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## Zimbabwe Coalition on Debt and Development

# MONITORING THE PROGRESSIVE REALISATION OF SOCIAL AND ECONOMIC RIGHTS IN THE CONSTITUTION OF ZIMBABWE (AMENDMENT NO 20 OF 2013)

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## Classification of Human Rights Under The Constitution – A Brief Analysis

Human Rights are generally accepted as falling into one of three categories named first, second, and third generation rights, although a United Nations resolution of 1977 has affirmed that all these rights should be considered as indivisible. In support of this view Dr John Tobin<sup>1</sup> has this to say, the official position within the United Nations is that economic, social and cultural rights and civil and political rights are interdependent and indivisible. This means that one set of rights does not have priority over the other and one set of rights cannot be enjoyed in a meaningful way if the other set of rights is also not enjoyed. For example, the right to vote and participate in public affairs will be weakened if an individual is denied food and water or deprived of the right to an education. The right to freedom from inhuman and degrading treatment will be compromised by a lack of adequate housing and access to health care.

### First Generation Rights

These rights pertain to civil and political rights such as the rights to life, the right to liberty, the right to freedom of expression, etc., and are set out in Chapter 4 of the Constitution. These rights are often regarded as negative rights in that they merely require governments to refrain from certain acts, such as arbitrarily depriving a person of his or her freedom. These rights can be applied without cost to the State.<sup>2</sup> The constitution in terms of Chapter 4 provided a comprehensive list of rights which one would expect in a liberal democracy. However the constitution<sup>3</sup> generally provide a blanket provision allowing limitations to the rights only in terms of laws of general application, and to the extent that the limitations are fair, reasonable, necessary, and justifiable in a democratic society based on openness, justice, human dignity, equality, and freedom.

The intention and effect is thus that any derogations from the rights will come through legislation “of general application”, and it will be for the Constitutional Court to determine whether any particular limitation of the right is fair, reasonable, necessary, and justifiable in a democratic society based on openness, justice, human dignity, equality, and freedom. In making this determination they must apply the interpretive principles referred to in Part 1<sup>4</sup> and, it must be guided by section 326 of the constitution, must also have regard to the jurisprudence of international human rights instruments. However, this approach has not been adopted uniformly throughout the Declaration of Rights, and, in some sections, the constitution have reverted to the format under the previous constitution by specifying particular derogations which are to be deemed permissible.

It is in these sections that the constitution is self-contradictory, for, if the derogations fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality, and freedom, there would be no need to make specific mention of these derogations as permissible. In so doing, the constitution appear to concede that these derogations require specific mention precisely because they would not be upheld as fair, reasonable, necessary, and justifiable in a democratic society based on openness, justice, human dignity, equality, and freedom. Hence, having stated in Chapter 2 that Zimbabwe is founded on fundamental values and principles

<sup>1</sup>Economic, Social and Cultural rights and the charter of human rights and responsibilities – a framework for discussion

<sup>2</sup>Derek Matyszak in the publication titled Human Rights And Zimbabwe's Draft Constitution

<sup>3</sup>Section 86 (limitation section)

<sup>4</sup>Part 1 of chapter 4 of the constitution

which include “fundamental human rights and freedoms”, and that there may “only” be a derogation from these fundamental human rights and freedoms where such derogations are fair, reasonable, necessary, and justifiable in a democratic society based on openness, justice, human dignity, equality, and freedom, the constitution then include derogations which do not adhere to this principle.<sup>5</sup>

### **Examples of first generation rights**

1. the right to life;
2. the right to personal liberty;
3. the rights of arrested and detained persons;
4. the right to human dignity;
5. the right to personal security;
6. the right to freedom from torture or cruel, inhuman or degrading treatment or
7. punishment;
8. the right to freedom from slavery or servitude;
9. the right to freedom from forced or compulsory labour;
10. the right to equality and non-discrimination;
11. the right to privacy;
12. the right to freedom of assembly and association;
13. the right of the freedom to demonstrate and petition;
14. the right to freedom of conscience;
15. the right to freedom of expression and freedom of the media

### **Second Generation rights**

Second generation rights by contrast; seek to impose a positive duty upon States. These rights pertain to social and economic rights and include the right to housing, food, education health, etc., and are set out mainly in Chapter 2 of the Constitution as “national objectives”. They obviously have cost implications for the State. Although the formulation is subject to slight variation for some of the rights, in general the provisions require the State to take reasonable legislative and other measures, within the limits of the resources available to it, to achieve the progressive realization of these rights. This formulation is taken from the South African constitution; it is therefore argued that the intention is most probably that the ground breaking jurisprudence of the South African Constitutional Court is followed in interpreting these rights.<sup>6</sup>

### **Examples of second generation rights**

1. the right to food security and food and water;
2. the right to employment;
3. the right to provision of care and assistance from the state for mothers, fathers
4. and other family members who have charge of children;
5. the right to education;
6. the right to shelter;
7. the right to health care services;
8. the right to social security;
9. the right to legal aid;
10. the right to sporting and recreational facilities; and the right to education.

