to ensure that the meaning given to a right is generally consistent with that which is given to many other rights. Comparing the terms ‘pay due regard’ in section 46(1)(d) and ‘take into account’ in section 46(1)(c), it appears evident that the former term creates more concrete legal obligations than the latter. As stipulated above, the duty to take international law into account does not strictly impose on the courts the duty to follow international law. On the contrary, the duty to ‘pay due regard’ to all the provisions of the Constitution, suggests that a court is duty-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.

### 3.4.2 Paying Due Regard to the Principles and Objectives Set out in the Constitution

Entrenched in Chapter 2 of the Constitution, national objectives form part of the guiding principles of constitutional interpretation. It is essential to realise that national objectives are *prima facie* not enforceable, but our Constitution appears to give them a special status than they have been given under comparative constitutions such as that of India. Yet, they must be accorded due respect when interpreting a provision in the DoRs. When interpreting the rights and freedoms in the DoRs, courts and other forums are bound to “pay due regard to the principles and objectives set out in” Chapter 2. Similarly, section 8(2) of the Constitution provides that “[r]egard must be had to the objectives set out in this Chapter when interpreting the state’s obligations under this Constitution and any other law”. As part of Chapter 2 of the Constitution, section 8(2) states one of the objectives referred to in the interpretation clause. By stipulating that regard must be had to national objectives when interpreting the state’s obligations under the Constitution, section 8(2) of the Constitution emphasises the idea that national objectives play a central role in the interpretation of the fundamental rights and freedoms enshrined in the DoRs.

By requiring courts to ‘pay due regard’ to the national objectives, section 46(1)(d) 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 courts 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 courts in interpreting the equality clause (section 56(1)–(6) of the Constitution), and the province of culture in section 16 of the Constitution must be reflected when the courts interpret section 63 of the Constitution. It can therefore become clear that the Constitution should be understood in its entirety, from national objectives to human rights guarantees and other constitutional provisions.

### 3.5 *The Discretion to Consider Foreign Law*

In paragraph (e) courts “may consider relevant foreign law”. This includes case law and statutes from other countries. This is however a discretionary provision and courts are allowed to exercise discretion on whether to take into account foreign law or not. In *S v. Makwanyane*, foreign comparative laws were taken into account.<sup>55</sup> The Court managed to compare the attitudes of countries on the death penalty. In its findings, many countries including neighbouring countries like Namibia, Mozambique and Angola had abolished the death penalty. By referring to foreign law, courts can have an informed understanding about how a certain

matter has been dealt with by other countries and, if persuaded, import findings of foreign courts into our domestic legal landscape. It is important to underline that courts are at liberty not to refer to foreign court judgments or law. This is because of the use of the word ‘may’ which indicates that the consideration of foreign law is at the discretion of the sitting judge. With respect to foreign law, it is patent that such law performs a purely persuasive function in our domestic courts and the courts will not be at fault if they do not refer to it at all.

### ***3.6 Interpretive Guidelines Given to Courts When Interpreting Legislation or When Developing the Common Law or Customary Law***

#### **3.6.1 The Obligatory Duty to Promote the Spirit of the DoRs**

Section 46(2) of the Constitution provides that when interpreting legislation “and when developing the common law or customary law, every court, tribunal, forum or body must promote and be guided by the spirit and objectives of this Chapter”. The interpretive role of the objectives of Chapter 4 is dealt with below. For now, it should be underlined that the spirit of the DoRs is to be found in the matrix and totality of rights and values embodied in them. Section 46(2) is therefore a source of the indirect application of the DoRs. While the objectives of the DoRs are generally written down, that is through the letter of the DoRs, the spirit of the same cannot be reduced to writing and needs to be discerned from the whole of Chapter 4 of the Constitution and in a manner that does not do violence to the purpose of other provisions of the Constitution. The spirit of the DoRs is invisible and entitles the courts to second-guess the legislature and come up with a credible and constitutionally compliant interpretation of legislation or development of the common law or customary law.

When the constitutionality of legislation is considered, the spirit and objectives may also be promoted by applying the rule that a reasonable interpretation must be followed that conforms to the DoRs rather than an interpretation that is inconsistent with the DoRs. This is also referred to as interpretation in conformity with the Constitution. It can also be observed that the courts should adopt a purposive approach to statutory interpretation. This is indicated by the phrase ‘spirit and objectives’ of the DoRs. Also, in determining whether or not customary law or common law should be developed, the courts must promote the spirit and objectives of the Constitution. This provision applies at all times when interpreting legislation and when determining the compliance of rules of the common law and customary law with the provisions of the Constitution. Developing customary law or common law includes a possibility that a court may attach new meanings to common law or customary law, without necessarily declaring the relevant rules to be inconsistent with the Constitution and therefore invalid.