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<sup>5</sup>Human rights and the Zimbabwe draft Constitution by Derek Mtshak March 2013

<sup>6</sup>Derek Mtshak Supra

## Third Generation Rights

It is argued that these set of rights are still a developing part of international rights law, but this category includes community rights and most frequently included under this rubric is the right to a clean environment. Third generation rights appears as part of Chapter 2 of the constitution. These rights relate to communities and the environment. With the exception of rights pertaining to the environment, third generation rights appear in Chapter 2. However it is suggested that the Constitution of Zimbabwe omitted some rights which must fall in the category of third generation rights.<sup>7</sup> Omitted from the list of third generation rights are rights pertaining to animals which have been included in many of the more recently drawn constitutions, such as those of Brazil, Ecuador and Bolivia. In 2002, the German constitution was amended to include the following: *“The state takes responsibility for protecting the natural foundations of life and animals in the interest of future generations”*. Provisions of this kind have been used to prevent the cruel treatment of animals and have engendered protective legislation concerning the lot of animals in commercial food production.

### Examples of third generation rights

1. Cultural rights, that is, the duty of the state to preserve and protect Zimbabwe's heritage;
2. The right to fair regional representation in the institutions of government and that all local communities have equitable access to resources to promote their development;
3. The duty of the state to take measures for the preservation of traditional knowledge possessed by members of local communities regarding the medicinal and other properties of animal and plant life in their areas;
4. Environmental rights.

## The Concept of Socio Economic Rights

The Universal Declaration of Human Rights (UDHR) recognized the human rights to which all persons are entitled. The UDHR includes civil and political rights, such as the rights to freedom of expression and association. These rights have since been enshrined in various binding treaties, including the International Covenant on Civil and Political Rights (ICCPR).<sup>8</sup> The UDHR also includes economic, social and cultural rights that are guaranteed in numerous instruments such as the International Covenant on Economic, Social and Cultural Rights (ICESCR)<sup>9</sup> and the African Charter on Human and People's Rights (ACHPR).<sup>10</sup> Zimbabwe, along with nearly every country in the world, is party to at least one treaty that recognizes economic, social and cultural rights.<sup>11</sup>

The body which is responsible for monitoring implementation of the ICESCR, the Committee on Economic, Social and Cultural Rights (ESC Committee), has issued numerous general comments in which it details the nature and scope of various economic, social and cultural rights. A common approach adopted by the ESC Committee in these comments is to explain that each economic, social and cultural right requires that a State must ensure, subject to its available resources, that the right must be available, accessible, and acceptable and of sufficient quality.<sup>12</sup> The governments are obliged to progressively realize these rights.

## Obligations of the states in relation to economic, social and cultural rights

The obligations of States in relation to economic, social and cultural rights are expressed differently from treaty to treaty. For example, in its Article 2 (1) the International Covenant on Economic, Social and Cultural Rights requires States **“to take steps”** to the maximum of their available resources to achieve progressively the full realization of economic, social and cultural rights. The Covenant also requires States to guarantee the enjoyment of economic,

<sup>7</sup>ibid

<sup>8</sup>International Covenant on Civil and Political Rights, adopted December 16, 1966, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force March 23, 1976, acceded to by Zimbabwe August 13, 1991 [hereinafter ICCPR].

<sup>9</sup>International Covenant on Economic, Social and Cultural Rights, adopted December 16, 1966, G.A. Res. 2200A(XXI), 21 entered into force January 3, 1976, acceded to by Zimbabwe August 13, 1991 [hereinafter ICESCR].

<sup>10</sup>African [Banjul] Charter on Human and Peoples' Rights, adopted June 27, 1981, I.L.M. 58 (1982), entered into force October 21, 1986, ratified by Zimbabwe May 30, 1986 [hereinafter ACHPR]

<sup>11</sup>According to an Article called Economic, Social And Cultural Rights In Zimbabwe options for constitutional protection written by the non governmental organizations

<sup>12</sup>See ESC Committee General Comment No. 14, “The Right to the Highest Attainable Standard of Health”, E/C.12/2000/4 (11 August 2000), paragraph 12.

social and cultural rights without discrimination and to ensure the equal right of men and women to the enjoyment of these rights. Other treaties or constitutions word obligations differently and even include specific actions that States must take, such as the adoption of legislation or the promotion of these rights in public policies.

The obligation to achieve progressively the full realization is a central aspect of States' obligations in connection with economic, social and cultural rights under international human rights treaties. At its core is the obligation to take appropriate measures towards the full realization of economic, social and cultural rights to the **maximum of their available resources**. The reference to “resource availability” reflects a recognition that the realization of these rights can be hampered by a lack of resources and can be achieved only over a period of time. Equally, it means that a State's compliance with its obligation to take appropriate measures is assessed in the light of the resources, financial and others—available to it. Many national constitutions also allow for the progressive realization of some economic, social and cultural rights.

Progressive realization clauses found in other United Nations human rights treaties are article 4<sup>13</sup> and article 4 (2).<sup>14</sup> Even though States may realize economic, social and cultural rights progressively, they must also take immediate action, irrespective of the resources they have in respect to elimination of discrimination; economic, social and cultural rights not subject to progressive realization; obligation to “take steps”; non-retrogressive measures; and minimum core obligations.

## **Socio economic rights under the international law**

The Universal Declaration of Human Rights, adopted by the United Nations General Assembly in December 1948, proclaimed the inviolability of social and economic rights. According to the International law, everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control. Article 2<sup>15</sup> states that everyone is entitled to these rights without distinction of any kind based on grounds such as race, color, sex, religion and so on.

As already articulated the ICESCR is one of the most influential and comprehensive international documents in the area of social and economic rights.<sup>16</sup> In addition, there are a series of international conventions, declarations and agreements that address economic, social and cultural rights.<sup>17</sup> These instruments have further refined international legal norms relating to a wide range of socio-economic issues. The economic, social and cultural rights embodied in the ICESCR are based on a perspective according to which people can enjoy rights, freedoms and social justice simultaneously.<sup>18</sup> Protection of economic, social and cultural rights has been deemed necessary as the right to live a dignified life can never be attained unless all basic necessities of life ie work, food, housing, health care, education and culture are adequately and equitably available to everyone.

## **International Mechanisms for Enforcement of Socio Economic Rights**

### **An Outline of the International Legislation**

Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)

Convention on the Rights of the Child (CRC)

International Covenant on Civil and Political Rights (ICCPR)

<sup>13</sup>of the Convention on the Rights of the Child

<sup>14</sup>of the Convention on the Rights of Persons with Disabilities

<sup>15</sup>Universal Declaration of Human Rights

<sup>16</sup>Ontario Ministry of the Attorney General, Constitutional Law and Policy Division, The Protection of Social and Economic Rights: A Comparative Study, Staff Paper (19 September 1991) at 34.

<sup>17</sup>In 1995, the United Nations estimated that there were no fewer than 81 formal” (1998) 47 U.N.B.L.J. 197 at 197.

<sup>18</sup>Ibid.

International Convention on the Elimination of Racial Discrimination (CERD)  
 International Covenant on Economic, Social and Cultural Rights (ICESCR)  
 International Labour Organization (ILO)  
 Universal Declaration of Human Rights (UDHR)

However it is argued that scholars have noted the relative weakness of the international system in ensuring compliance with international norms generally, and in the area of social and economic rights in particular. To the extent that procedures exist, they are inquisitorial and supervisory in nature and rely on persuasion rather than coercion.<sup>19</sup> There was an establishment of an optional protocol to the ICESCR for the benefit of these rights. Also in addition to that the complainants may still have recourse to the general procedures of the Committee, and may utilize what has been called an unofficial petition procedure based on the modalities of the Committee.<sup>20</sup> Similarly, the Human Rights Committee, which studies reports and hears complaints under the *ICCPR*, has indicated that economic and social rights may, in some instances, be protected as civil and political rights.<sup>21</sup>

As there is no complaint procedure under the *ICESCR*, the primary mechanism for its enforcement is the state reporting process. Pursuant to Articles 16 and 17, States parties undertake to submit periodic reports to the ICESCR Committee on the programmes and laws they have adopted and the progress made in protecting Covenant rights. The U.N. has promulgated guidelines for the preparation of reports.<sup>22</sup> The State reporting procedure is quite complex but some aspects merit discussion. State reports receive initial consideration by a pre-sessional working group of the ICESCR Committee which develops a list of questions. The States parties must provide a written reply before their delegation appears before the ICESCR Committee. At meetings of the *ICESCR* Committee, State delegations and U.N. specialized agencies provide information relevant to the report being considered. Committee members then put questions and observations to the State party and responses are provided. The Committee may request supplemental information for consideration at forthcoming sessions

The Committee also has formalized a procedure for participation by Non-Governmental Organizations (“NGOs”) in the process. NGOs are given an opportunity to make oral submissions about State parties' implementation of Covenant rights before the pre-sessional working group and the regular session of the ICESCR Committee. The Committee will receive oral testimony from NGOs provided it is reliable, relevant and not abusive. The Committee also receives written materials from NGOs. The ICESCR Committee concludes its consideration of the State party's report by issuing Concluding Observations which constitute the decision of the Committee regarding the status of the ICESCR in the country. The Concluding Observations include positive aspects of implementation, principal subjects of concern and suggestions and recommendations. The Committee may conclude that a State party has failed to comply with an obligation and, hence, a violation of the ICESCR has taken place.<sup>23</sup> It is also important to note that the ICESCR Committee's Concluding Observations are not legally binding and there is no method for enforcement. However, the Committee has stated that for a State party to ignore the views contained in the Concluding Observations would be to show bad faith in implementing Covenant-based obligations.