#### **3.6.2 The Obligatory Duty to Promote the Objectives of the DoRs**

When interpreting legislation or developing customary law or the common law, every court must promote the objectives of the DoRs. The objectives of the DoRs are not explicitly stated, but it is suggested that the first port of call in identifying such objectives is section 44 of the Constitution. Section 44 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”. ‘This Chapter’ refers to the entire DoRs. Thus, the overall objective of the DoRs is to ensure that state and non-state actors respect, protect, promote and fulfil fundamental rights and freedoms. Accordingly, the courts should interpret legislation and develop the common law or customary law in a manner that ensures that the rights in the DoRs are respected, protected, promoted and fulfilled. The obligatory duty

to promote the objectives of the DoRs serves to remind courts that even when dealing with matters that are purely regulated by legislation, the common law or customary law, the goals set to be achieved by protecting rights in the Constitution should not be ignored or neglected. This reinforces the idea of a single unitary legal system drawing inspiration from and controlled by the Constitution. As observed by the Constitutional Court of South Africa in *Pharmaceutical Manufacturers Association of South Africa: In re: ex parte President of the Republic of South Africa*.<sup>53</sup>

There are not two systems of law, each dealing with the same subject matter, each having similar requirements, each operating in its own field with its own highest court. There is only one system of law. It is shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control.<sup>54</sup>

These remarks, and our Constitution, speak of a unitary legal system in which even the interpretation of statutory provisions should broaden the enjoyment of fundamental human rights and freedoms. One of the objectives of the DoRs is to ensure that everyone is afforded the rights and freedoms protected in the Constitution, without discrimination based on prohibited grounds. This implies that customs, laws and practices which seek to undermine this goal are likely declared to be inconsistent with the objectives of the Constitution and therefore invalid. Thus, all statutory provisions that unjustifiably limit the enjoyment of constitutional rights and civil liberties should be adapted to the demands of the Constitution which requires pro-human rights approaches to matters regulated by statute law.

#### 4 Conclusion

The discussion above demonstrates that the interpretation clause fits a number of theoretical models of interpretation into the constitutional interpretive framework. First, by requiring courts to give full effect to the fundamental rights guaranteed in the DoRs, the Constitution echoes the elements of a generous interpretation of the constitutional provisions that is influenced by ideas relating to the interdependence, interrelatedness and mutually reinforcing nature of human rights. Second, the Constitution requires courts to “promote the values and principles that underlie a democratic society” based on founding and other social values; thereby authorising courts to invoke value-based or purposive interpretation of the provisions entrenching fundamental human rights and freedoms. In most instances, this approach requires courts to go beyond grammatical interpretation and literalism towards an approach that finds a place for the unwritten in the written constitution. When courts make decisions that are inconsistent with these values and principles, such decisions ought to be disregarded for want of consistency with the Constitution.

Courts also have the peremptory obligation to take into account international law and all treaties and conventions to which Zimbabwe is a party. Section 46(1)(c) of the Constitution also indirectly imposes on practising lawyers an ethical duty to refer to all applicable laws to ensure that the court is acquainted with the relevant international norms when locating the meaning and scope of the constitutional provision or right in question. Given that there are limited, if any, sections of the DoRs which do not have corresponding provisions at the international level, it is highly likely that the interpretation of constitutional rights almost invariably requires the consideration of equivalent provisions in international law. Accordingly, courts should always endeavour to interpret fundamental human rights and freedoms in a manner that does not create

---

<sup>53</sup> 2000 (2) SA 674 (CC).

<sup>54</sup> Para. 44.

breaches of international law. In addition, the principle of consistent interpretation enshrined in the Constitution imposes on courts the obligatory duty to follow the dictates of international law even in circumstances where there is another reasonably feasible interpretation that is inconsistent with international law. Thus, the courts may not easily depart from the interpretation that is consistent with international law, in favour of an interpretation that is not consistent with international law.

The duty to consider all provisions of the Constitution implies that the provisions of the Constitution must and are often understood in relation to and in light of one another (especially when they are associated) and of other components of the more encompassing instrument of which they form part, drawing on the system or logic or scheme of the written text as a whole. This imperative echoes tremors of both systematic and contextual interpretation. It also emphasises the idea that rights are not discrete silos and that citizens get adequate protection if the meaning of rights is derived from the broad textual context 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. In addition, by requiring courts to pay due regard to 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. When 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.

In the context of interpreting legislation, courts have the duty to promote the spirit and objectives of the DoRs. The spirit of the DoRs is to be found in the matrix and totality of rights and values embodied in the DoRs. While the objectives of the DoRs are generally written down, that is through the letter of the DoRs, the spirit of the same cannot be reduced to writing and needs to be ‘discerned’ from the whole of Chapter 4 of the Constitution. The spirit of the DoRs is invisible and empowers the courts to second-guess the legislature and come up with a credible and constitutionally compliant interpretation of legislation or development of the common law or customary law. One of the objectives of the DoRs is to ensure that everyone is afforded the rights and freedoms protected in the Constitution, without discrimination based on prohibited grounds. Accordingly, customs, laws and practices which seek to undermine this goal are likely to be declared to be inconsistent with the objectives of the Constitution and therefore invalid.