## **The Progressive Realization of Socio-economic Rights vis-à-vis the Constitution of Zimbabwe**

### **Progressive realization – the concept in general**

*“What freedom has our subsistence farmer? He scratches a bare living from the soil provided the rains do not fail; his children work at his side without schooling, medical care or even good feeding. Certainly he has freedom to vote*

<sup>19</sup>See for example *The Protection of Social and Economic Rights: A Comparative Study*, supra, note 21 at 37

<sup>20</sup>The 1998 Concluding Observations are illustrative of the Committee's use of the reporting mechanism to enhance economic and social rights

<sup>21</sup>The Protection of Social and Economic Rights: A Comparative Study, supra, note 21 at 38. This study notes that, in deciding two cases, the Human Rights Committee has held that excluding a person from social security benefits (protected under the ICESCR) is a violation of the right to equality under the ICCPR for which the state must provide a remedy. As well, the Human Rights Committee has given some indication in a General Comment that the right to life under the ICCPR could require a state to adopt positive measures, e.g. to reduce infant mortality or eliminate malnutrition.

<sup>22</sup>For example, United Nations Committee on Economic, Social and Cultural Rights, General Comment No. 1: Reporting by States Parties, 24 February 1989, E/1989/22.

<sup>23</sup>The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, reprinted in (1998) 20 Human Rights Quarterly 691

*and to speak as he wishes. But these freedoms are much less real to him than his freedom to be exploited. Only as his poverty is reduced will his existing political freedom become properly meaningful and his right to human dignity become a fact of human dignity.”*

**Julius K. Nyerere, former President of Tanzania<sup>24</sup>**

This statement by the President of Tanzania simply means that socio-economic rights and political rights are interlinked. If social rights have been infringed it means that political rights have also been infringed.

The ICESCR's definition of the concept points to the fact that progressive realization introduces an element of flexibility in terms of the obligations of states and also in the enforcement of rights. The concept recognizes that the full realization of socio-economic rights would not generally be achieved in a short period of time. The obligation on states therefore is “to move as expeditiously and effectively as possible” towards full realization.<sup>25</sup> The ICESCR has reiterated that progressive realization implies a specific and continuing obligation on states to, as much as possible, be expeditious and effective in working towards the full realization of the right to education. For example, progressive introduction of free education implies that states must not only prioritize the provision of free primary education but must also take concrete steps towards achieving free secondary and higher education.

Progressive realization thus goes beyond achieving the minimum essential levels of a right; and beyond ensuring access to goods and services to improvements in access over time. There are three main arguments in terms of understanding progressive realization. First, there must be immediate and tangible progress towards the realization of rights. The fact that progressive realization introduces flexibility to the enforcement of socio-economic rights does not therefore imply that states can drag their feet. Progressive realization cannot be interpreted under any circumstance to imply for states the right to defer indefinitely efforts to ensure full realization. States are required to begin immediately to take steps to fulfill their obligations.<sup>26</sup> Progressive realization therefore includes some immediate (as well as tangible) obligations on states. For instance, in the context of the ICESCR, the obligation to take steps towards progressive realization “must be taken within a reasonably short time”, after entry into force of the ICESCR for the state concerned.

#### **An outline of the mechanisms of enforcement**

1. Monitoring legislation relevant to economic, social and cultural rights
2. Monitoring public policies relevant to economic, social and cultural rights
3. Monitoring budgets and using budget information
4. Monitoring violations of economic, social and cultural rights linked to specific cases
5. Monitoring violations of economic, social and cultural rights through courts and quasi-judicial mechanisms

The second argument is that states cannot pursue deliberate retrogressive measures, as progressive realization also implies that deliberate retrogressive measures are not permissible and have to be fully justified by reference to the totality of rights. In this regard, the CESCR has stated that there is a strong presumption of impermissibility of any retrogressive measures taken in relation to rights such as education and water; retrogressive measures should in principle not be taken in relation to the right to work; and any retrogressive measures would have to be fully justified.<sup>27</sup>

<sup>24</sup>Quoted in the book

<sup>25</sup>CESCR General Comment No 3 The Nature of States Parties Obligations UN doc E/1991/23 (1990) par 9

<sup>26</sup>Limburg Principles on the Implementation of the ICESCR UN doc E/CN4/1987/17, Annex, par 21; reproduced in 1987 Human Rights Q/ly122-135

<sup>27</sup>General Comment No 13 par 45; CESCR General Comment No 15 The Right to Water UN doc E/C12/2002/11 (2003) par 19; General Comment No 18 par 21

In relation to justifying retrogressive measures, Liebenberg has stated that such measures may be justifiable where, for example, a state can show that the retrogressive measures are necessary to achieve equity in the realization of the right or a more sustainable basis for adequate realization of the rights.

The third argument is that progressive realization requires that special measures for vulnerable and disadvantaged groups need to be put in place. States are required to do more than abstain from taking measures that might have a negative impact on the enjoyment of their rights. The obligation on the state is to take positive action to reduce structural inequality and to give appropriate preferential treatment to vulnerable and marginalized groups. Positive action includes specially tailored measures or additional resource allocation for these groups.<sup>28</sup> However the African Charter is silent on the progressive realization terminology.<sup>29</sup>

In the case of **Minister of Health v New Clicks South Africa (Pty) Ltd**,<sup>30</sup> the Court held that progressive realization requires that the state “must accelerate reasonable and progressive schemes to ameliorate vast areas of deprivation” In the case of **President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd**,<sup>31</sup> the Court held in relation to the right to adequate housing that “the progressive realization of access to adequate housing, as promised in the Constitution, requires careful planning and fair procedures made known in advance to those most affected. Orderly and predictable processes are vital”. Progressive realization also requires that measures adopted must be flexible so as to adapt to changing situations.<sup>1</sup> involves an improvement in the adequacy of housing for the meeting of human interests ... it means that each is entitled as a matter of priority to basic housing provision, which the government is required to improve gradually over time.

In addition to this, according to the project called Queen's University Belfast, School of Law,<sup>32</sup> the states must adopt what is called the **tripartite typology**, to **respect** (refrain from interfering with the enjoyment of the right), to **protect** (prevent others from interfering with the enjoyment of the right) and to **fulfill** (adopt appropriate measures towards the full realization of) economic, social and cultural rights.

## The entrenchment of socio-economic rights in the Zimbabwean constitution

The Constitution of Zimbabwe enshrines respect and protection of fundamental rights and freedoms as one of the founding constitutional values and principles.<sup>33</sup> Fundamental rights can be defined as those entitlements which are due to a human being because he or she is a human being and these can be divided into civil liberties as well as socio-economic and cultural rights.<sup>34</sup> In contemporary democratic constitutions, fundamental rights are usually provided for under the Bill of Rights. Under the Constitution of Zimbabwe, the Declaration of Rights found under Chapter Four serves as the Bill of Rights In terms of section 44 of the Constitution, the application of the Declaration of Rights.

In terms of section 327 (2)(b) an international treaty which has been concluded by the President does not bind Zimbabwe, does not form part of the law of Zimbabwe unless it has been incorporated into the law through an Act of Parliament. However the state cannot derogate some rights which are fundamental (*jus cogens*) in interpreting the constitutional provisions the courts must be guided by international standards in terms of section 326 (2) of the constitution, this argument was also emphasized in the south African case of *S v Makwanyame*

<sup>28</sup>CESCR General Comment No 5 Persons with Disabilities UN doc E/1995/22 (1994) par 9

<sup>29</sup>See generally Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative on behalf of Children of Nubian Descent in Kenya v The Government of Kenya Communication No Com/002/2009 2011-03-22).

<sup>30</sup>2006 8 BCLR 872

<sup>31</sup>2005 8 BCLR 786

<sup>32</sup>Budgeting for Economic and Social Rights: A Human Rights Framework

<sup>33</sup>See section 3(1) (c) of the Constitution of Zimbabwe Amendment (No.20)

<sup>34</sup>Pollis A., A new Universalism. In Pollis A. and Schwab P (eds), Human Rights: New perspectives, New realities(2000) Lynne Rienner Publishers at 10.

## State obligations in respect of socio-economic rights under the Zimbabwean constitution

The government has an obligation to adhere to what is called the **tripartite typology** which involves the duty to respect, protect, promote and fulfill the rights and freedoms enshrined therein.<sup>35</sup> It is important to understand what these terms mean.

The duty to *respect* encompasses the obligation to observe and refrain from interfering with the enjoyment of an existing fundamental right and freedom. For instance, the agencies of government such as local authorities have a duty to respect the citizens' rights to water. In terms of section 44<sup>36</sup> duty to respect fundamental rights, the local authorities have a constitutional duty to refrain from interfering with the enjoyment of an existing supply of water.

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

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

## Specific socio-economic and cultural rights as they are provided for in terms of the constitution

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

### The Right to Language and Culture

The new Constitution of Zimbabwe guarantees the right to language and culture through section 63. The language and culture right includes the following rights. Everyone has the right to use their language of choice Everyone has the right to participate in the cultural life of their choice Before examining the content of the above rights, it is important to note that these rights cannot be exercised in any manner that is inconsistent with any of the provisions of the Declaration of Rights or that violates the rights provided therein.<sup>37</sup> For instance, one cannot exercise their right to conduct cultural activities where such cultural practices amount to a violation of the right to equality, right to human dignity or any other fundamental right enshrined under the Declaration of Rights. Thus the right to culture is not a constitutionally valid justification for limiting any of the fundamental rights provided for under the Declaration of Rights.

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<sup>35</sup>Budgeting for Economic and Social Rights: A Human Rights Framework

<sup>36</sup>Constitution of Zimbabwe

<sup>37</sup>See section 63(b) of the constitution

Practical examples of steps that can be taken for progressive realization of the right to language and culture

- Teaching of all languages which are being provided for in the constitution (section 6 of the constitution) in schools
- The state and all institutions and agencies of government of every level must ensure that all officially recognized languages are treated equitably
- The state must take into account the language preferences of people affected by governmental measures or communication
- The state must promote and advance the use of all languages used in Zimbabwe including the sign languages and must create conditions for the development of those languages

The state must allow the people to participate in the cultural life of their choices

### **Section 63(a) Right to Use Language of Choice**

In terms of section 63(a), everyone is entitled to the right to use their language of choice. Essentially this means that everyone is free to communicate using any language that they may prefer, whether such language is constitutionally recognized as an official language or not.

## **Declaration of Rights**

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

In both international law and foreign jurisdictions, this right has been interpreted to include the freedom to enjoy one's own culture particularly the right to participate in cultural activities and the right to maintain and celebrate cultural identity.<sup>160</sup> However, section 63(b) right is not limited to one's own culture but to '*the culture of their choice*', which essentially means the freedom to identify with, enjoy and participate in the activities of 'any' culture that one chooses.

### **The Right to Freedom of Profession, Trade or Occupation**

The right to freedom of profession, trade or occupation is provided for under section 64 of the Constitution of Zimbabwe. It is considered as a socio-economic right because it is a right that is meant to ensure that individuals are able to provide materially for themselves and their dependents, as well as live profitable, dignified and fulfilling lives.<sup>161</sup> Just like the rest of the other socio-economic rights, the right to freedom of profession, trade or occupation constitutes a basis for the existence of other rights and freedoms. To a large extent, section 64 is framed in the same way as section 22 of the Constitution of South Africa.<sup>163</sup> However, in terms of section 22 of the Constitution of South Africa, South Africans only are entitled to the freedom of profession, trade and occupation while in terms of section 64 of the Constitution of Zimbabwe, every person who is in Zimbabwe is entitled to that right.

### **The Right to Freedom from Arbitrary Eviction**

The Constitution of Zimbabwe provides for the right to freedom from arbitrary eviction. This right is provided for under section 74<sup>38</sup> which is framed as follows

<sup>38</sup>Section 74 of the constitution of Zimbabwe

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

This right is framed similarly to the section 26(3) right under the Constitution of South Africa. Given the limited Zimbabwean jurisprudence on this particular right, the interpretation of section 26(3) of the Constitution of South Africa by the South African judiciary is very significant in trying to understand the scope and content of the section 74 right under the Constitution of Zimbabwe. In the case of **Mavis Marange vs Chitungwiza Municipality and Glory to Glory Housing Cooperative**<sup>39</sup> the court held that, therefore no matter what justifications maybe present, no one has the authority to evict a person from his or her home without obtaining a court order first. Consequently, any law in Zimbabwe which authorizes evictions or demolition of homes without obtaining a court order first is unconstitutional and cannot be enforced.<sup>40</sup> The UN Committee on Economic, Social and Cultural Rights has defined 'eviction' to include the permanent or temporary forceful removal of individuals, families and or communities from their homes or land which they are occupying.<sup>41</sup>

Steps that can be taken to progressively realize the right to freedom from arbitrary eviction

- the state must take reasonable steps to ensure that no person may be evicted from their homes or have their homes demolished
- There must be a court order for a person to be evicted
- There must be a consideration of relevant circumstances before eviction or demolition

After eviction the state must provide alternative homes to the parties affected

## The Right to Shelter

Section 74 of the Constitution of Zimbabwe does not provide for the right to shelter but guarantees freedom from arbitrary eviction. However the Constitution of Zimbabwe provides for the right to shelter for children. The constitution defines children as every boy and girl who is under the age of eighteen years. Therefore children can claim both the right to shelter as well as the right to freedom from arbitrary eviction. Where the court is approached for an order of eviction or demolition in a case that involves children, it is imperative that such a court considers the right of children to shelter as one of the relevant circumstances to be considered as required under section 74 of the Constitution, even if the defendant does not raise it as an argument.<sup>42</sup>

Steps that can be taken to progressively realize the right to shelter

- The state must take reasonable legislative framework to enable every person to have access to shelter
- The state must use resources available to them, to enable every person to have access to adequate shelter
- The state must finance housing projects

The state must make sure stands prizes are affordable

<sup>39</sup>This case was heard in the magistrates court under case number 106/14

<sup>40</sup>A constitutional law guide- towards understanding Zimbabwe's fundamental socio-economic and cultural rights by Justice Mavengedze and Douglas J Coltat

<sup>41</sup>The UN Committee on Economic, Social and Cultural Rights General Comment No. 7 On the Right to adequate Housing (1997) para 4.

<sup>42</sup>Justice Mavengedze and Douglas J Coltat Supra at page 32

## The Right to Education

The Constitution of Zimbabwe provides for the right to education through section 75(1-4). First, in order to establish the scope of this right, it is important to identify the specific rights provided for under section 75. The constitutional right to education as provided for under section 75 includes the following rights; Right of Zimbabwean citizens and those that hold permanent residence in Zimbabwe to basic state funded education, including adult basic education. [Section 75(1) (a), right of Zimbabwean citizens and those that hold permanent residence in Zimbabwe to further education. [Section 75(1) (b), the right to establish and maintain independent educational institutions. [Section 75(2) Secondly and more importantly, in order to establish the scope of the right to education, section 75 must be interpreted together with the provisions of section 81(1) (f) relating to the rights of children, section 83(e) relating to the rights of persons with disabilities, section 27 relating to national objective on education.

Steps that can be taken to fully realize the right to education

- The state must promote free and compulsory basic education for children
- The state must promote free education to higher and tertiary education
- The state must take must measure that girls are afforded same opportunities as boys at all levels of education

The state must realize the right of a person to establish and maintain independent institution

## The Right to Healthcare

Zimbabwean courts have not yet had the opportunity to define this particular right. However, this right was thoroughly discussed in the judgment of the Constitutional Court of South Africa in **Minister of Health v Treatment Action Campaign**<sup>43</sup>, however the Constitution of Zimbabwe provides for the right to health care through section 76. In order to understand the scope and content of this right, one has to consider the interpretation of the right to healthcare as an international human right. The United Nations' (UN) General comments on the right to health provided for under article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) must be taken into consideration. Regard must also be given to article 16 of the African Charter on Human and People's Rights which is however drafted similarly to article 12 of the International Covenant on Economic, Social and Cultural Rights. However regard must be given to the fact that the right provided for under both the African Charter and the ICESCR is wider than what is provided for under the Constitution of Zimbabwe.<sup>202</sup> As such the scope and content of this right under the ICESCR or the African Charter is wider than what is contemplated under section 76 of the Constitution of Zimbabwe.

<sup>43</sup>2002 (5) SA 703



#### Steps to be taken

- The state must take all practical measures to ensure the basic accessible and adequate health services throughout Zimbabwe
- The state must take appropriate measures to ensure that no person is refused emergency medical treatment at any health institutions
- The state must take all preventive measures within limits of resources available to it , including education and public awareness programmes against the spread diseases

The state must take reasonable legislative and other measures to achieve the progressive realization of this right

## The Right to Food and Water

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

(a) Safe, clean and potable water; and

(b) Sufficient food;

The right to food and water is framed as a single right. The right to water is indispensable for leading a life in human dignity, and it is a prerequisite for the realization of other human rights.<sup>228</sup> In fact human life is not possible without water and the human person cannot survive for more than a few days without water. High Court of Zimbabwe was presented with an opportunity to interpret this right in the case of **Farai Mushoriwa v City of Harare**<sup>44</sup>, the Court emphasized that it is the role of the judiciary to interpret and enforce the law when someone complains that their human rights have been violated. As such, there is not enough detail within the local jurisprudence on the interpretation of this right.

#### Steps to be taken

The state must

- Encourage people to grow adequate food
- Secure the establishment of adequate food reserves
- Encourage and promote adequate and proper nutrition through mass education and other appropriate means

Must also fund money to buy farming inputs

The second sub-right of 'the right to food and water' is the right to 'sufficient food'. The African Commission on Human and Peoples' Rights has stated that 'the right to food is inseparably linked to the dignity of human beings and is therefore essential for the enjoyment and fulfillment of such other rights as health, education, work and political participation. The fact that this right is protected under the new Constitution of Zimbabwe is very important given that many people are faced with food insecurity in the country.

## Marriage Rights

Through section 78, the Constitution of Zimbabwe provides for marriage rights. These rights are, everyone who has attained the age of 18 years has the right to enter into a marriage and establish a family and everyone has the right to freedom from being forced to enter into a marriage. These rights are framed in pretty much clear and simple language to the extent that it is easy to deduce the scope and content of the rights enshrined. In terms of section 78(1), everyone in Zimbabwe is free to decide to enter into a marriage once they reach the age of 18 years. The Constitution does not specify the type or nature of marriage, which means that a person can choose to enter into any kind of a marriage and found a family. However this right does not include same sex marriages as section 78(3) prohibits persons of same sex from marrying each other. The right to marry is however not absolute in the sense that such a right will be exercised subject to fulfilling certain legal procedural requirements that are set through the relevant legislation.

### Steps to be taken

The state must take appropriate measures to ensure that

- No marriage is entered into without the free and full consent of the intending spouses
- Children are not pledged
- There is equality of rights and obligations of spouses during marriage and at its dissolution

In the event of dissolution of marriage whether through deaths or divorce, provision is made for the necessary protection of any children and spouses

## A Benchmark for Fulfillment or Non-Fulfillment of Socio-economic Rights

It is argued that before measuring whether the government has complied with its ESR obligations, there has to be conceptual clarity about what is to be measured.<sup>45</sup> This determination involves two keys steps. First, the substantive content of the particular ESR under analysis must be established. Second, the legal duties that are imposed by the right must be defined. It is generally accepted that all rights (ESR and civil, political and cultural) are interdependent and interrelated and that both sets of rights may entail resource implications, resulting in their having budgetary implications. Any arguments regarding the budgetary obligations of ESR rights ought to happen in the context of the precise definition of the scope and content of the right and the national context in which it is considered.<sup>46</sup>

When seeking to determine the full content of the rights set out in ICESCR, the primary reference point will be the work of the Committee on Economic, Social and Cultural Rights, including the General Comments and Concluding Observations issued by that body. Also to ascertain the extent to which a state is complying with the requirements of ICESCR may also be looked at, these are a less direct, source of information on the substantive content of Covenant rights.<sup>47</sup>

## Methodology for Monitoring the Implementation of Socio-Economic Rights

This part offers practical guidance on monitoring economic, social and cultural rights and the special considerations that are to be taken into account. The discussion identifies methods and possible approaches for effective

<sup>45</sup>J V Welling 'International Indicators and Economic, Social and Cultural' (2008) 30 *Human Rights Quarterly* 933 – 958 page 948

<sup>46</sup>Budget Analysis Project Budgeting for Economic and Social Rights: A Human Rights Framework (2010) QUB School of Law, Belfast Supra at page 11

<sup>47</sup>Committee on Economic Social and Cultural Rights, 'The Guidelines on Treaty-Specific Documents to be Submitted by State Parties under Articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights'

monitoring. It highlights tools and resources commonly used for monitoring these rights. These methods include national laws, budgets, ratification of international treaties, public policies, plans of action etc<sup>48</sup>

### **1 Monitoring legislation relevant to economic, social and cultural rights**

International human rights standards and principles must be enshrined in national legislation as a first important step after ratification. Existing national legislation must therefore be harmonized with the international treaty obligations. Legislation and regulations are necessary to define entitlements and access to services and benefits in areas such as health, education, housing, work or social security. Article 2 (1) of the International Covenant on Economic, Social and Cultural Rights underscores the importance of adopting legislative measures to achieve the full realization of these rights. Conversely, failure to adopt legislation or adopting inadequate or insufficient legislation will most likely prevent international human rights obligations being met.

National legislation should be the result of a nationally owned consultative process involving relevant civil society organizations and other actors.

### **2. Monitoring public policies relevant to economic, social and cultural rights**

Public policies, such as sectoral plans of action (for example, on employment, housing, health or education), national or local work plans, poverty reduction strategies or national development strategies, are also an important means of meeting obligations stemming from economic, social and cultural rights. Public policies translate the abstract text of treaties into context-driven plans and specific measures to realize rights. In many cases, they constitute the framework for putting economic, social and cultural rights into practice. They are also entry points for longer-term capacity-building strategies and for putting human rights at the centre of decision-making.<sup>49</sup>

### **3. Monitoring budgets and using budget information**

As already discussed in order for the states to progressively realize socio-economic rights, they are required to make use of the maximum of their available resources for the progressive Realization of economic, social and cultural rights (International Covenant on Economic, Social and Cultural Rights, art. 2 (1)).<sup>16</sup> Budgets (federal, national, provincial or local) are essential instruments of policymaking, and often involve various departments in the central Government as well as in the legislative bodies, regional governments and autonomous institutions. Through public budgeting, the State authorities establish priorities and express their commitment to concrete actions which may improve or limit the enjoyment of some social guarantees.

### **4. Monitoring violations of economic, social and cultural rights linked to specific cases**

This part reiterates the importance of monitoring specific cases of human rights violations and underlines that case-based monitoring is possible not only for violations of civil and political rights but also for violations of economic, social and cultural rights. The principle of progressive realization is often monitored by analyzing socio-economic and other administrative statistics over a period of time. Yet monitoring violations of economic, social and cultural rights is often based on describing and documenting the concrete circumstances of an event. For example, monitoring the progressive realization of the right to education may entail considering the evolution of some indicators such as enrolment in primary education or school dropout rates over a certain period of time to assess if

<sup>48</sup>Chapter 20 of the manual on human rights monitoring

<sup>49</sup>Chapter 20 of the manual on human rights monitoring Supra at page 17

they have improved. Monitoring specific cases of violations will rather focus on concrete events, such as the turning-away of a group of children from school for lack of place, the arbitrary expulsion of a pregnant pupil or the failure to provide reasonable accommodation to children with disabilities.<sup>49</sup>

## 5. Monitoring violations of economic, social and cultural rights through courts and Quasi-judicial mechanisms

Judicial and quasi-judicial complaints usually require the identification of specific violations of economic, social and cultural rights as a basis for their claims. However, different legal systems allow for variety of claims, which range from individual to collective or group cases. Some legal systems allow only individual victims to seize courts. Others also allow groups – including class actions, public interest representation or *actiopopularis* (i.e., allowing anyone to bring a claim before a court in certain cases).<sup>50</sup>

## Conclusion

Armed with this information on what progressive realization of socio-economic rights as enshrined in the constitution is, and how to monitor the extent to which these rights are being promoted, fulfilled and protected by the government, it is now the role of the citizens to act, stand up and demand that their rights be fulfilled.

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<sup>50</sup>Ibid at page 22



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